The Case for Rebalancing Antitrust and Regulation

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THE CASE FOR REBALANCING ANTITRUST 
AND REGULATION

Howard A. Shelanski*

The Supreme Court's decisions in Verizon v. Trinko and Credit 
Suisse v. Billing reduced the reach of antitrust law in regulated in-
dustries; they did so even where Congress expressly preserved 
antitrust enforcement, and even though the Court itself had long 
declined to block antitrust suits against regulated firms except in 
unusual circumstances. This Article analyzes the reasoning and po-
tential consequences of Trinko and Credit Suisse. It provides a 
critique of the Supreme Court's redrawing of the relationship be-
tween antitrust and regulation and explains how Trinko and Credit 
Suisse could saddle regulators with a choice between inefficiently 
strong and overly weak regulation as economic conditions change 
in regulated industries. The Article concludes that consumers and 
industry would benefit from a rebalancing of antitrust and regula-
tion and discusses several possible means to that end.

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INTRODUCTION

One good way to measure the importance of a court decision is to ask how previous cases would have differed had the decision been in place earlier. By that measure, the Supreme Court’s decisions in Verizon v. Trinko\(^1\) and Credit Suisse v. Billing\(^2\) turn out to be unusually significant. By broadening the conditions under which regulation blocks antitrust enforcement, those cases redrew the boundary between antitrust and regulation and would likely have prevented the government from bringing, in previous decades, a number of important antitrust cases in regulated industries. Most notably, Trinko and Credit Suisse would likely have blocked the suit by the U.S. Department of Justice (“DOJ”) that in 1984 broke up AT&T’s monopoly over telephone service,\(^3\) considered among the most important antitrust enforcement actions in history.\(^4\)

The preclusion of such cases has strong implications for the future of both antitrust enforcement and industrial regulation. Before 2004, the year the Supreme Court decided Trinko, public agencies and private plaintiffs had long enforced antitrust law in a variety of regulated settings. Several of those cases reached the Supreme Court and many more went through lower federal courts with no finding that they were inconsistent with the core objectives of antitrust or would interfere with regulatory objectives.\(^5\) Yet many of those cases would have difficulty surviving a motion to dismiss today. Without specifically indentifying legal flaws or harmful consequences from previous antitrust actions in regulated markets, the Supreme Court has in the past decade reconfigured the relationship between antitrust law and regula-

4. See, e.g., Richard A. Posner, Antitrust Law 111 (2d ed. 2001) (“[I]t is strongly arguable that the divestiture of AT&T was the most successful antitrust structural remedy in history.”); Anne K. Bingaman, Ass’t Att’y Gen., Antitrust Div., U.S. Dept. of Justice, Innovation and Antitrust Speech (July 29, 1994), (transcript available at http://www.justice.gov/atr/public/speeches/innovate.htm) (calling the AT&T divestiture “[t]he best and most important example in U.S. history” of an antitrust action to promote economic growth and innovation).
5. See infra Part I.
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tion to make it much more difficult for antitrust law to play an important role in regulated markets—a limitation this Article will argue is potentially costly and unnecessarily strong.

Although the recent Supreme Court decisions on the relationship between antitrust and regulation are grounded in reasonable concerns about the potential costs of antitrust enforcement, they cast aside several important countervailing considerations. The Court discounted the potential for antitrust to complement regulation and to fill gaps where regulation is unsuccessful. Moreover, the Court presented little basis for its strong assumptions about the high costs of antitrust and mostly ignored the costs of regulation. This is a particularly important omission because, as this Article will argue, the relative costs of regulation and antitrust enforcement vary as technological developments and other economic forces alter the market structures and economic conditions of regulated industries. By limiting antitrust law’s ability to step in during such transitions, the Supreme Court’s current doctrine governing the interaction of antitrust and regulation could restrict competition policy in regulated markets to a needlessly inefficient choice between underregulation and overregulation, to the potential detriment of American consumers and economic growth.

Part I of this Article describes the relationship between antitrust and regulation before 2004 and examines how the Supreme Court changed that relationship through its decisions in Trinko and Credit Suisse. It then offers a critique of the Court’s doctrinal and analytic reasons for limiting antitrust in regulated markets and discusses some important questions that the Court’s decisions leave open. Part II explains why Trinko and Credit Suisse matter by examining how their rules might have affected prior antitrust cases, notably AT&T. Part III explains why Trinko and Credit Suisse are likely to leave important gaps in market settings in which the very antitrust enforcement that the cases limit would be particularly valuable. It argues that Trinko and Credit Suisse may limit regulators’ ability to adapt their regulatory policies as competition emerges in the industries they govern, creating a potential costly choice between underregulation and overregulation. It analyzes why default to certain common forms of regulation to fill the gap of diminished antitrust enforcement is particularly costly as industries transition from monopoly to competition. Finally, Part IV considers how the current state of the law could be improved while still addressing the concerns that motivated the Supreme Court to adopt its restrictive stance toward antitrust enforcement in regulated industries.

I. THE DOCTRINAL EVOLUTION OF REGULATORY IMMUNITY FROM ANTITRUST LAW

Before 2004, the federal courts readily allowed public enforcement agencies or private parties to base antitrust claims on conduct subject to regulation and construed limits on such claims narrowly. In 1963, for example, the Supreme Court rejected the New York Stock Exchange’s attempt to block a group of securities dealers from pursuing an antitrust suit against
the exchange for having directed its members not to provide wire transfer services to the nonmember plaintiffs.\textsuperscript{6} The Court ruled that the Securities Exchange Act of 1934 allowed some self-regulatory conduct by exchanges that might ordinarily run afoul of the antitrust laws, but held that the group boycott at issue was outside the permissible scope of such self-regulation and therefore not exempt from antitrust suits.\textsuperscript{7} The Court’s decision presumed against exemptions from Sherman Act scrutiny in order to advance section 1’s core objective of preventing anticompetitive collusion. Similarly, in 1973 the Court affirmed the government’s application of section 2 of the Sherman Antitrust Act\textsuperscript{8} (“section 2”) to interconnection among rival electric utilities.\textsuperscript{9} The Federal Power Commission (“FPC”) had independent authority under the Federal Power Act to order and regulate such interconnection.\textsuperscript{10} The Court nonetheless upheld the lower court’s decision to block a dominant utility from using its control over electrical generation to exclude a rival power distributor and monopolize the power market.\textsuperscript{11} The DOJ had three times sued AT&T (in 1912, 1949, and 1974) for a variety of exclusionary practices against rivals in various telephone equipment and service markets.\textsuperscript{12}

In several of those cases, the Supreme Court expressly grappled with whether the applicable regulation implied immunity from particular applications of antitrust law; in others, the courts implicitly resolved the question of antitrust immunity by letting the antitrust case proceed without comment. The key point is that the federal courts allowed the simultaneous operation of the general antitrust statutes and an industry-specific regulatory statute. This simultaneous operation was consistent with the respective statutory texts. Nothing in the Communications Act, the Securities Exchange Act, or the Federal Power Act expressly conferred immunity from antitrust law. Congress was silent on the relationship between antitrust law and those statutes, and the Supreme Court maintained a presumption against antitrust immunity. It established specific standards for the level of conflict—“plain repugnancy” in the Court’s words—between antitrust law and the regulatory statute that must exist before courts can imply immunity from antitrust.\textsuperscript{13}

While the strength of the presumption against implied immunity from antitrust law did not remain constant across the cases that came before Trinko and Credit Suisse, those two cases marked a significant change from the earlier decisions. As will be discussed in detail below, Trinko expanded the

\textsuperscript{7} Id. at 357–60.
\textsuperscript{10} Id. at 373.
\textsuperscript{11} Id.
\textsuperscript{12} See Stuart Minor Benjamin et al., Telecommunications Law and Policy 713 (2d ed., 2006) (discussing the antitrust actions).
\textsuperscript{13} Otter Tail, 410 U.S. at 372.
scope and rationale for implied immunity from antitrust enforcement in a market governed by a regulatory statute that, far from being silent with regard to antitrust, contains a savings clause that expressly preserves the simultaneous operation of antitrust and regulation. *Credit Suisse* extended the idea of "repugnancy" between regulation and antitrust even to antitrust claims that could not in fact conflict with regulatory prerogatives. To understand the impact of the Supreme Court's recent decisions, this Part begins with a discussion of the doctrinal relationship between antitrust and regulation before *Trinko* and then turns to a discussion of the *Trinko* and *Credit Suisse* decisions themselves.

**A. Antitrust and Regulation Before 2004**

1. **Implied Immunity Without a Savings Clause**

Regulatory statutes can do essentially three things with respect to the antitrust laws: (1) expressly exempt conduct in a given industry from antitrust through a preemption or immunity clause,14 (2) expressly preserve antitrust enforcement through a savings clause,15 or (3) be silent on the question.16 Most cases involving the limits of antitrust enforcement in regulated industries have arisen in contexts where the regulatory statute at issue said nothing about immunity. The rule that emerged from early cases, simple in its statement if not necessarily in its application, was that the courts should disfavor implied immunity from the antitrust laws and require antitrust to cede to regulation only where, and to the minimum extent, necessary for the more specific regulatory statute to achieve its purpose.17

The Supreme Court characterized the standard for implied immunity as one of "plain repugnancy" between antitrust enforcement and regulation.18 In *Silver v. New York Stock Exchange*, for example, the Court held that courts should try to "reconcile[] the operation of both" antitrust and regulation rather than preclude the effect of one or the other.19 The Court then allowed the plaintiff's group-boycott claim under the Sherman Act to go forward because nothing in the Securities Act could be read to authorize

14. See, e.g., 15 U.S.C. § 62 (2006) (the Webb-Pomerene Act, expressly exempting certain collective export associations from antitrust liability); id. § 1012 (the McCarran-Ferguson Act, providing limited antitrust immunity to state-regulated insurance companies); id. § 17 (exempting labor strikes).
19. See 373 U.S. at 357.
such anticompetitive conduct.\textsuperscript{20} In \textit{Gordon v. New York Stock Exchange, Inc.}, the Court took a broader view of what constitutes repugnancy in reviewing an antitrust claim against stockbrokers for conspiring to fix prices.\textsuperscript{21} The securities laws authorized the Securities and Exchange Commission ("SEC") to regulate brokers' rate-setting practices and approve fixed rates,\textsuperscript{22} and the agency had in fact decided to prohibit the kind of rate fixing at issue.\textsuperscript{23} The Court nonetheless found that despite the then-current compatibility between antitrust and regulation, the SEC's statutory authority to allow future rate setting would be nullified by allowing the plaintiffs' antitrust suit to go forward.\textsuperscript{24} The Court held that antitrust law's potential interference with a future exercise of regulatory powers under the securities laws was sufficiently repugnant to warrant the implication of antitrust immunity.\textsuperscript{25}

After \textit{Silver} and \textit{Gordon}, the caselaw thus made clear that "plain repugnancy" would be measured in terms of whether antitrust might disallow conduct that regulators could authorize under the regulatory statute. Actual conflict need not exist between antitrust and the actual implementation of the regulatory statute for courts to imply immunity; the potential for conflict would suffice.

The Court clarified in \textit{United States v. National Ass'n of Securities Dealers} ("NASD") that even absent active regulatory supervision of the specific conduct at issue in an antitrust claim, a court could imply immunity if the challenged conduct could be allowed under the statute and if the agency generally exercised "the kind of administrative oversight of private practices that Congress contemplated."\textsuperscript{26} Despite this broadened view of what could constitute repugnancy between antitrust and regulation, the Court's doctrine was grounded in the genuine potential for antitrust to reduce or impede an agency's exercise of regulatory authority conferred by Congress.

The courts did not limit the repugnancy standard to securities regulation. In \textit{Otter Tail Power Co. v. United States}, the Supreme Court declined to find that the Federal Power Act provided immunity from the government's claim that the defendant had violated the antitrust laws by refusing to supply either interconnection to distribution facilities or power to competing municipal utilities.\textsuperscript{27} The Supreme Court found that Otter Tail's conduct contradicted the objectives of the statute and that the FPC had authority to prevent the defendant's refusal to deal.\textsuperscript{28} Because the FPC had no authority under the

\begin{itemize}
\item \textsuperscript{20} See \textit{id.} at 357–58, 365.
\item \textsuperscript{21} 422 U.S. 659 (1975).
\item \textsuperscript{22} \textit{id.} at 665–67.
\item \textsuperscript{23} \textit{id.} at 671–72.
\item \textsuperscript{24} \textit{id.} at 689–91.
\item \textsuperscript{25} \textit{id.}
\item \textsuperscript{26} 422 U.S. 694, 728 (1975).
\item \textsuperscript{27} 410 U.S. 366 (1973).
\item \textsuperscript{28} \textit{id.} at 373–74.
\end{itemize}
statute to authorize the refusals to deal at issue, however, the antitrust claims
could only be duplicative of, but not repugnant to, any actual or potential
exercise of the FPC's regulatory authority. The *Otter Tail* decision therefore
shows that mere overlap between antitrust and regulation was not a valid
basis for implied immunity.

In *Phonotele, Inc. v. AT&T*, a case decided under the Communications
Act of 1934 (as it existed before the 1996 amendments that added an anti-
trust savings clause), the Ninth Circuit denied implied immunity from
antitrust claims directly related to conduct the Federal Communications
Commission ("FCC") had regularly and actively overseen and regulated.29
The plaintiff sued on grounds that AT&T had violated section 2 of the
Sherman Act by denying customers the ability to connect a device that the
plaintiff manufactured to the telephone network. AT&T claimed implied
immunity on grounds that the Communications Act gave the FCC jurisdi-
cion over such matters and that the FCC had in fact consistently held
proceedings and issued orders on precisely the conduct of which plaintiff
complained. The Ninth Circuit rejected a broad reading of *Gordon* and
*NASD* and held that the antitrust suit reinforced, but was not repugnant to,
the FCC's regulation of the allegedly monopolistic conduct.30 Key to the
court's decision was the fact that from the FCC's perspective, the mere fact
of overlap did not imply repugnancy because there was no conflict between
the FCC's regulatory position against AT&T's conduct and the antitrust
law's potential imposition of liability for those activities.31 The Ninth Circuit
thus distinguished overlap from repugnancy and dismissed the likelihood of
potential conflict in the future. *Phonotele* shares essential features of the
DOJ's 1974 antitrust suit that culminated in the break-up of AT&T in 1984,
which will be further discussed in Section 1.A.2 below.

