Unfit for Prime Time: Why Cable Television Regulations Cannot Perform Trinko's 'Antitrust Function'

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NOTE

UNFIT FOR PRIME TIME: WHY CABLE TELEVISION REGULATIONS CANNOT PERFORM TRINKO'S "ANTITRUST FUNCTION"

Keith Klovers*

Until recently, regulation and antitrust law operated in tandem to safeguard competition in regulated industries. In three recent decisions—Trinko, Credit Suisse, and Linkline—the Supreme Court limited the operation of the antitrust laws when regulation "performs the antitrust function." This Note argues that cable programming regulations—which in some respects factually similar to the telecommunications regulations at issue in Trinko and Linkline—do not perform the antitrust function because they cannot deter anticompetitive conduct. As a result, Trinko and its siblings should not foreclose antitrust claims for damages that arise out of certain cable programming disputes.

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INTRODUCTION

Lawsuits involving regulated industries form the foundation of the modern American antitrust canon. The famous Standard Oil case revolved largely around railroad shipping rates, which were highly regulated by the U.S. Interstate Commerce Commission. More recently, the U.S. Department of Justice ("DOJ") obtained the breakup of AT&T, a telephone monopoly closely regulated by the U.S. Federal Communications Commission ("FCC" or the "Commission"). The rule seemed clear: regulated industries were subject to the antitrust laws.

Over the past seven years, a string of Supreme Court decisions have challenged this orthodoxy. In Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, the Supreme Court ruled that certain refusal to deal antitrust claims against Verizon—a successor to the former AT&T monopoly—were legally incognizable. Although the Court grounded its decision in narrow language regarding the type of duty to deal, it also identified several factors that, together, suggested that the antitrust laws were unnecessarily

1. See Standard Oil Co. v. United States, 221 U.S. 1, 32–33 (1911).
2. The Interstate Commerce Commission, created in 1887, was charged with regulating railroad rates and ensuring that railroads did not discriminate against small shippers by granting rebates to larger shippers. See Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.
4. See id. at 157 ("As the Court previously stated, regulation under the Communications Act is neither sufficiently explicit nor sufficiently pervasive to allow it to stand in the way of the enforcement of the antitrust laws." (footnote omitted)).
6. Trinko, 540 U.S. at 410 ("We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents.").
7. See id. at 410–11 (finding that the refusal to deal "is not a recognized antitrust claim" and declining to expand the scope of existing claims).
duplicative of state and federal regulation. Since Trinko, the Supreme Court has also ruled that antitrust law may be muted by either (1) the existence of a regulation that “performs the antitrust function” or (2) a regulatory structure that is “clearly incompatible” with the antitrust laws. Taken together, Trinko and its siblings announce a broad shift in the way the Court views the relationship between regulation and antitrust law.

Lower courts and scholars have struggled to define the new boundary between antitrust law and regulation. Some scholars writing soon after the decision argued that Trinko may limit antitrust claims against a wide range of regulated entities. More recent scholarship has proposed narrow exceptions to Trinko, including, for example, exceptions for industries undergoing deregulation. The Court seemed to confirm this expansive view (at least in part) in Pacific Bell Telephone Co. v. Linkline Communications, Inc., which used a “straightforward application” of Trinko to limit certain antitrust claims in the internet access industry. Yet Linkline arose under the same statute as Trinko—the Telecommunications Act of 1996 (“Telecommunications Act”)—and thus sheds little light on the application of Trinko’s principles to industries, such as cable television, whose regulatory statutes prescribe more limited regulatory authority. And as the Court noted in Trinko itself, “Antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.”

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10. See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007) (extending Trinko’s logic to cover stock underwriters accused of “laddering” and “tying” violations).


13. See Linkline, 129 S. Ct. at 1119–20 (extending Trinko to cover a different type of claim—“price squeezes”—in the internet access industry).


15. For example, Trinko noted that the Telecommunications Act grants the FCC wide authority to impose sharing requirements and to regulate the price of shared inputs. See Trinko, 540 U.S. at 405–06 (describing UNE regulation). By contrast, the Cable Act does not impose such far-reaching requirements. See infra Section II.B.

16. Trinko, 540 U.S. at 411 (quoting Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990)).
Applying this individualized analysis, federal district courts have split on whether Trinko's logic extends to limit antitrust claims against cable companies. One court extended Trinko to foreclose even antitrust claims not created by regulation; another refused to apply Trinko even to a refusal-to-deal claim. And a trio of related decisions suggest that Trinko may apply to the cable industry. No U.S. court of appeals has yet considered the question.

This Note argues that Trinko and its siblings should not be read to displace judicially enforced antitrust law in the cable industry because existing FCC regulations cannot perform Trinko's "antitrust function." Part I reviews the pre-Trinko era and summarizes Trinko and the subsequent decisions in Linkline and Credit Suisse Securities (USA) LLC v. Billing. Part I concludes that regulated industries that do not satisfy the tests in Trinko and its siblings remain subject to cognizable antitrust claims. Part II argues for a deterrence-based definition of Trinko's "antitrust function." Applying this definition to cable television regulations that are facially similar to the telecommunications regulations in Trinko and Linkline, Part II concludes that cable television regulation does not "perform[] the antitrust function" and thus cannot displace antitrust law. Part III attempts to clarify Trinko's teachings in light of the case's potential application to the cable industry. Part III thus proposes to focus Trinko's "antitrust function" test more clearly on whether the overlapping regulatory regime is sufficient to deter anticompetitive conduct in practice. Part III then argues that when regulatory deterrence is inadequate, as in the cable industry, regulation should not bar antitrust suits for damages.


18. See N.Y. Jets LLC v. Cablevision Sys. Corp., No. 05 Civ. 2875(HB), 2005 WL 2649330, at *8 (S.D.N.Y. Oct. 17, 2005) (recognizing the viability of refusal to deal claims against a cable operator "when the purpose of [the] refusal is to maintain a monopoly"). Although the court did not address the matter, the case is legally distinct from Trinko because the duty to deal does not arise from regulation. Id.


20. Trinko, 540 U.S. at 412.


22. My conclusion does not suggest that antitrust claims against cable operators will necessarily prevail in court. Rather