2. Immunity and Statutes with an Antitrust Savings Clause

There is little caselaw prior to 2004 addressing the relationship between
antitrust and regulatory statutes that contain savings clauses expressly pre-
serving antitrust enforcement. The two notable cases, one of which is the
Second Circuit's decision in *Trinko* itself, both arose under the Telecommu-
nications Act of 1996, which expressly saves the simultaneous application
of antitrust law in telecommunications markets.32

In brief, the Telecommunications Act of 1996 sets up a system of regula-
tion to encourage competition in the market for local telephone services.33
While expressly providing that "nothing in this Act . . . shall be construed to

29. 664 F.2d 716 (9th Cir. 1981).
30. Id. at 727-30.
31. Id. at 733-35.
modify, impair, or supersede the applicability of any of the antitrust laws," the statute directs the FCC to implement rules under which incumbent telephone monopolies must provide access to their network facilities to new competitors, known as "competitive local exchange providers" ("CLECs"), whose market entry would be impaired absent such "unbundling" of incumbent networks. The ensuing FCC rules allow a new entrant wishing to provide phone service to a customer in a given area to have the incumbent connect the customer's line to the new entrant's routing and billing equipment. In this way, new entrants can provide service without first having to build all the costly "last mile" lines to each customer. Two cases arose in which private plaintiffs filed antitrust claims against the incumbent carriers in their local markets for failing to deal properly under the 1996 act with the CLECs from whom the plaintiffs were trying to purchase telephone service. These cases led to the first court decisions interpreting the effect of an express antitrust savings clause on the scope of antitrust claims a plaintiff can raise against a regulated firm.

The first case is the Seventh Circuit's decision in Goldwasser v. Ameritech Corp. Plaintiffs alleged that Ameritech had violated section 2 of the Sherman Act by refusing to comply with the local competition provisions of the Telecommunications Act of 1996. The court found that the plaintiffs had failed to support their antitrust claim with any allegation of conduct that was independent of the duties to deal with rivals specifically listed in the FCC's regulations implementing the 1996 act. Finding those regulations to go well beyond what antitrust alone would require in terms of a duty to deal and finding nothing at all in plaintiff's pleading stating that defendant's actions would violate section 2 in absence of the regulations, the Seventh Circuit held that plaintiffs failed to state a basis for antitrust liability and affirmed the trial court's dismissal of the claims. The 1996 act's antitrust savings clause did not come into play because the court found that the plaintiff had never stated an antitrust claim whose relationship to the regulatory scheme needed to be analyzed.

Two years later, in Trinko, the Second Circuit came to a different result in a case virtually identical to Goldwasser. The incumbent provider of local telephone service in New York City was Bell Atlantic, which later merged with GTE in 2000 to form Verizon. One CLEC attempting to enter the local telephone market in New York City was AT&T, which had been out of the local telephone business since its divestiture in 1984. Plaintiff Curtis V. Trinko was one of the retail customers AT&T signed up. AT&T faced delays

34. Id. § 601(b)(1), 47 U.S.C § 152 historical note.
35. 222 F.3d 390 (7th Cir. 2000).
36. Goldwasser, 222 F.3d at 396.
37. Id. at 401–02.
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in providing service to Trinko's law office because of a dispute with Bell Atlantic over AT&T's access to Verizon's network facilities.\(^{39}\)

Ostensibly because he could not obtain his choice of telephone service provider, the plaintiff sued Verizon under section 2 of the Sherman Antitrust Act as well as under the Communications Act and sought class certification for similarly situated customers. He claimed that Verizon discriminated against rivals like AT&T by failing to supply them with the network connections they needed to provide service to customers like Trinko's law office\(^ {60} \):

Bell Atlantic has not afforded CLECs access to the local loop on a par with its own access. Among other things, Bell Atlantic has filled orders of CLEC customers after fulfilling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with Bell Atlantic.\(^ {41} \)

Each of Verizon's allegedly illegal actions specified in the complaint involved a breach of a regulatory duty under the 1996 act. The Second Circuit explained the complaint as follows:

Consequently, the plaintiff claims Bell Atlantic violated the various duties imposed on it as an ILEC by subsections (b) and (c) of section 251 of the Telecommunications Act and its duties as a common carrier under section 202(a) of the Communications Act. The amended complaint also alleges that Bell Atlantic's conduct had no valid business reason and was intended to exclude competition from the market "by making it difficult for its competitors to provide service in the Local Phone Service market on the level that Bell Atlantic is able to provide to its customers in that market."\(^ {42} \)

The plaintiff's suit on its face focused on violations of the telecommunications statutes; the general harm to competition and lack of valid business justification that might provide independent substance for an antitrust claim appear, without specificity, in an amendment to Trinko's complaint. The district court thus dismissed Trinko's suit for failing to state an antitrust claim distinct from Verizon's alleged violation of the 1996 act, which the plaintiff had no standing to enforce.\(^ {43} \)

\(^{39}\) Trinko, 540 U.S. at 402-05.

\(^{40}\) Id. at 404-05.

\(^{41}\) Trinko, 305 F.3d at 95 (quoting Amended Complaint at ¶ 21, Law Offices of Curtis V. Trinko v. Bell Atl. Corp, 123 F. Supp. 2d 738 (S.D.N.Y. 2000) (No. 00 Civ. 1910)).

\(^{42}\) Id. (quoting Amended Complaint at ¶ 52, Law Offices of Curtis V. Trinko v. Bell Atl. Corp, 123 F. Supp. 2d 738 (S.D.N.Y. 2000) (No. 00 Civ. 1910)).

\(^{43}\) Trinko, 540 U.S. at 405. The plaintiff had no standing to sue directly under the 1996 act, which does not provide private rights of action in federal court. N. Cnty. Comm. Corp. v. Calif. Catalog & Tech., 594 F.3d 1149 (9th Cir. 2010). Whether the plaintiff had standing to sue under the antitrust laws as an "indirect purchaser" is also unclear; the Trinko majority did not address the issue, although Justice Stevens in dissent, joined by Justices Thomas and Souter, would have decided the case solely on the basis that Trinko lacked standing. 540 U.S. at 416-17.
The Second Circuit reversed the district court’s dismissal and reinstated the suit on grounds that the plaintiff’s complaint could be interpreted as raising section 2 claims independent of any statutory duties under the 1996 act. The court first noted that the plaintiff did not even specifically mention section 251 of the 1996 act in his complaint, although it is clear from the facts he pleaded that he was referring to a breach of that and other sections of the act. The court then stated that “[t]he allegations in the amended complaint describe conduct that may support an antitrust claim under a number of theories,” specifically that “the amended complaint may state a claim under the ‘essential facilities’ doctrine” and that “the plaintiff may have a monopoly leveraging claim.” As the word “may” in the Second Circuit’s discussion of the complaint suggests, the plaintiff’s amended complaint was vague. In each instance the court went on to describe the kinds of facts and basic legal elements the plaintiff might plead in support of such antitrust claims. The clear implication is that plaintiff had pleaded neither the facts nor the basic elements of any antitrust claims in his actual amended complaint and that the court was adopting a very liberal pleading standard.

As a technical matter, the Second Circuit’s decision does not conflict with Goldwasser’s holding that the antitrust claim must have a basis independent from the defendant’s purely regulatory obligations, because the Second Circuit found such an independent section 2 claim in Trinko’s complaint (the Seventh Circuit did not find one in Goldwasser’s suit). The tension between the courts is mostly in how generously they read the pleadings. But, because the Second Circuit found Trinko to have pleaded potentially valid claims under antitrust law, his case at least implicitly raised the question of the extent to which the 1996 act’s savings clause preserved antitrust jurisdiction, a question the circuit court answered in allowing Trinko to pursue even his very vague section 2 allegation.

It is hard to know what to infer about the relationship between antitrust and regulation from the Second Circuit’s decision in Trinko. Even if one assumes the refusal-to-deal claim had an independent basis in antitrust law, it was a claim that directly implicated duties to deal governed by FCC rules. If a court were to find that Verizon was not liable under section 2 for refusing to deal, that result would have no bearing on Verizon’s regulatory obligations. On the other hand, if a court were to find section 2 liability, the result would either duplicate or expand the regulatory duty to deal. Duplication of the regulatory duty through antitrust enforcement might be unnecessary when the regulation is enforced, but would need not conflict with the FCC’s full exercise of its authority under the 1996 act and could be justified under the act’s savings clause. Expansion of regulatory obligations,

44. Trinko, 305 F.3d at 108.
45. Id.
46. Id.
47. Id.
48. Id.
however, could interfere with the agency’s administration of the statutory scheme; it might, for example, nullify a regulatory decision not to extend the duty to deal as far as the court saw fit to do under antitrust, even if that regulatory decision was based on the agency’s finding that more extensive duties to deal would be contrary to the statute’s objectives.

The Second Circuit sidestepped the relationship between the plaintiff’s antitrust claim and the 1996 act by finding that “[t]he savings clause unambiguously establishes that there is no ‘plain repugnancy’ between the Telecommunications Act and the antitrust statutes.” But such an interpretation of the savings clause is too strong. While that clause should be read to preserve antitrust enforcement where at all possible, it would be contrary to the general treatment of savings clauses to read it as preserving general antitrust law where so doing would impede the specific statutory mandates and objectives. Whether such impediment actually exists can only be determined case by case, and while such actual conflict may be unusual, it is strained to read the savings clause as deeming it to be impossible. The Second Circuit’s decision thus provides little guidance as to how genuine conflicts between antitrust and regulation should be managed in the presence of an antitrust savings clause. But neither the Second Circuit in *Trinko* nor the Seventh Circuit in *Goldwasser* gave any hint that regulation pursuant to a statute with an antitrust savings clause could be grounds for blocking a properly pleaded antitrust claim. Both in those cases and in the implied immunity cases involving statutes without antitrust-specific savings clauses, the prevailing doctrine was premised on preserving the domain of antitrust law, at least to the extent possible without conflicting with the underlying regulatory statute.

**B. Antitrust and Regulation After 2004**

1. Verizon v. Trinko

After the Second Circuit reinstated Trinko’s complaint, the Supreme Court granted certiorari “limited to the question whether the Court of Appeals erred in reversing the District Court’s dismissal of respondent’s antitrust claims.” More specifically, the Supreme Court phrased the question before it in *Trinko* as “whether a complaint alleging breach of the incumbent’s duty under the 1996 act to share its network with competitors states a claim under section 2 of the Sherman Act.” Several background facts related to the status of refusal-to-deal claims under section 2 of the Sherman Act and the FCC’s implementation of the 1996 act’s regulatory

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49. *Id.* at 109.


52. *Id.* at 401.
framework provide important context for the Court's consideration of that question.

First, Trinko's claim was essentially that Verizon should be held liable for refusing to deal with its competitor AT&T on equal terms. A firm's unilateral refusal to deal with a competitor on particular terms or at all, while long recognized as a potential basis for antitrust liability under limited circumstances, has always been one of the hardest claims for a plaintiff to win. Although the conditions for such liability were perhaps not as stringent as the Supreme Court retrospectively found them to be in Trinko, it is fair to say that even under the best of circumstances the plaintiff bore a heavy burden to show Verizon had violated antitrust laws.

Second, the FCC's regulations implementing the 1996 act directly address the conduct at issue and impose duties to deal on incumbent telephone carriers that are at least as strong as, and likely much stronger than, any that could be established under section 2 of the Sherman Act. Any duty to deal under the Sherman Act at a minimum requires a showing that (1) the defendant has monopoly power and (2) the defendant's refusal to deal was on balance anticompetitive and devoid of a valid business justification. The 1996 act requires only a finding by the FCC that, without access to the incumbent's network facilities, a new entrant would be "impaired" in entering the market, a much weaker standard. As the Supreme Court explained, the 1996 act tries to eliminate legally established monopolies while the Sherman Act tries only to prevent illegal monopolization. A firm's refusal to deal could therefore easily violate the 1996 act without violating the Sherman Act.

Taken together, these facts put Trinko's antitrust claim in an unsympathetic light from the outset. His section 2 claim was at best weak and duplicative of ongoing regulation; it was at worst an attempt to use antitrust law as a cover for bringing a class action suit he did not have standing to file under the 1996 act and to use that act as a basis for liability he would be unlikely to establish under antitrust law. It is therefore not surprising that the Supreme Court took a dim view of Trinko's suit and remanded the case for dismissal. The significance of the case is not that the Court reached that result in this particular case, but in the broad reasoning through which it did so.

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54. See infra notes 62–72 and accompanying text.
57. Trinko, 540 U.S. at 415.
The Court could have most narrowly resolved the case on grounds that the plaintiff had pleaded only the statutory violation and no facts or law from which a court could reasonably conclude that Verizon's conduct met the standards for liability under section 2.\footnote{58} To the extent Trinko was trying to bootstrap an alleged violation of the FCC's unbundling rules into an antitrust claim, he could not do so without pleading facts on which section 2 would impose the same duty to deal independently of the 1996 act. Given the characteristics of the regulation and antitrust claim at issue in 
Trinko, such a ruling would be consistent with the 1996 act's savings provision governing the relationship between antitrust law and telecommunications regulation.

The two critical attributes of the 1996 act for current purposes are that it preserves but does not modify antitrust law and that it imposes duties to deal that are at least as strong as any that antitrust law might impose. The critical characteristic of the plaintiff's refusal-to-deal claim under section 2 of the Sherman Act is its qualified and limited recognition in antitrust precedent. Taken together, those factors make the dismissal of Trinko's antitrust suit look obvious and reasonable. Where regulation is more demanding than antitrust, allowing mere allegation of a regulatory breach to be the basis for a section 2 antitrust claim risks allowing the regulation to modify the scope of antitrust law, in contravention of the 1996 act's savings clause. As the Court found, just as that clause "preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards."\footnote{59}

Moreover, where the basis for antitrust liability is very limited, as in the case of unilateral refusals to deal under section 2, barring allegations of regulatory breaches from sufficing to support an antitrust claim is particularly unlikely to contradict the savings clause's main purpose of preserving the operation of antitrust law in telecommunications markets. Both antitrust and telecommunications law provide grounds for reversing the Second Circuit's decision to allow Trinko's "antitrust" claim to proceed, as Trinko made no effort to show that his particular claim fell within the limited zone of refusal-to-deal liability recognized under the Sherman Act rather than in the more expansive duties to deal of the 1996 act.

Under a narrow ruling—that breaches of the broad 1996 act duties to deal do not suffice to plead a violation of section 2's much more limited duties to deal—the Supreme Court would have provided important procedural guidance to lower courts and litigants but more limited guidance on the substantive scope of antitrust law. That narrow ruling would not be trivial: requiring antitrust plaintiffs to plead section 2 claims as violations of

\footnote{58} The Court later adopted such a procedural approach to limiting weak antitrust claims in \textit{Bell Atlantic Corp. v. Twombly}, 550 U.S. 544 (2007).

\footnote{59} 540 U.S. at 407.
antitrust law instead of invoking breaches of regulatory obligations would force plaintiffs to anchor their claims in relevant antitrust facts and precedent. But such improved pleading would still leave open the question of what courts should do when a plaintiff files an antitrust claim of first impression—i.e., one that would expand the boundaries of precedent—against a regulated firm but without reference to that firm’s regulatory obligations.

A ruling that narrowly answered the question presented would leave open the possibility that a lower court would decide that, putting aside the FCC’s rules and remedies, antitrust law should independently recognize a more extensive range of refusals to deal as grounds for liability than it had in the past. The *Trinko* decision forecloses this possibility. First, the Court redefined the existing limits of refusal-to-deal liability under section 2 of the Sherman Act to exclude liability for Verizon’s refusal to deal, no matter how well pleaded as an antitrust violation.\(^60\) Second, the Court introduced a cost-benefit analysis that bars lower courts from considering any expansion of those existing limits of section 2 in the presence of competition-oriented regulation.\(^61\) In so doing, the Court went well beyond the question of whether an alleged breach of the 1996 act suffices to state an antitrust claim.

The questions the Court really answered were, first, where the limits of refusal-to-deal liability are under section 2 of the Sherman Act and, second, whether a claim for expansion of existing grounds for antitrust liability could be heard against a regulated firm. The *Trinko* Court’s rulings on these questions affect cases well beyond those that involve the relationship between 1996 act regulation and antitrust law’s duties to deal. They make it harder for antitrust claims to proceed against firms subject to any competition-oriented regulation, even where the antitrust claim is stronger and the regulation weaker than was the case in *Trinko*.

b. Limiting Liability for Refusals to Deal Under Section 2

When regulation imposes more extensive duties or limitations on firms than antitrust law, plaintiffs might obtain remedies contemplated under neither antitrust nor regulation if courts allow breach of a purely regulatory duty to suffice for an antitrust violation. In such cases, the line between claims recognized in antitrust and those potentially recognized only under the regulatory statute becomes important. It then makes sense for courts to require antitrust plaintiffs to show that their antitrust claims stand on their own as a matter of antitrust law, independent of the defendant’s regulatory obligations. The plaintiff in *Trinko* did not come close to carrying this burden: as discussed above, he appeared to be using the 1996 act to establish a violation he would have trouble arguing under antitrust law and using antitrust law to get standing he could not get under the 1996 act.

The Supreme Court, however, ruled that the plaintiff could not have established his refusal-to-deal claim under antitrust law no matter how he

\(^{60}\) *Id.* at 410–11.

\(^{61}\) *Id.* at 414.
pleaded his case. The Court found that refusal-to-deal liability lies at the outer boundary of section 2 liability—and indeed mostly outside that boundary.62 In concluding that the duties to deal under the 1996 act went beyond relief recognizable under the antitrust laws and that any antitrust claim based on the statutory duties should be denied, the Court read antitrust precedent on unilateral refusals to deal restrictively. Despite several cases in which the Supreme Court and lower courts had found grounds to hold dominant firms liable for the denial of an essential input to competitors,63 the Court in Trinko disclaimed ever having sanctioned an “essential facilities” doctrine or any other general basis for refusal-to-deal liability.64

The Court acknowledged that it had upheld liability for a unilateral refusal to deal in Aspen Skiing v. Aspen Highlands.65 But it emphasized the unusual and specific facts of that case—notably, a prior course of dealing with the plaintiff and none but an anticompetitive explanation for changing course—and described Aspen as being “at or near the outer boundary of Section 2 liability.”66 The facts of Trinko not fitting those of Aspen, the Court found that the plaintiff could not state a recognized antitrust claim: as a doctrinal matter, the Court found that Trinko’s claim simply fell outside the scope of established section 2 liability.67

It is indisputable that the federal courts have always interpreted antitrust law with a strong presumption against mandating that a firm deal with its competitors, and for good reason: such duties could interfere with a firm’s incentives to invest and innovate and might punish firms for the very kind of conduct—aggressive competition—that the antitrust laws seek to promote.68 But successful duty-to-deal claims were neither as novel nor as improbable as the Court found them to be in Trinko. To reach its conclusion that the kind of dealing with a competitor addressed by the 1996 act was novel to antitrust law, the Court arguably engaged in some sleight of hand by altering ex post the substantive scope of section 2 liability for refusals to deal, re-drawing the boundary of liability to ensure that Trinko’s claim would fall beyond the limits of existing antitrust precedent.

At the time Trinko filed his suit, however, courts had not yet applied as strong a presumption against liability for unilateral refusals as the Supreme Court later held there to be. Aspen itself neither adopted such a skeptical

62. Id. at 409.


64. 540 U.S. at 410–11.

65. Id. at 409.

66. Id.

67. For an analysis of why even this conclusion of the Court is subject to question, and in turn why it is unclear how much of Aspen actually survives Trinko, see Eleanor M. Fox, Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act, 73 Antitrust L. J. 153 (2005).

68. 540 U.S. at 407–08.
posture toward refusal-to-deal claims nor confined liability for such conduct to its own facts, as the Court retrospectively did in *Trinko*. To the contrary, in *Aspen* the Court considered itself already to have "squarely held" in *Lorain Journal* that a monopolist's right to exclude competition through a refusal to deal is a qualified one. Whereas *Trinko* expressly cabined refusal-to-deal liability to the facts of *Aspen*, the Court in *Aspen* itself adopted a more flexible approach in stating that "[t]he qualification on the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*." The *Trinko* Court interpreted *Aspen* to narrow *Lorain Journal*, whereas the *Aspen* Court read *Lorain* as a broader rule that could apply to the specific facts of the *Aspen* case.

It is also hard to reconcile the Court's description of refusal-to-deal liability with *Otter Tail*, in which the Court had no difficulty allowing antitrust claims that involved pure refusal to deal to proceed in the regulated power sector. In *Trinko*, the Court suggested that *Otter Tail* fit the facts of *Aspen* because the defendant power company was refusing to supply some municipal utilities with the same goods and services it was already providing to others. But if the Court is thereby implying that dealing with one firm could trigger antitrust liability for refusal to deal with other firms, then that rule is broader than *Aspen*'s. In *Aspen* the key point was that the defendant had previously dealt with the very same party with whom it later refused to deal. By discounting that distinction between *Aspen* and *Otter Tail*, the Court would curtail a seller's discretion more than *Aspen* itself might do. Moreover, if the Court means what it said about *Otter Tail*, then it could be hard to distinguish *Trinko*'s refusal-to-deal claim if Verizon was refusing to supply AT&T the same kind of access it was supplying to other competitive entrants into the local telecommunications market. If *Otter Tail* and not *Aspen* more accurately describes the outer boundary of section 2 liability, then the claim at issue in *Trinko*, though perhaps weak, may not look novel.

Even with its doctrinal revisionism, had the Court in *Trinko* stopped at explaining the scope of section 2 and preventing the importation of duties from a regulatory statute into claims under the antitrust laws, it would have accomplished two things: it would have established the anti-bootstrapping principle, thereby keeping statutory duties and grounds for antitrust liability independent; and, for better or worse, it would have clarified the substantive antitrust law on refusals to deal to make it harder in all cases for plaintiffs to make such claims, whether in regulated industries or not. Harder, however, does not mean impossible. The *Trinko* Court did not make unilateral refusals to deal legal per se; it did not expressly overrule *Aspen* or any other relevant

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70. *Aspen*, 472 U.S. at 601.
71. *Id.* at 603.
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 precedent, and it back-handedly implied that some circumstances beyond those of Aspen could justify a mandate to deal with a rival. The Court’s holding on the limits of existing refusal-to-deal liability under section 2 therefore does not in itself prevent a plaintiff with a claim against a regulated firm from asking a court to find that the facts of a particular case warrant addition to the preexisting grounds for antitrust liability. The Court, however, took a further step to foreclose the possibility that federal courts will actually hear such claims, even if those claims contain facts and arguments rooted in the purposes of antitrust law rather than in the applicable regulatory statute. Indeed, the Court at this point expressly broadened its formulation of the question presented, saying, “The question before us today is whether the allegations of respondent’s complaint fit within existing [grounds for refusal-to-deal liability] or provide a basis, under traditional antitrust principles, for recognizing a new one.”

c. Barring Expansion of Antitrust Liability in Regulated Industries

In part IV of its opinion, the Court examined whether “traditional antitrust principles” would justify adding Verizon’s alleged refusal to deal to the kinds of conduct for which antitrust law imposes liability. The Court answered in the negative, and not just because of the particular facts of Trinko. The Court grounded its analysis in observations about the relative costs and benefits of antitrust enforcement and then turned those observations into presumptions in cases involving regulated industries. The Court found that where there exists “a regulatory structure designed to deter and remedy anticompetitive harm,” antitrust law should be modestly enforced because “the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.”

The Court cited Silver and NASD, two implied immunity cases, as authority for factoring the costs and benefits of antitrust into its consideration of whether antitrust claims of first impression should be allowed against a regulated firm: “[J]ust as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.” There is a fundamental difference, however, between the reasoning of the implied immunity precedent the Court cited and the Court’s reasoning in Trinko. Under Silver and NASD, the critical requirement for immunity is

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73. See id. at 411.
74. See id. at 408.
75. Id. at 411.
76. Id. at 411–12.
77. Id. at 412.
78. Id.
79. Id. at 412 (internal citation omitted).
"repugnance"—the real prospect of conflict—between antitrust and regulation. That conflict requirement was not, however, the basis for Trinko's preclusion of novel antitrust claims against regulated firms. The Court's reasoning instead hinged upon the costs of antitrust enforcement and the reduced likelihood in regulated industries that the benefits of additional antitrust enforcement would offset those costs.80

Were conflict between antitrust and regulation the Court's main concern, it could have ruled that an antitrust savings clause, in addition to not implicitly enlarging antitrust liability through regulation, should not be interpreted as an antitrust supremacy clause under which the statute's regulatory provisions impliedly yield to antitrust law in cases where the latter would actually and directly interfere with the former. Such a conflict-based rule to preclude the antitrust claim in Trinko would have been consistent with the Court's implied immunity precedent and would have given effect to the antitrust savings clause to the extent possible without compromising the regulatory statute. Instead of an inquiry into conflict between antitrust and regulation, however, Trinko focused on the questionable marginal benefits of adding antitrust enforcement on top of existing regulation.81

On one hand, the Court's argument about the relevance of regulation to the net benefits of antitrust enforcement is perfectly sound. Regulation can make it more difficult to assess anticompetitive harms for purposes of an antitrust case. For even if antitrust and regulation are consistent with each other, regulation's influence on the economic structure and conduct of an industry might make it harder for antitrust enforcers to link particular competitive effects to the defendant's conduct and to design suitable remedies. Because economic regulation usually changes the terms on which market participants interact, the competitive effects and justifications relevant to the rule-of-reason inquiry are likely to change depending on whether or not regulation is taken into account. It therefore makes sense that precedent requires courts to take account of the nature and pervasiveness of state and federal regulation and of the particular legal and economic setting of any industry in which antitrust law is being applied.82 As Herbert Hovenkamp has argued, the case-by-case determination of whether antitrust should apply or yield to active regulation of the conduct at issue is precisely the kind of antitrust inquiry that the savings clause should be interpreted to preserve.83

On the other hand, the Court did not base its skepticism toward expansive antitrust enforcement against regulated firms on the difficulties regulation may create for the application of antitrust law. Nor did it ground its skepticism on the prospect of conflict between general antitrust law and the specific objectives of the regulatory statute. Instead it barred expansion of antitrust liability because it found the marginal benefit of antitrust en-

80. Id. at 414.
81. Id.
82. Id. at 411 (citing United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 91 (1975), and Town of Concord, Mass. v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990)).
83. Hovenkamp, supra note 50, at 375–76.
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forcement against conduct already governed by regulation to be too small to justify the potential costs. The Court’s implication that its reason for blocking the expansion of section 2 follows from the implied immunity cases falls apart on even cursory analysis. The implied immunity cases hinge on antitrust law’s conflicts with regulation, while Trinko hinged on antitrust law’s potential duplication of regulation. The former was clearly inconsistent with the statutes in the relevant cases; the latter was expressly provided for in the savings clause of the regulatory statute at issue in Trinko.

Moreover, the Court did not simply instruct lower courts to take account of the case-specific marginal benefits of antitrust before they decide whether to allow a novel or aggressive antitrust claim against a regulated firm. Instead, the language of the opinion makes clear the Court’s view that the net benefits of antitrust in the presence of regulation should be weighed with a strong, skeptical presumption. In stating that in the presence of competition-oriented regulation that benefits of antitrust will “tend to be small,” that application of section 2 can be difficult “under the best of circumstances,” and that mistakes in enforcing section 2 “are especially costly,” the Court placed a firm thumb on the scales of any lower court’s determination of whether an expansive antitrust claim should be allowed against a regulated firm. This presumption against lower courts’ ability to hear the merits of boundary-pushing antitrust claims is in tension not only with the 1996 act’s savings clause, but also with the Court’s own pronouncement in Gordon that “the determination of whether implied repeal of the antitrust laws is necessary to make [a regulatory statute] work is a matter for the courts, and in particular, for the courts in which the antitrust claims are raised.”

d. Unclear Standards for Regulation

The Court’s presumption that expansion of antitrust in the presence of relevant regulation would be too costly appears harmless on the facts of Trinko itself. Even absent such a presumption, it seems unlikely that a district court would find the antitrust claim to be worthwhile given the nature of the claim and the direct correspondence between the underlying refusal to deal and the FCC’s network-access rules. But nothing in the Trinko opinion confines the Court’s presumption about the costs of antitrust in regulated industries to the facts of the case.

Trinko stated that one key factor in deciding whether to recognize an antitrust claim against a regulated firm “is the existence of a regulatory structure designed to deter and remedy anticompetitive harm,” because “[w]here such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small.” The Court made clear its view that the regulation at issue in Trinko itself directly addressed

84. Trinko, 540 U.S. at 412.
85. Id. at 412, 414–15.
87. Trinko, 540 U.S. at 412.
the allegedly illegal conduct and was actively overseen by the FCC.\textsuperscript{88} Had the Court made equally clear that to preclude antitrust claims a regulatory structure must, like the one at issue in \textit{Trinko}, be directly relevant to the conduct at issue, be as demanding as antitrust law, and be actively administered, one might worry less about any collateral consequences for legitimate antitrust cases.

The Court did not, however, tie its decision to the particular attributes of the regulations at issue in \textit{Trinko} or establish any standard that a regulatory program must meet to preclude antitrust claims. The Court instead offers as the contrasting scenario in which antitrust might be worthwhile the case where "'[t]here is nothing built into the regulatory scheme which performs the antitrust function.'"\textsuperscript{89} Between "nothing" and the actively enforced duties to deal under the 1996 act there is a lot of room.

Unanswered in \textit{Trinko} is the important question of whether the competition-focused regulation has to correspond closely to the conduct at issue and be actively enforced or whether its mere existence on the books is sufficient to forestall aggressive antitrust claims. At the heart of this question is what constitutes a "regulated" firm for purposes of \textit{Trinko}'s preclusion of aggressive antitrust claims. \textit{Trinko} counseled courts to dismiss even well-pleaded claims to expand antitrust liability beyond its existing boundaries when those claims are made against regulated firms, whereas an unregulated firm may have to fight those same claims on the merits under antitrust law's rule of reason. In \textit{Trinko}, the Court confronted a combination of statutory authority to regulate the conduct at issue, agency rules that implemented that authority, and active administration and enforcement of the regulations by the agency. But what if one of the latter two elements is missing or present in a weaker form than in \textit{Trinko}? Future antitrust claims could arise against firms subject to a relevant regulatory statute but where the agency has not implemented rules, or where the agency has promulgated regulations that do not directly govern the allegedly anticompetitive conduct, or where the agency does not actively administer or enforce its rules. The \textit{Trinko} decision left open the question of where along this spectrum of possibilities a firm becomes sufficiently "regulated" for the Court's rule against boundary-expanding antitrust claims to apply.

This is a key question after \textit{Trinko}. If a presumption against antitrust can apply absent active enforcement of a regulatory statute that ostensibly "performs the antitrust function," then a little regulation could be a dangerous thing for competition enforcement in regulated industries. The risk for antitrust enforcement is that, given the \textit{Trinko} Court's emphasis on the "sometimes considerable disadvantages" of antitrust, lower courts will preclude antitrust suits where the regulatory scheme is something greater than "nothing" but something well short of the FCC's implementation of the 1996 act's competitive access provisions.

\textsuperscript{88} Id. at 414-15.

\textsuperscript{89} Id. at 412 (quoting \textit{Silver v. N.Y. Stock Exch.}, 373 U.S. 341 (1963)).
e. The Court's Line Between Established and Expanded Grounds for Antitrust Liability Does Not Save the Savings Clause

The 1996 act's savings clause would appear to deny courts a basis for weighing the marginal costs and benefits of antitrust enforcement against firms subject to regulation under the statute. Absent some interference between antitrust enforcement and the statute's specific objectives, Congress has expressly judged antitrust law worthwhile even in parallel with FCC rules. The Court tried to preserve the savings clause by barring only claims against regulated firms that had not yet been recognized under antitrust law at the time of the given suit. All previously recognized claims can proceed through the normal litigation process and are therefore saved. There are three reasons why this formal distinction between novel and established antitrust claims fails to give full effect to Congress's express antitrust savings clause.

First, the Court based its rationale for distinguishing between new and previously recognized antitrust claims on the savings clause's statement that the 1996 act does not "modify" antitrust law. That statement provides a sound basis for not allowing statutory breaches themselves to supply the basis for antitrust liability. But if a plaintiff makes an argument for adding certain conduct to that already recognized as illegal under antitrust law without reference to the statute and based solely on the goals and principles of antitrust law itself, then any modification of preexisting antitrust would be the result of the court's application of antitrust law's rule of reason, not its enforcement of the regulatory statute. Where the modification has nothing to do with the 1996 act (or with some future statute with the same savings clause), preventing the modification cannot be justified by the act's savings clause.

Second and relatedly, the Court did not preserve the entirety of existing antitrust law as applicable to regulated firms. The Supreme Court read the reference in the 1996 act's savings clause to "any antitrust law" to encompass only substantive antitrust doctrine, and not the provisions of the antitrust laws that govern process. Those procedural provisions assign the heavily fact-driven question of whether a particular course of conduct violates the law to the district courts. As with any civil suit, the district court has authority to dismiss an antitrust claim and the Supreme Court has jurisdiction to review both final and interlocutory appeals. In *Trinko*, however, the Court reversed the appellate court on a procedural decision involving a claim that never had a hearing on the merits. The district court had dismissed the case on grounds that the plaintiff was trying to assert a claim under the 1996 act rather than under section 2 and that there was no

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content to plaintiff's separate antitrust cause of action. In reversing, the Second Circuit found that the plaintiff had at least stated an antitrust claim sufficiently in line with section 2 precedent and sufficiently distinct from the 1996 act's network-access provisions to survive dismissal under rule 12(b)(6). It was that decision rather than a ruling on the merits that the Supreme Court reviewed. A narrower ruling like that discussed earlier would have restored the district court's decision on procedural grounds without cutting off the lower courts' ability to hear properly pleaded claims for increased antitrust liability in future cases.

Although Trinko's claim was a stretch and likely would have failed once the district court reviewed Verizon's conduct under a rule-of-reason inquiry, the Supreme Court's decision prevents district courts from engaging in that inquiry at all for claims that push the boundaries of antitrust in the context of a regulated industry. While it is easy to shrug off the preclusive effect of such a rule in the context of a weak case, the Court's decision will also bind lower courts in cases with more complex facts and complaints that have greater merit. The difficulties of attaching presumptions to the fact-intensive inquiries underlying antitrust law's rule of reason or a regulatory statute's implication of antitrust immunity are precisely why, in general, strong presumptions should not short-circuit the express procedural provisions of the antitrust statutes.

Finally, the Supreme Court's distinction between novel and established antitrust claims is porous. The line between a novel and an existing basis for antitrust liability may not be clear, especially in activities analyzed under the fact-intensive rule of reason. The Court itself recognized that there are "myriad" means by which a firm can illegally exclude competition. The more factual dimensions there are to a liability determination, the more likely it is that every example of some category of conduct will be distinguishable from every other example and, therefore, to some extent a novel application of doctrine that came before. Is a claim of liability for a defendant's refusal to continue dealing with the plaintiff (Aspen) the same as a claim of liability for a defendant's refusal supply the plaintiff the things the defendant has supplied to third parties (Otter Tail)? If so, could Trinko have made his claim nonnovel simply by alleging in his complaint that Verizon was supplying other new entrants with the same network elements it was allegedly refusing to supply AT&T? How would such a claim differ from that at issue in Otter Tail, a case the Court in passing interpreted to be within the purview of liability established by Aspen? Distinguishing novel

94. See supra Section I.B.1.a.
95. The one exception under antitrust law involves the small class of per se illegal violations under section 1 of the Sherman Act. These are limited to price-fixing agreements and their equivalents. Over the years, the range of conduct subject to per se liability has shrunk, and even where such liability does apply, defendants have the opportunity to convince the court that their conduct should be treated otherwise.
96. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam)).
from existing grounds for liability might therefore be a far less clear-cut task than the Court implied.

Moreover, where the line between a novel and an existing basis for liability is blurred, the Court made clear that its major concern is with the likelihood of false positives—i.e., of enforcement against conduct that may constitute aggressive competition, the conduct the antitrust laws try to promote and protect—rather than with the likelihood of illicit anticompetitive strategies. The *Trinko* opinion emphasized the costs of antitrust enforcement, first referring to antitrust enforcement’s “sometimes considerable disadvantages”\(^7\) and later to how difficult antitrust cases are “[u]nder the best of circumstances.”\(^8\) The Court’s error-cost discussion tells lower courts to choose false negatives over false positives—in other words, to be generous in the definition of what constitutes expansion and parsimonious in the definition of existing law. The Court thereby appears to have placed a thumb on the scale in favor of finding antitrust claims to be novel, and therefore precluded, in a market subject to competition-oriented regulation.

In sum, *Trinko* shows that the Court will interpret the substantive scope of antitrust liability narrowly in regulated settings even where Congress has expressly preserved the operation of antitrust law. This narrow interpretation of existing law diminishes plaintiffs’ recourse to antitrust claims against regulated firms and in turn gives narrow and incomplete effect to the savings clause. In reducing access in regulated markets to the judicial process through which antitrust law evolves, the Court leaves it principally to regulatory agencies, rather than to courts applying the antitrust laws, to evaluate and redress certain kinds of potentially anticompetitive conduct.

\[f. \text{Trinko’s Broad Potential Effect on Antitrust in Regulated Industries}\]

In sum, the Court in *Trinko* went beyond the parameters of the question it set out to answer at the start of the opinion. The Court did not simply rule that pleading a violation of the 1996 act’s regulatory duty to deal is insufficient to state a claim under section 2 of the Sherman Act. It accomplished that result, but as a lesser-included effect of a much broader ruling that limited refusal-to-deal liability under section 2 in a more restrictive manner than precedent would suggest, introduced a cost-benefit rationale for effectively barring new monopolization claims under section 2 against regulated firms even if those claims are pleaded purely and specifically as antitrust rather than regulatory violations, and left open how directly and actively regulation must address the conduct that is the basis for such an antitrust claim before the Court’s rule against novel antitrust claims should apply. While the Court’s distinction between established and novel antitrust claims might appear to preserve the 1996 act’s savings clause, it does so more as a formal than practical matter.

\(^7\) Id. at 412.

\(^8\) Id. at 414.
The net result of *Trinko* is a reduction of the scope of antitrust enforcement against regulated firms notwithstanding the presence of an express antitrust savings clause. Even if antitrust enforcement would not conflict with regulation, and even if regulation does not so alter the marketplace as to make antitrust inquiries moot or difficult to undertake, plaintiffs will face an uphill battle in pursuing regulated firms under the Sherman Act. Plaintiffs will bear the heavy burden of proving that their claims fall under clearly established grounds for antitrust liability, and courts will assess those claims through a presumption that in the presence of regulation antitrust will have benefits too small to justify its costs.

2. Credit Suisse v. Billing

Three years after it decided *Trinko*, the Supreme Court decided *Credit Suisse v. Billing*.\(^9\) *Credit Suisse* involved an attempted antitrust suit against collusion in the underwriting of initial public offerings of securities. The relevant regulatory statutes give the SEC authority to review joint underwriting activities and contain no specific antitrust savings clause.\(^1\)\(^0\) They do, however, contain a general savings clause that "the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."\(^1\)\(^0\) In nonetheless finding the securities laws to imply immunity from the plaintiffs' antitrust claim, the Court went beyond the boundaries on immunity set by its prior cases.

The implied-immunity cases that came before *Credit Suisse* all drew a line between antitrust claims that could conflict with an agency's statutory authority to regulate a particular kind of conduct and those claims that could not conflict principally because they addressed activities the agency had no power either to approve or prohibit. The doctrinal progression from *Silver* to *Gordon* to *NASD* interpreted agency authority and "plain repugnancy" with increasing breadth, but those cases did not imply immunity where the conduct underlying the antitrust claim was distinct from anything the securities laws would or could allow. In *Credit Suisse*, the Court applied those prior cases, but added a prudential consideration that would preclude some antitrust claims involving conduct the agency either has no specific statutory power to regulate or is certain to regulate in a manner that is consistent with the antitrust laws.

a. A Judicial-Confusion Rationale

The plaintiffs in *Credit Suisse* had complained that defendants violated section 1 of the Sherman Act by going beyond the kinds of joint setting of securities prices that the securities laws allow. They alleged that the defen-
dants had impermissibly engaged in tying and similar activities that are prohibited by both antitrust laws and securities statutes. Importantly, the Court took it as given that the defendants’ conduct was unlawful under the securities laws and would remain so. The Court nonetheless extended the potential-conflict rationale for immunity established by Gordon to apply even where the antitrust claim, correctly construed, would not actually conflict with regulation. The Court reasoned that “only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid.” The Court’s concern was that, because of that fine line, trial courts would make mistakes by mischaracterizing some allowable economic conduct in securities markets as being impermissible under the securities laws and, in allowing antitrust challenges to that conduct, would deter underwriters from engaging in legal forms of economic cooperation. Such mistakes, the Court found, would be “clearly incompatible” with the administration of the securities laws.

Thus, while it acknowledged tying to be plainly illegal under securities laws, the Credit Suisse Court found that an antitrust claim for tying by underwriters could lead a court to confuse conduct other than tying, such as a customer’s mere purchase of two separate securities from the underwriter, with the customer’s being forced to purchase one of the securities in order to buy the other. Similarly, the facts that might show an underwriter to have legitimately inquired into an investor’s future interest in buying increased numbers of shares could be mistakenly read to show the underwriter illegally requiring the investor to agree to buy shares at a more expensive aftermarket price in order to be allowed to buy some shares at the initial offering price. The Court offered several other hypothetical examples before concluding that the risks of mistakes in the interpretation of securities market activity were simply too great in antitrust cases involving securities pricing to allow those cases to proceed.

Credit Suisse went beyond prior implied immunity cases by precluding even antitrust claims that are based on legitimate antitrust principles, consistent with securities laws, and not even potentially repugnant to the

102. Tying involves conditioning the sale of one product (usually one over which the seller has market power) on the buyer’s agreement to also purchase a second product (usually one in which the seller faces competition). Tying is generally subject to rule-of-reason review as a monopolizing practice (in the second product above) under the antitrust laws, but under some circumstances it may be subject to per se liability. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

103. Credit Suisse, 551 U.S. at 278–80 (discussing relevant SEC regulations and proposed rules).

104. Id.

105. Id. at 283.

106. Id. at 285.

107. Id. at 279–80.

108. Id.

109. Id. at 283.
regulatory scheme, where the underlying conduct is so similar to regulated conduct that a judge might, in some other case, confuse the two and create a conflict with regulatory authority. The Court moreover adopted a strong presumption that “antitrust courts are likely to make unusually serious mistakes in this respect” because of “nonexpert judges” and juries and “the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible.”

b. Emphasis on the Costs of Erroneous Antitrust Enforcement

The Credit Suisse analysis is important because it marks the first time in the line of implied-immunity cases that the Court has found regulation to imply immunity from legitimate and nonrepugnant antitrust claims. In so doing, the Court emphasized the potential effects of erroneous interpretations of fact by future courts and the costs of erroneous conflicts with the securities laws without mentioning the costs of errors on the other side: regulatory approval of, or failure to enforce against, conduct that the agency mistakenly places on the legitimate side of the line.

Ultimately, the Court favored regulation for two reasons. First, antitrust enforcement could deter behavior the statute approves or encourages while the opposite effect of regulation on the goals of antitrust is unlikely or expressly dominated by Congress’s specific statutory objectives. Second, injured parties still have a remedy from the SEC even if barred from pursuing antitrust claims. Both reasons are open to question. The case itself involved concerted conduct at the heart of what the antitrust laws prohibit, and the SEC had in fact failed to reach a resolution or remedy for precisely the kind of conduct the plaintiffs were alleging. By its logic and likely practical effect, Credit Suisse contracted the scope of antitrust enforcement and expanded the scope of implied immunity in industries regulated by statutes that fail expressly to save the operation of antitrust law.

c. The General Savings Clause Does Not Preserve the Antitrust Claims

What about the general savings clauses in the securities acts mentioned above? The Court itself had previously interpreted those clauses to “confirm that the remedies in each [securities] Act were to be supplemented by ‘any and all’ additional remedies.” That precedent formed the basis for Justice Thomas’s dissent in Credit Suisse from the majority’s implication of antitrust immunity. Justice Thomas pointedly noted that the Sherman Act, having been enacted in 1890, clearly falls within the “any and all other rights and remedies” preserved by the Securities Act and the Securities Ex-

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110. Id. at 281–82.
111. Id. at 283–84.
112. Id. at 283.
change Act, both of which were enacted in the 1930s. Justice Thomas thus concluded that "both statutes explicitly save the very remedies the Court holds to be impliedly precluded. There is no convincing argument for why these saving provisions should not resolve this case in respondents' favor." The majority gave two reasons for putting aside the savings clauses, neither of them terribly compelling. The first is that the plaintiff had failed to present the effect of the savings clauses for consideration by the lower courts. That is a peculiar rationale given that it was not the plaintiff but the defendant who, in asking for immunity, sought a ruling in tension with the savings clauses.

The Court’s other reason for overriding the savings clauses was that two earlier securities cases, NASD and Gordon, had implied immunity to antitrust suits notwithstanding the same savings clauses. But that reasoning ignores a crucial difference between Credit Suisse and those earlier cases: the necessity of choosing between giving full effect to the securities laws and full effect to the antitrust laws. In each of the earlier cases, the antitrust suit, even correctly construed, could have directly conflicted with the SEC's exercise of regulatory authority under the securities laws. In such cases, the securities law remedies would not be "in addition" to antitrust law remedies, but exclusive of them. With such clear "repugnancy" between the two sets of laws, the Court had to choose between them. The Court’s decision to prioritize the more specific securities laws over the more general antitrust laws is in keeping with established cannons of statutory construction.

In Credit Suisse, however, the particular antitrust suit at issue could not have conflicted with the exercise of authority under the securities laws, and the Court therefore did not face the situation of mutual exclusivity it had faced in NASD or Gordon.

In the wake of Trinko, in which the Court offered a cramped interpretation of a savings clause specific to antitrust law, the outcome in Credit Suisse is perhaps not surprising. Both cases reflected the Court's skepticism about the marginal value of antitrust enforcement against regulated firms and the Court's presumption about the high costs of mistaken antitrust enforcement. In Trinko, concern about the costs of antitrust led the Court to cabin section 2 liability for refusals to deal generally and to bar expansion of the grounds for antitrust liability in suits against regulated firms. In Credit Suisse, the Court's reliance on potential future errors by trial courts to block antitrust suits gave short shrift to the savings clause, enlarged the zone of implied immunity beyond the area of actual or potential conflict, and discounted Congress's own judgment about

116. Id.
117. Id. at 275 (majority opinion).
118. Id.
119. See Morton v. Mancari, 417 U.S. 535 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of [respective dates] of enactment.").
the cost and benefits of applying other laws, beyond the securities acts, in securities markets.

C. The Court’s Underlying Rationale: Overemphasis on Overenforcement?

The principal reason the Court gave in Credit Suisse and Trinko for precluding antitrust claims was concern with the costs of false positives in enforcement. The Court was unusually explicit in its aversion to the potential costs of antitrust in Trinko, notwithstanding that Congress, in including a savings clause in the 1996 act, appeared to have taken a different view. Cases that came after Trinko continued to raise barriers to antitrust plaintiffs in both regulated and unregulated settings. As discussed above, Credit Suisse conferred immunity from even well-established antitrust claims like price-fixing if those claims involve conduct that is factually close to, though not within, activities covered by a regulatory statute. In Twombly, the Court increased the burden on all antitrust plaintiffs through heightened pleading requirements.\(^{120}\) Most recently, in Pacific Bell v. Linkline, the Court virtually eliminated “price squeezes” as cognizable claims under section 2,\(^{121}\) a consequence flowing in large part from the Court’s interpretation of refusal-to-deal liability in Trinko.\(^{122}\) Recent cases thus amplify the Court’s concern in Credit Suisse and Trinko that overenforcement of antitrust could do more to deter beneficial behavior than to prevent anticompetitive conduct, a concern the Court found especially acute in regulated industries.

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121. Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc., 129 S. Ct. 1109 (2009). A price squeeze can arise when a monopolist in the market for a productive input is also a competitor in the market for the final product incorporating that input. Id. at 1114. The monopolist might then try to squeeze the profits of its wholesale customer (and downstream competitor) by first charging a high wholesale price for the necessary input and then charging consumers a low price for the final product in which the wholesale customer competes with the monopolist. Id. at 1114–15.

122. Id. at 1119. The other requirement Linkline established for a price squeeze claim is that the defendant’s retail prices for the final product be predatory as defined in Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), under which the plaintiff must prove that the defendant’s retail prices were below cost and likely to give the defendant enough market power in the future to raise prices and “recoup” the money it lost from its predatory conduct. Linkline, 129 S. Ct. at 1120. A perplexing feature of the Linkline decision, which is beyond the scope of this Article, is the absence of any real discussion by the Court of whether the interaction between monopoly power in the wholesale input market and low retail pricing in the final product market should give rise to a different definition of predatory pricing in price-squeeze cases than in straight predation cases. The Court quickly dismissed an amicus brief’s argument for taking such an interaction into account. Id. at 1122 (citing Brief for American Antitrust Institute at 30, Linkline, 129 S. Ct. 1109 (No. 07-512)). But it did not engage the underlying economics at any depth and simply asserted the independence for antitrust purposes of the defendant’s behavior in the upstream and downstream markets. Id. at 1122–23.
1. Overemphasis on False Positives: Some Evidence

The Supreme Court's presumption that false positives are more costly than false negatives in the presence of regulation is questionable on several fronts. First, the cost-benefit assumption underlying the Court's bar to complex or novel claims against regulated firms may or may not be correct in a given case. Its accuracy depends on a number of factors and hinges more on empirics than systematic logic. For instance, the regulatory agency might not actively exercise its authority. The benefits of adding antitrust enforcement will therefore not necessarily be small or marginal just because Congress has given an agency the authority to regulate.

Second, while the Trinko opinion emphasized the costs of false positives in antitrust enforcement, precluding antitrust liability would likely cause some number of false negatives in which anticompetitive conduct would go unpunished. To the extent courts can distinguish conduct that causes net harm to competition, an overinclusive rule against liability will reduce consumer welfare. The Supreme Court took the view that the risk and cost of false negatives is minor compared to the risk of false positives. Even if it were true that any individual false positive result is on average more costly than any individual false negative, it is not necessarily true that the total costs of false positives from antitrust enforcement are higher than the cumulative costs of false negatives. That balance depends on the comparative frequency of false positives. In its 2007 Report and Recommendations, the Antitrust Modernization Commission discussed the importance of avoiding both overdeterrence and underdeterrence of anticompetitive conduct, but noted in its discussion of treble damages that "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission."123

Third, substantive and procedural developments in antitrust law over the past thirty years have reduced both the likelihood that cases will reach trial and the probability that plaintiffs will win once they get there. On the procedural side, the Supreme Court has placed limits on who can sue under the antitrust laws124 and has raised the pleading requirements for those who can.125 More fundamentally, the Court has increased the substantive burdens on plaintiffs for a number of antitrust claims—in particular those alleging monopolization under section 2 of the Sherman Act. The Supreme Court's rulings in antitrust cases over the past twenty years126 have made it harder for plaintiffs to get to the merits, never mind win, on claims


125. Twombly, 550 U.S. at 544.

126. Until the Court recently decided American Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010), the last antitrust plaintiff's victory out of seventeen antitrust cases in the Supreme Court had been in Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).
ranging from predatory pricing\textsuperscript{127} to vertical price restraints\textsuperscript{128} and, of course, to refusals to deal.\textsuperscript{129} Those are only examples, and the Court has raised barriers to plaintiffs for numerous other kinds of antitrust claims as well.\textsuperscript{130} The point here is not to debate the merits of any of those particular decisions, but to show that antitrust jurisprudence has evolved to reduce significantly the likelihood of false positives. The assumption that even more preclusive rules against liability are necessary to protect against investment deterrence and other costs of overenforcement requires more justification than the Court has offered in light of these developments.\textsuperscript{131}

The caselaw provides additional empirical evidence that the prospect of false positives is not so great as to warrant the antitrust-precluding effect the Court gives to competition-oriented regulation. There have been relatively few successful claims of refusal-to-deal liability and the overall number of cases has not been so great as to suggest the administrative and deterrence costs of a rule-of-reason test will be higher than the benefits of such a rule. Glen Robinson has shown that from 1980 to 2000, there were a total of 71 district and circuit court opinions addressing essential-facilities claims.\textsuperscript{132} Although essential-facilities claims are a subset of refusal-to-deal claims, they are a large subset and serve as a reasonable proxy for the volume of the latter. In only 5 of 28 circuit court opinions and 6 of 43 district court opinions did the courts find there to be even a triable issue of fact as to the existence of an essential facility.\textsuperscript{133} My update of the data shows that from 2001 to 2010 there were 22 circuit court opinions addressing essential-facilities claims, of which only 3 found a triable issue on the merits.\textsuperscript{134} Those 3 include the Second Circuit’s \textit{Trinko} decision that the Supreme Court later reversed. During that same recent period there were 56 district court cases (distinct from the circuit court cases just mentioned) that dealt to differing degrees with the essential-facilities doctrine, only 12 of which declined to dispose of the claim on dismissal or summary judgment.

\begin{itemize}
  \item \textsuperscript{128} See, e.g., Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
  \item \textsuperscript{129} See, e.g., Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).
  \item \textsuperscript{130} See Stacey L. Dogan & Mark. A. Lemley, \textit{Antitrust Law and Regulatory Gaming}, 87 Tex. L. Rev. 685 (2009).
  \item \textsuperscript{131} As Dogan and Lemley point out, the landscape of antitrust law has changed significantly since Judge Frank Easterbrook’s 1984 critique of antitrust law’s propensity toward false positives. \textit{Id.} at 700 (discussing Frank H. Easterbrook, \textit{The Limits of Antitrust}, 63 Texas L. Rev. 1 (1984)).
  \item \textsuperscript{132} Glen O. Robinson, \textit{On Refusing to Deal with Rivals}, 87 Cornell L. Rev. 1177, 1207 n.129 (2002).
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} To do this update, I followed Robinson’s method of searching all federal court cases in the LexisNexis database that expressly addressed “essential facilities.” \textit{See id.} To avoid double counting, any district court case that was appealed was counted as an appellate case, and the district court category contained only cases for which there was no subsequent opinion on appeal. See supra note 84 for the reference to Robinson’s method (search records on file with author).
\end{itemize}
The case precedent therefore shows that even under the essential-facilities approach the Court disdained in Trinko, courts have been able to weed out the majority of cases and potential liability will not necessarily be a broad deterrent to investment and innovation. To be sure, even the majority of cases that ended with dismissal or summary judgment entailed costs for defendants and the courts, although those costs are presumably much less than what would have resulted from mistaken findings of liability. But the overall number of essential-facilities cases, which I take as a proxy for the broader universe of refusal-to-deal cases, has been modest. As precedent develops, courts and plaintiffs gain increased guidance for the disposition of future cases. To the extent specific factual circumstances (like those of Aspen) can be identified in which refusal-to-deal liability may be warranted, those facts can become elements that constrain the rule-of-reason inquiry and limit the incidence of false positives in enforcement. In sum, the case-law does not on its face suggest such indiscriminate disposition by the courts or such a large number of cases that the deterrent and other costs of antitrust enforcement justify a presumptive preference for agency regulation over judicial disposition.

The basis on which the Court elevated one form of government intervention over the other is therefore unclear. One possible answer is that antitrust suits are more discretionary than regulation, and that while antitrust can adjust in light of regulation, the reverse may not be true depending on the agency’s obligations under the regulatory statute. This logic would provide a rationale for presuming against novel antitrust theories that might interfere with specific statutory provisions. It does not, however, provide a basis for more broadly limiting strong antitrust enforcement on matters within a regulatory agency’s jurisdiction where Congress has specifically provided otherwise. The Court did not second-guess Congress’s judgment about the benefits of regulation under the 1996 act. Congress’s inclusion of the antitrust savings clause suggests that Congress also determined the costs of antitrust enforcement to be worthwhile in telecommunications markets. The Court should have deferred here as it has in the past, where “Congress itself expressed a willingness to bear the costs.”

2. Public Versus Private Antitrust Actions

Both Trinko and Credit Suisse involved private antitrust suits rather than public enforcement actions by the Federal Trade Commission ("FTC") or the DOJ. The Supreme Court’s decisions, however, affect public and private actions equally. The Court nowhere confined its holdings to private cases and antitrust doctrine draws no distinction between public and private enforcement. This is unfortunate because the Court’s animating concerns about costs are most salient in private suits while the benefits of antitrust

law as a complement and substitute for regulation are likely to be greatest through public enforcement. These differences arise because of differences in the incentives and capabilities of public and private antitrust plaintiffs.

Phrased broadly, the Court's concern was that antitrust is always costly and, in the presence of regulation, it is likely to have little additional benefit for competition. Treble damages and class action litigation could make erroneous antitrust liability particularly costly in private cases. The government, however, does not gain from using antitrust law against regulated firms unless doing so can yield net benefits on top of those the market already gets through regulation. The federal antitrust agencies therefore have stronger motivation than private plaintiffs do to assess the potential costs of an antitrust case, identify the potential benefits that regulation will not provide, and balance the two in the public interest.

The public antitrust authorities also have greater resources than private plaintiffs to assess the costs and benefits of antitrust enforcement and to avoid interfering with regulatory objectives. The FTC and DOJ can both investigate private conduct through a variety of tools that can be focused on specific conduct and information. These procedures are not costless, but they can be narrowly tailored and they occur in advance of litigation, unlike private discovery which occurs after litigation has been initiated and where plaintiffs have incentives to be much less discriminating in the information they demand from defendants. Public antitrust agencies have greater ability and incentive to coordinate with relevant government regulatory agencies to avoid conflicts and unnecessary administrative costs.

As a result, public antitrust enforcement is much more likely than private litigation to avoid claims that will be prone to judicial errors, interfere with regulation, or fail to yield net benefits over regulation. Although the rationales of Credit Suisse and Trinko apply more to private suits than public enforcement, their precedent could have a preclusive effect on both.

II. DO TRINKO AND CREDIT SUISSE MAKE A DIFFERENCE?

To illustrate how Trinko and Credit Suisse have altered the relationship between antitrust and regulation, consider an issue briefly mentioned in the Introduction: whether the suit that led to the break-up of AT&T could be brought today. The AT&T case is widely considered one of the U.S. government's most successful antitrust enforcement actions. The case began


138. See Posner, supra note 4, at 111; Bingaman, supra note 4.
in 1974 when the DOJ filed suit under section 2 of the Sherman Act for, among other things, AT&T's monopolization of the market for long-distance telephone service; it ended in 1984 with the execution of a settlement that broke AT&T's nearly century-old, integrated monopoly into seven separate local telephone companies, an independent long-distance carrier, and an independent equipment manufacturer.\footnote{139. United States v. AT&T, 552 F. Supp. 131 (1982) (adopting a modified consent decree that would go into effect two years later and discussing prior action in the case, including the original 1974 filing at note 18 and accompanying text).}

The DOJ filed its case in the midst of regulatory efforts by the FCC that had also been aimed, though unsuccessfully, at getting AT&T to provide potential competitors in the long-distance business the access to AT&T's local-service customers that those rivals needed. Through a variety of strategies, AT&T had made such access either unavailable or available only on burdensome, anticompetitive terms. As a result of the antitrust action that forced the 1984 divestiture, AT&T lost both the incentive and ability to engage in such anticompetitive discrimination and consumers came to benefit from lower prices and more innovative technology for long-distance calling.

The AT&T divestiture marked not only the most important development in decades for telecommunications regulation, but also an event of great importance for U.S. antitrust enforcement. While there remains much discussion about the costs and benefits of the Bell break-up and its subsequent implementation, there is no doubt that the Modification of Final Judgment (or "MFJ," as the consent decree has come to be known) fundamentally reconfigured the U.S. telecommunications market and set the course for subsequent developments in legislation and industry structure. The MFJ marked the end of a checkered history of efforts by the FCC to mediate AT&T's discriminatory conduct toward competing long-distance and equipment providers. For antitrust, the decree marked a success. The DOJ had previously pursued AT&T for antitrust violations in 1912 and 1949 only to obtain ineffectual settlements that did little to alter either AT&T's conduct or its market power.\footnote{140. BENJAMIN ET AL., supra note 12, at 713.} In other large monopolization cases the DOJ had similarly been unable to report recent victories. But on the same day the DOJ announced it was withdrawing pursuit of its costly and inconclusive investigation into alleged monopoly misconduct by IBM, it was able to announce a definitive result in its case against AT&T.\footnote{141. AT&T, 552 F. Supp. at 138 n.17 (stating that January 8, 1982, was the date the government and AT&T announced settlement and mutually moved to dismiss the case); From Cave Paintings to the Internet: A Chronological and Thematic Database, HISTORYOFSCIENCE.COM, http://historyofscience.com/G21/timeline/index.php?id=1210 (last visited Nov. 11, 2010) (stating that January 8, 1982, is the date the government announced its withdrawal of its antitrust suit against IBM).}

Could the DOJ have sued AT&T if precedent that was equivalent to Trinko had existed in 1974? Even under a narrow interpretation, Trinko's presumption against antitrust in a regulated industry applies in the presence of three elements: (1) a novel claim of monopolizing conduct; (2) a
regulatory statute that addresses the specific conduct underlying the antitrust claim; and (3) active regulation of the activities at issue in the antitrust claim. Each of those elements existed in Trinko’s suit. As the following discussion shows, they also existed in the government’s 1974 antitrust suit that resulted ten years later in the break-up of AT&T.

Central to the DOJ’s antitrust suit were AT&T’s relationships with its would-be competitors and the company’s conduct in preventing those rivals from challenging AT&T’s monopoly in any area of U.S. telecommunications. Pursuant to its authority under the Communications Act of 1934, the FCC itself had already been directly involved in mediating those same competitive relationships for over twenty-five years by the time the DOJ filed the 1974 antitrust suit that culminated in the Bell break-up. In 1947, for example, the commission ruled that AT&T could not bar subscribers from using non-AT&T recording devices in conjunction with their AT&T phone service. Several years later, however, the FCC allowed AT&T to prohibit customers from using the “Jordaphone,” a more sophisticated device that not only recorded phone calls the subscriber had answered but that itself answered those calls mechanically (like a modern answering machine does) and therefore could supposedly harm the network in ways the earlier recording devices could not.

After an embarrassing decision (subsequently reversed by an appellate court) in the famed Hush-a-Phone case, in which the FCC allowed AT&T to bar customers from using a simple, snap-on sound-dampening device that enabled people to speak more privately in crowded environments, the commission became more aggressive in its policing of AT&T’s dealings with competitors. In 1968, the FCC rejected AT&T’s effort to block use of the Carterfone, a device that interconnected mobile radios (of the kind then used by police departments and taxi fleets) to the telephone network and ruled that absent proof of harm to the network or to AT&T’s operations, any device could be attached to the telephone network. To be sure, Carterfone was not the end of AT&T’s wrangling with its equipment competitors or with the FCC over those competitive relationships. The details of those interactions are not relevant for current purposes; what is relevant is the fact that the FCC was exercising active regulatory oversight over AT&T’s relationships with its competitors in the years leading up to the DOJ’s antitrust suit against Bell.

At the heart of the AT&T divestiture was competition in long-distance telephone service. Here, too, the FCC had been directly involved in AT&T’s

142. AT&T, 552 F. Supp at 131; BENJAMIN ET AL., supra note 12, at 723.
143. Use of Recording Devices in Connection with Tel. Serv., 11 F.C.C. 1033 (1947).
147. See, e.g., Phonotele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981); see also, BENJAMIN, ET AL., supra note 12, at 716–17.
deals with its soon-to-be competitors. Indeed, the FCC sparked the rise of competitive interexchange service by authorizing use of microwave technology to provide private transmission of interstate communications.\footnote{148} Eventually, the FCC allowed more kinds of commercial long-distance competition to develop. In 1969, the commission authorized construction of a competing commercial service providing long-distance calling between Chicago and St. Louis,\footnote{149} and in 1971 the agency more broadly permitted commercial entry by specialized long-distance carriers that competed with AT&T to carry traffic for large businesses.\footnote{150} In 1974, the same year both the government and MCI filed antitrust suits against AT&T, the FCC required AT&T to file tariffs under which Bell would make its local networks available for interconnection with competing long-distance networks.\footnote{151} Notably, the FCC order came seven months before the government filed its suit.\footnote{152} The FCC issued its order several weeks after MCI filed its private action against AT&T,\footnote{153} but the regulatory proceedings that led to the order had been underway long before MCI went to court.\footnote{154} There was much wrangling before the commission and the courts over the details of AT&T’s tariffs and its compliance with them, but there is again little question that the FCC was directly involved in regulating precisely the relationships between AT&T and new long-distance market entrants that were the subject of the private and public antitrust suits.

There remains the question of whether those antitrust suits involved claims that were novel and would therefore trigger Trinko’s bar against expansion of antitrust liability in the presence of regulation. Had the government not broken up AT&T in 1984 and were it bringing its suit today, the claims would be just as novel as Trinko’s claim was. The refusal-to-deal claims in the government’s 1974 suit look quite aggressive when considered retrospectively through the lens of Trinko. As the Trinko Court interpreted the 1985 Aspen case, it marked an exception to a long-standing reluctance in American antitrust law to impose unilateral duties to deal.\footnote{155} In the Court’s recounting, Aspen marked an expansion of section 2 liability the year after

\footnote{148. See Allocation of Frequencies in the Bands Above 890 Mc., 27 F.C.C. 359 (1959).}


\footnote{150. Establishent of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Serv. in the Domestic Pub. Point-to-Point Microwave Servs., 29 F.C.C. 2d 870 (1971).}

\footnote{151. Bell Sys. Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C. 2d 413 (1974).}

\footnote{152. The FCC’s order issued on April 23, 1974, id., and the government filed its lawsuit on November 20, 1974, see AT&T v. Grady, 594 F.2d 594 (7th Cir. 1979).}

\footnote{153. MCI filed its suit on March 6, 1974. MCI Comm. Corp. v. AT&T, 462 F. Supp. 1072 (N.D. Ill. 1978).}

\footnote{154. See Bell Sys. Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C. 2d 413.}

the divestiture, suggesting that the latter occurred when antitrust law had yet fewer exceptions to the presumption against duties to deal with competitors and the government's theory of liability was even more novel. There are good grounds for debate over how novel Aspen really was in 1985 and about the historical movement of the outer bounds of section 2 liability. There is little doubt, however, that the government's claims against AT&T, as well as MCI's successful private suit against the carrier, were novel from Trinko's perspective on then-existing antitrust doctrine.

The antitrust suit that brought about AT&T's divestiture thus has the three important attributes that led the Supreme Court to dismiss Trinko's claims: (1) a novel or "outer boundary" antitrust claim, (2) a statute that gives the regulatory agency authority to regulate conduct related to economic competition, and (3) active regulation by the agency of precisely the monopolizing conduct at issue in the government's antitrust suit. AT&T, Otter Tail, Silver, and other cases show that the government and private plaintiffs could bring such cases twenty-five or thirty years ago, with the courts denying implied immunity from the private antitrust suits under statutes that lacked an antitrust savings clause. That today there are substantial barriers to such cases even when there is an express statutory provision to save antitrust demonstrates the far-reaching implications of Trinko and Credit Suisse for the relationship between antitrust and regulation. The consequences are particularly important for public antitrust agencies like the FTC and the Antitrust Division of the DOJ, which have the discretion, investigatory authority, and expertise to mitigate the presumed costs and risks of antitrust enforcement that motivated the Court, but whose ability to bring cases is just as affected by Trinko and Credit Suisse as that of private plaintiffs.

III. CONSEQUENCES FOR THE BALANCE BETWEEN ANTITRUST AND REGULATION

In many cases, the practical effect of Trinko and Credit Suisse will be to impose a reasonable limitation on conceptually weak antitrust claims where regulation specifically addresses the conduct at issue. There are important circumstances, however, in which the effects of those cases will not be so modest and will lead to unintended, harmful consequences. The potential harm will arise because Trinko and Credit Suisse will also limit antitrust law's ability to complement regulation where the latter has gaps in coverage or effectiveness (as in the AT&T divestiture case); those cases will limit antitrust in substituting for regulation where antitrust would be a more targeted and less costly means of competition enforcement.

156. The FCC had acknowledged that its regulation had been ineffective in preventing the conduct at issue in the government's antitrust suit against AT&T. United States v. AT&T, 552 F. Supp. 131, 168 (D.D.C. 1982). But the same might be said anytime harmful conduct occurs notwithstanding active regulation, for had the regulation prevented the conduct there would be no grounds for the antitrust suit.
Contrary to the Court’s presumption, in many cases regulation will be more costly than either antitrust enforcement or a combination of antitrust and regulation would be. In the words of Justice (then Judge) Breyer, “[A]ntitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative.” Of course, if Congress requires an agency to regulate, policymakers cannot choose antitrust as an alternative. But antitrust might still be a beneficial supplement even if it is not a full substitute; and in the far more usual case where agencies have some discretion in the promulgation and enforcement of regulations, the comparative benefits of antitrust as a substitute become important. Even if regulators have authority to regulate, they may decide that forbearance from “gearing up the cumbersome, highly imperfect bureaucratic apparatus of classical regulation” in favor of antitrust enforcement will be the better policy choice. This will be a particularly important option as economic conditions in the regulated industry change. The case-by-case approach of antitrust enforcement, which targets specific instances of anticompetitive conduct as they arise, can usually deal with unique or unexpected factual situations better than can regulatory rulemaking, which depends more on specifying competitive obligations and prohibitions prospectively, in advance of actual conduct. After Trinko and Credit Suisse, however, statutory authority to regulate has become a greater potential barrier to antitrust law as a substitute for regulation.

This Part begins by discussing the costs and benefits of regulation and then explains why the comparative costs and benefits of antitrust change as an industry moves from monopoly toward competition. It argues that the benefits of regulation diminish as markets become competitive while the costs of regulation remain and even increase as that transition occurs. Regulatory costs that might result in a net benefit in the presence of monopoly become less likely to do so as a market moves away from a concentrated structure. This change in the relative costs and benefits of regulation has implications for the socially desirable balance between antitrust and regulation and, in turn, shows how Trinko and Credit Suisse may require administrative agencies to make inefficient choices between underregulation and overregulation.

A. The Costs and Benefits of Regulation

Economic regulation typically arises because there is some reason that competition is either undesirable or unattainable in a market. Natural monopoly, where it costs less to have one firm serve the entire market than


159. Id.
to have multiple firms competing to do so, is a prominent example.\textsuperscript{160} In such cases, the regulator’s main job is to ensure that the monopolist meets its service obligations without extracting monopoly profits from consumers. In other settings, regulators might want to keep multiple firms in the market but allow them to cooperate to overcome certain market failures. Thus, securities regulators might want to let underwriters cooperate in gathering broad information on the potential retail market for securities a firm plans to issue in the future, but at the same time use regulatory oversight to mitigate the scope and harmful effects of collusive pricing that might result from such cooperation in the concentrated securities underwriting market.\textsuperscript{161} As a final example, regulators might oversee the development of competition in historically monopoly markets. In such cases, the job of the agency may involve establishing conditions on which competitive entrants can gain access and interconnection to the incumbent monopolist’s customers and facilities.\textsuperscript{162}

Whatever the particular form economic regulation takes, its potential costs have numerous causes: information asymmetries, regulatory capture, incentive distortions, and a host of other ills have long been the subject of substantial commentary and concern from policymakers, firms, and researchers.\textsuperscript{163} The kinds of regulation at issue in \textit{Trinko} and \textit{Credit Suisse} are variants of common forms of economic regulation. The regulation at issue in \textit{Trinko} involved access rules and decisions about what pieces of incumbent networks competitors should be able to use, and at what price. At issue in \textit{Credit Suisse} was the SEC’s oversight of the process by which syndicates of securities underwriters collectively work out the retail price and quantity of securities that members of the syndicate would sell to investors.\textsuperscript{164} A more general discussion of pricing and access regulation can help shed light on the cost-benefit assumptions underlying \textit{Trinko} and \textit{Credit Suisse} and on potential policy consequences of those cases.

1. Price Regulation

In the presence of natural monopoly, distributional objectives, or other circumstances in which an unregulated market will not work well, the gov-

\textsuperscript{160} For a discussion of natural monopoly, see \textsc{Benjamin et al., supra} note 12, at 444–49.

\textsuperscript{161} \textit{See U.S. Underwriter and Fee Information, Gerard Hoberg’s Homepage, \url{http://www.rhsmith.umd.edu/faculty/ghoberg/buyw.html} (showing data complied by Thompson Financial).}

\textsuperscript{162} This is the purpose of the Telecommunications Act of 1996 and its mandate to the FCC, but telecommunications is not unique. For example, similar facilitation of competition occurs in pharmaceutical regulation, pursuant to the Hatch-Waxman Act, 21 U.S.C. § 355(j) (2006), and under the Federal Power Act, 16 U.S.C. §§ 791a-928c (2006).

\textsuperscript{163} \textit{See, e.g., Hal R. Varian, Intermediate Microeconomics 588 (2d ed. 1990) (discussing moral hazard and other regulatory difficulties); Harvey Averch & Leland Johnson, Behavior of the Firm Under Regulatory Constraint, 52 Am. Econ. Rev. 1052 (1962) (fundamental article on incentive distortions for regulated firms); George J. Stigler, The theory of economic regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971) (a classic discussion of regulatory capture).}

\textsuperscript{164} See the detailed discussions of \textit{Trinko} and \textit{Credit Suisse} in Part I supra.
ernment may decide to intervene to control prices. In principle, this price regulation can be socially beneficial. Limits on monopoly pricing can protect consumers from the absence of competition; mandated differential pricing to commercial and residential consumers can ensure cross-subsidies that enable poorer households to afford electricity or communications services; and common carriage rules can ensure that firms of various kinds cannot discriminate by charging differing prices to different customers. In practice, however, achieving long-term benefits of any kind through price regulation is hard and should be tried only when markets will likely fail to achieve society’s objectives. Again, as put by Justice Breyer, “Regulation is viewed as a substitute for competition, to be used only as a weapon of last resort—as a heroic cure reserved for a serious disease.”

Regulators have long recognized the difficulties of price regulation, difficulties that apply whether wholesale or retail prices are at issue. One threshold problem with determining “reasonable” terms for sale of a product or service is that the information necessary for the relevant calculations is in the hands of the very companies being regulated. Moral hazard problems thus arise because a firm can affect a regulatory agency’s determination of allowable terms by manipulating underlying accounting data. Even in cases where regulators can resolve such information asymmetries and obtain accurate cost data and other relevant market information, retail regulation raises several perplexing problems. Regulators must figure out which costs the seller may pass on to buyers with a mark-up that allows the seller a positive return, which costs the seller may pass on to buyers without any mark-up, and which costs the seller may not pass on at all. Typically, regulators allow firms to earn a return on things like expenditures on physical capital and the costs of financing the firms’ operations, but not, for example, on executive pay bonuses or investments that regulators deem “imprudent.”

The last category of costs can be particularly contentious and involve protracted regulatory proceedings. It can also raise some of the very potential for investment disincentives that the Court ascribed to antitrust enforcement in *Trinko*. For example, the California Public Utilities Commission excluded from the rate base nearly 80 percent of the costs Pacific Gas & Electric incurred in building the Diablo Canyon Nuclear Power Plant because it believed that “unreasonable management was to blame for a large

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165. Breyer, supra note 158, at 1007.
167. See, e.g., Varian, supra note 163, at 609.
168. See 4 FCC Rcd. 2873, 2883–84 (1989); see also W. Kip Viscusi et al., *The Economics of Regulation and Antitrust* 381 (2d ed. 1995).
169. 47 U.S.C. §§ 213, 220 (2006); see also Viscusi et al., supra note 168, at 381–82.
170. See 4 FCC Rcd. at 2884 (describing an investigation into Bell System’s accounting of costs).
part of [the] cost overrun." While that particular decision and others like it protect consumers from bearing costs that dominant firms could not pass through if they faced competition, regulators must be careful about punishing a firm for decisions that were well-founded when made but later turned out badly. Mistaken or politically motivated hindsight could have as strong a deterrent effect on innovation incentives as could unwarranted antitrust liability.

Putting aside the difficulties of assessing a firm's costs for purposes of determining a "rate base" on which to calculate a firm's allowable return from its regulated sales, regulators face the challenge of how to value that rate base. As a general matter, regulators try to meet constitutional requirements by allowing a return on the "fair value" of a utility's assets. The principle of the fair value measure is to allow return on those investments that have resulted in productive facilities and to disallow return on investments that have failed to produce beneficial assets for the firm. Another way to frame the fair value approach is to ask what the current market value of relevant assets would be, were they hypothetically to be sold—a determination the Supreme Court has called a "laborious and baffling task."

2. Access Regulation

The Telecommunications Act of 1996 tries to foster competition in U.S. telecommunications markets by allowing new entrants to have access to the infrastructure of incumbent firms. In this respect, the statute was part of a broader evolution in regulatory policy away from conduct and pricing rules designed to control monopoly power and toward rules designed to speed the growth of competition and eliminate or reduce the need for costly economic regulation in the future.

The 1996 act charges the FCC with identifying the parts of the incumbent networks to which new entrants should have such access and at what prices, the very regulation at issue in Trinko. The difficulty with the first step was in distinguishing network facilities that new entrants could not economically provide for themselves from facilities entrants could obtain from sources other than the incumbent. Too lax an access rule would create disincentives for entrants or third parties to invest in building competing infrastructure and deprive consumers of the competition and innovation such investment could bring. Too strict an access rule would prevent potential


entrants from gaining a foothold in the telecommunications market and defeat the act's purpose.

The FCC's challenge in drawing up a list of incumbent facilities to which new firms would have access was fraught with many of the same difficulties found in price regulation: information asymmetries, moral hazard, the identification of relevant costs, and so on. But in the case of access regulation the problem was to some degree magnified because the commission needed detailed information not just about the incumbent firms' costs but also about the costs and technologies of the competitive entrants and of potential third-party providers of telecommunications facilities. This proved to be a tall order for the FCC, if the agency's record before the courts is an indicator of success; it took the FCC four rulemaking proceedings over nearly ten years to issue an unbundling order that finally held up in court,\(^\text{176}\) lending some irony to Trinko's skepticism about the ability of antitrust enforcement to be adequately discriminating about refusal-to-deal liability for incumbent telephone companies. In 1999 the Supreme Court itself struck down the FCC's first attempt at unbundling rules as overbroad and devoid of a limiting principle.\(^\text{177}\)

With respect to prices, the 1996 act prescribes rates for parts of the network to which the FCC grants entrants access—known as unbundled network elements ("UNEs")—that are based on cost.\(^\text{178}\) To avoid building historical inefficiencies of the monopoly network into the rate base, the FCC determined that the relevant costs for setting UNE rates should not be based on what the firm actually spent to build its network in the past. Instead, the cost base should be no higher than what it would cost to buy the firm's network technology in the current market.\(^\text{179}\) The idea was that new entrants should have to pay only what the technology is worth today, not the potentially higher amount it actually cost to build historically. Properly implemented, this approach requires calculating the forward-looking economic value of each element of a network. This calculation resembles the fair-value approach already discussed, with all of its attendant difficulties.

After several years of experience trying to set UNE rates based on forward-looking cost and successfully defending the rate setting mechanism in court,\(^\text{180}\) the FCC declared the enterprise to be counterproductive. First, the commission found that the pricing rules "have proven to take a great deal of time and effort to implement. . . . The drain on resources for

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176. Benjamin et al., supra note 12, at 823.
178. See 47 U.S.C. §§ 252 (2006). Section 251 explains the obligations of incumbent providers to provide competitors with access to their networks while § 252 explains the terms and conditions for that access, which has come to be called "unbundling" of "network elements." See, e.g., Covad Commc'ns Co. v. BellSouth Corp., 314 F.3d 1282, n.5 (11th Cir. 2002).
179. See 47 C.F.R. § 51.505 (2009). The FCC called its pricing rule the "TELRIC" method; the acronym stands for total, element, long-run, incremental costs. Id.
the state commissions and interested parties can be tremendous.\textsuperscript{181} The FCC further observed that "these complicated and time-consuming proceedings may work to divert scarce resources from carriers that otherwise would use those resources to compete in local markets."\textsuperscript{182} Second, the commission found the costly proceedings to produce inconsistent results:

[F]or any given carrier there may be significant differences in rates from state to state, and even from proceeding to proceeding within a state. We are concerned that such variable results may not reflect genuine cost differences but instead may be the product of the complexity of the issues, the very general nature of our rules, and uncertainty about how to apply those rules.\textsuperscript{183}

Finally, the FCC found that "[t]he lack of predictability in UNE rates is difficult to reconcile with our desire that UNE prices send correct economic signals."\textsuperscript{184} As the commission's observation about incorrect economic signals indicates, the rate-setting function of monopoly regulation is costly not only in its administrative burdens, but in its effects on economic incentives of market participants.

The FCC example shows that one cannot presume that regulatory processes are more accurate or efficient than antitrust. Just as mistaken antitrust enforcement can deter innovation or other beneficial conduct, regulatory errors can be costly to consumers and the regulated firm alike. If regulators set rates too high, then price regulation is not protecting consumers very well, yet is still incurring administrative costs and distorting incentives. Consumers might be better off with competition that, although perhaps less efficient from a cost standpoint, does a better job of disciplining pricing behavior. If, on the other hand, regulators set prices too low, then the regulated firm might have trouble attracting the financial investment necessary to maintain, develop, and deploy capital in the way that best benefits consumers in the long run.\textsuperscript{185}

Even if one assumes there is no industry capture and no political or economic distortion of individual regulators' incentives, regulation is unlikely to be error-free. Just like errors in antitrust enforcement, regulatory errors have potentially serious consequences for consumer welfare and firms' incentives. There are likely to be substantial costs incurred through agency oversight and firms' compliance with regulation as well. There thus seems little basis to presume, as the Court appears implicitly to do in \textit{Trinko}, that the costs of regulation are of lesser concern than are the costs of antitrust enforcement. There are, however, reasons why the costs of regulation rela-


\textsuperscript{182} \textit{Id.} at 18949.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Cf.} VISCUSI \textit{et al.}, supra note 168, at 379.
Rebalancing Antitrust and Regulation

tive to those of antitrust are likely to rise as an industry moves from the concentrated structures that originally motivated regulation to competition.

B. Why Regulation Gets Harder as Competition Develops

As competition develops in a regulated industry, regulators face new challenges on top of the difficulties discussed above. The conundrum for regulatory agencies and Congress is that regulation is likely to become more difficult before the industry's evolution to competition is sufficiently developed for a laissez-faire approach to serve consumer welfare. The problem is particularly complex where, as in telecommunications, the growth of competition may for a time depend on the very regulations that are becoming harder for the FCC to implement successfully.

To illustrate, suppose regulators want to protect buyers from a monopolist's exercise of its market power and allow the seller only a "fair" or competitive rate of return on its sales. Mistakes in setting the rates could either deliver consumers too little benefit compared to monopoly pricing (if the regulated rate is too high) or deter efficient levels of investment by the regulated firm (if the regulated rates are too low). In either case, it is still possible for the regulated rates to improve both consumer welfare and total welfare. If the regulated prices are lower than those the monopolist would charge unconstrained, then the buyers are still better off even if the regulator overshoots the fair-return benchmark. If the regulated prices are too low, then consumers will at least temporarily gain through lower prices and the regulated firm can seek redress through a new rate tariff.

The emergence of competition in regulated markets increases both the likelihood of rate-setting errors and their potential costs because the rate affects not just consumer surplus and incumbent carriers' decisions, but the incentives of the new entrants as well. Competitive entry has important welfare consequences for consumers who would benefit from the competition and innovation it could yield. If regulators set prices too low, potential entrants will stay out of the market. This is particularly true when firms must make large, fixed investments in infrastructure to provide service. In regulating the incumbent's rates, therefore, regulators in a market undergoing transition to competition must also consider whether the rates provide the return competitors need to attract investment and profitably enter the market; new entrants will not be able to attract customers if they set prices above the incumbent's rate. In their efforts to restrain a dominant firm's perceived market power, regulators risk deterring the competitive entry that could improve long-run consumer welfare and ultimately obviate the need for regulation at all.

Regulated prices that are too high can also cause harm, although differently and less predictably than undercompensatory prices. There is evidence that under some conditions regulated prices that are above those that would have emerged from unregulated competition among the incumbent and the new entrants can act as focal points around which market prices cluster. That is, even if the regulated firm has downward pricing flexibility, prices
may be higher than in an unregulated setting if the incumbent must file tariffs that give advance notice of its intention to lower prices. As the Supreme Court noted in *Albrecht v. Herald*, when competition emerges that would drive prices down toward cost, a scheme setting maximum prices “tends to acquire all the attributes of an arrangement fixing minimum prices.” Empirical data suggest that rate regulation in the long-distance telephone market for several years kept rates higher than they would have been in the absence of price regulation.

Similar concerns arise with regulation of the rates competitive entrants pay for access to elements of incumbent facilities—e.g., rail tracks, pipelines, or telephone lines—in a regulated market. If regulated access rates are too high then they do not facilitate efficient entry and are therefore not worth their administrative costs. Access rates that are too low can deter an incumbent from investing in its network and deter entrants from building their own networks by providing them with subsidized use of the incumbent's network. Underpriced access for competitors may in fact create disincentives for the most desirable entrants from coming into the market. An entrant with beneficial new technology might not deploy its innovation if artificially low (i.e., below an appropriate measure of cost) access rates allow less efficient entrants to use incumbent facilities to enter the market. Such inefficient entry can drive up the cost of capital for desirable (i.e., efficient and innovative) entrants by increasing the latter’s competitive risks and driving down the returns from their innovative investments. The result may be less investment by incumbents and entrants alike, less innovation, and less price competition over time for consumers.

Regulators must therefore walk a fine line in markets in which competition is emerging: they must set rates at a level high enough to allow an efficient firm to attract the investment necessary to compete in the marketplace, but not so high as to create a de facto, noncompetitive price floor. Rates above the targeted level will make consumers worse off than they would be in an unregulated market; rates below that level could deter competition that would naturally lower prices and obviate the need for administratively costly regulation. Given the difficulties that regulators inevitably face in setting rates with such precision, one must be skeptical about the wisdom of importing rate-regulation schemes from a monopoly setting into an emerging competitive environment.

The discussion above highlights several points for understanding the comparative purposes and advantages of antitrust and regulation. First, regulation is neither costless nor necessarily beneficial and, more importantly, is

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186. *Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1968). The Court overruled *Albrecht's* per se rule against maximum price fixing in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), as the harm from maximum prices could not be as conclusively presumed as the harm from minimum price fixing.


not presumptively more efficient than antitrust enforcement. Second, the comparative benefits of antitrust and regulation vary with market conditions. The benefits of price and access regulation depend largely on the existence of some reason, like natural monopoly, that competition cannot or should not exist. In monopoly, rates that are too low do not by definition distort competition, and rates that are too high relative to a competitive benchmark may still be better than what the monopolist (or regulated syndicate, as in Credit Suisse) would charge unconstrained. Monopoly thus allows regulation to be imprecise and still create consumer benefits. Under competition, especially emerging competition, regulators have much less margin for error. The errors and administrative costs that may still be compatible with net social gains under regulated monopoly become less so as competition develops. Rather than restraining the significant harms of monopoly, regulation risks impeding the greater benefits of competition.

C. Antitrust as a Substitute for Regulation

When changes in technology, consumer preferences, or other market conditions alter or weaken the rationale for regulation, changes and the means and objectives of regulatory agencies are likely to follow. Harm to consumers through the exercise of monopoly power may diminish in magnitude while harm to consumers through anticompetitive conduct, either in collusion with or against emerging competitors, becomes an increasing concern. Rules that specify or limit conduct as a whole ex ante may give rise to standards for judging conduct on a case-by-case basis ex post. But this transition may leave regulators with the challenge of managing potential gaps in market oversight. Leaving a market with a dominant player and emerging entrants to its own competitive devices might work in some settings, but in others it will allow the dominant firm to maintain its market position and exclude rivals. Some regulatory statutes may give agencies the authority to intervene in a more targeted way to punish or enjoin anticompetitive behavior ex post, thereby freeing the agency to eliminate costly ex ante rules without losing regulatory leverage altogether. But often such authority will not exist or, in the case of the Communications Act, be ambiguous at best. The natural backstop at such a point is antitrust enforcement.

The availability of antitrust to substitute for regulation during such transitional phases, which may last for years, is what Trinko and Credit Suisse diminish. The regulatory statute will likely remain in force during periods of transition to competition. Congress may have little interest in deregulating

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before competition is well-developed, so the economic structure of a market in transition is unlikely to invite statutory repeal.\textsuperscript{191} Depending on how the agency has implemented regulation, new entrants or incumbents may also want to retain regulation during transitional periods because it either reduces the costs of entry or the consequences of competition. Regulation will therefore often remain on the books even if the regulatory agency makes a reasoned finding that exercise of its regulatory authority will be unhelpful and decides it would be better to forebear to the extent it has discretion to do so. It is at this point, when antitrust enforcement would be most useful as a complement or substitute for regulation in the evolving market, that the limits Trinko and Credit Suisse impose on antitrust claims could be most costly.

The fact that Trinko purported to bar only novel claims does not substantially mitigate the potential for antitrust gaps in settings where regulation becomes less likely to yield benefits. First, as discussed above, the line between novel and established antitrust liability theories may be hard to maintain. Second, as regulated industries evolve they may be especially likely to give rise to factually novel circumstances. New, more competitive market structures often arise from technological innovation or shifting patterns of consumer demand.\textsuperscript{192} In such dynamic settings, familiar assumptions about the consequences of various kinds of economic conduct in the marketplace may not hold. The same refusal-to-deal, product tie, or exclusive dealing arrangement that looked competitively benign might, in the changing market, produce unacceptably anticompetitive results. Yet the evolving marketplace will at the same time make the effects of ex ante conduct rules less predictable, rendering prospective conduct regulation more difficult. In such cases, the availability of antitrust enforcement allows regulation to diminish without leaving a gap in oversight of competitive conduct in the relevant markets.

Especially where Congress has not granted immunity from antitrust law or, as in the Telecommunications Act of 1996, has expressly preserved it, there is no reason to think that Congress intends regulation alone to address the novel competitive circumstances that evolving regulated markets may present. Economic conditions in a regulated industry might for a time require Congress to establish “the kinds of affirmative duties . . . [that] do not

\textsuperscript{191} See Fine \& de Figueiredo, supra note 190.

\textsuperscript{192} One example of the former is microgeneration in the electricity industry, allowing smaller plants to achieve sufficient scale and contest the market for generated power against conventional utility monopolies. An example of the latter is the shifting consumer preference away from conventional wire-line telephone service and toward mobile, wireless service. See Howard A. Shelanski, Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy, 24 Yale J. on Reg. 55 (2007).
exist under the unadorned antitrust laws." As conditions in the market become more competitive, regulation may become inefficient or counterproductive even while the market retains some risk of the failures that spurred Congress to authorize regulation. Antitrust enforcement might offer a less costly way to meet those risks, but in industries unique enough to have attracted Congress’s attention, the facts of a particular antitrust case may not fit squarely within the bounds of clearly established doctrine even if they might otherwise present a compelling basis for section 2 liability.

Evolving market conditions will not always limit agencies to a choice between costly regulation and inadequate competition enforcement. When they do impose such a choice, however, they impede a more efficient transition to competition that could have large consumer-welfare benefits, especially in major regulated sectors like energy and telecommunications that affect virtually every household. The loss or delay of those benefits and the removal of antitrust as a factor agencies can take into account in determining how they regulate are thus unfortunate and potentially costly consequences of Trinko and Credit Suisse. The emphasis in those cases on redundancy and incompatibility between antitrust and regulation obscures the fact that antitrust may be a complement or substitute for regulation that regulators will wish to take into account in deciding on the nature and extent of their rules. The presence of an antitrust savings clause can be read to expressly recognize this relationship between antitrust and regulatory decision making. There is no doubt that in some cases antitrust enforcement is so costly that it should be avoided, but the effort to limit those costs should not leave in place a yet less efficient and more costly set of regulatory options.

IV. ALTERNATIVE SOLUTIONS TO BALANCING ANTITRUST AND REGULATION

The more broadly courts interpret Trinko and Credit Suisse to preclude antitrust claims, the greater the gap in competition regulation is likely to be as industry structure evolves and the less-inclined agencies will be to repeal costly rules. The situation is exacerbated in industries, like electric power, whose statute contains no antitrust savings clause and in which immunity could sweep especially broadly under Credit Suisse. There are a variety of ways that the harmful consequences of Trinko and Credit Suisse could be mitigated. The challenge is in overcoming the overbroad removal of antitrust from the regulatory balance while still preserving the beneficial aspects of those cases.

194. As just one example of where an agency has withdrawn regulation partly in reliance on antitrust to fill the gap, see the discussion of the FCC’s withdrawal of some of its media ownership rules in 2003. See Howard A. Shelanski, Antitrust Law as Mass-Media Regulation: Can Merger Standards Protect the Public Interest?, 94 CALIF. L. REV. 371 (2006).
One possibility is that some lower federal courts will interpret *Trinko* and *Credit Suisse* narrowly. As mentioned in Part I, *Trinko* left open the questions of how closely regulation must address the conduct underlying an antitrust claim and how actively the regulatory supervision must be to trigger preclusion of an antitrust claim. The higher the standard lower courts apply, the fewer the antitrust claims they will block. Similarly, lower courts could take a very narrow view of what constitutes "expansion" of existing antitrust law or of what claims are likely to confuse district courts, and reduce the scope of implied immunity in that way. Such decisions would lead to less immunity from antitrust for regulated firms in those jurisdictions. If enough diversity developed among the federal courts, the Supreme Court might at some point revisit and refine their balance between antitrust and regulation.

Another possibility would be for Congress (or the Supreme Court in a future case) to establish clearer standards for antitrust immunity and to assign the case-by-case immunity determination to district courts. This is the position the solicitor general's office took in *Credit Suisse*, essentially asking the court to clarify its standard of incompatibility between antitrust and regulation and to let district courts decide which cases met that standard. As discussed, the Court believed the line-drawing problem to be too difficult for courts and decided to err in favor of precluding valid claims rather than to allow claims that should have been barred by the regulation. From a judicial economy and consistency perspective, the solicitor general's proposed solution would be costlier than the Court's immunity approach, but it would also preserve the benefits of antitrust, avoid costs of underenforcement, and have benefits as markets change because courts could respond accordingly to claims of anticompetitive behavior. The Supreme Court's recent ruling in *Twombly*, holding that plaintiffs must plead antitrust claims with heightened specificity or face dismissal, will likely mitigate the kinds of line-drawing hazards for regulated industries that the Court indentified in *Credit Suisse* and will reduce the likelihood of false positives that concerned to the Court in *Trinko*.

Alternatively, Congress could compensate for the gap that *Trinko* and *Credit Suisse* created by exempting the FTC and DOJ from those rulings, thereby at least preserving more flexible public antitrust enforcement in regulated industries. Congress could also reduce the potential consequences of the Court's rulings by expressly giving regulatory agencies antitrust-like authority to make case-by-case determinations about allegedly anticompetiti-

197. While more stringent pleading standards might help, they will also potentially defeat meritorious cases in which the facts necessary for heightened pleading are beyond the plaintiff's reach. Such an approach risks converting motions to dismiss into summary judgment proceedings before the plaintiff has even had a chance for discovery. See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss become (Disguised) Summary Judgments*, (Univ. Chi. L. & Econ., Olin Online Working Paper No. 403, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126359#.
tive conduct even in the absence of a formal rulemaking proceeding. Such
an approach is not without cost, as agencies will likely have to undertake an
increased amount of adjudication. Increasing the ability of regulatory agen-
cies to intervene ex post to resolve competition concerns on a case-by-case
basis rather than ex ante through a broadly applicable rule could nonetheless
help to bridge the antitrust gap that arises as regulated industries shift to
more competitive structures and conventional regulation becomes less ben-
ficial and more costly.

The Supreme Court’s trend in adopting blunt forms of claim preclusion
in regulated industries throws out good cases along with the bad, treats
private cases identically to those brought by public enforcement agencies,
and makes no provision for the comparative advantages of antitrust and
regulation in different settings. Whether through the above or some other
approaches, the gap in competition enforcement and reduction in regula-
tory flexibility the Court has created warrants policy attention. Courts,
Congress, and the antitrust agencies should work to restore the balance
between antitrust and regulation while mitigating the kinds of enforcement
costs that have motivated the Supreme Court to reconfigure that relation-
ship so strongly against antitrust.

CONCLUSION

As the law stands today, antitrust will play a diminished role in regu-
lated industries compared to that which it played before 2004. The
Supreme Court’s decisions in Trinko and Credit Suisse interpreted the im-
licit immunizing effect of regulation broadly and read express savings
clauses narrowly. This is a change from the past, when the Court disfa-
vored immunity and antitrust often worked as a constructive complement
to regulation in the absence of any express statutory savings provision.
This change by the Court is particularly striking given that Congress has
gone in precisely the opposite direction, adding an antitrust savings clause
to the Communications Act through the 1996 amendments that goes be-
yond the express but general savings clauses of the securities acts.

The Court’s rationale for its recent decisions hinges on its view of the
costs of antitrust, particularly the costs of false positives in enforcement.
Concern for false positives in antitrust cases is warranted, but it can be
taken too far. Neither the evidence from previous antitrust actions in
regulated industries nor the antitrust caselaw more generally provides a
basis for such disproportionate avoidance of false positives compared to
false negatives or for the Court’s implicit presumption that regulation will
be more efficient than antitrust enforcement. As this Article has argued,
the latter presumption is especially inappropriate in several major
industries subject to economic regulation. In important sectors like
telecommunications and energy, the traditional monopoly structure is
giving way to competition in the face of technological change and shifting
consumer demand. Antitrust law can play a supporting role that allows
regulators to retreat from increasingly inefficient and costly forms of
competitive oversight in favor of more targeted antitrust enforcement. *Trinko* and *Credit Suisse* weakened that important relationship between antitrust and regulation. Until the balance is restored, regulators will face difficult choices between overregulation and underregulation, with consequences potentially far more costly than those that would have arisen from errors in antitrust enforcement in the regulated markets at issue.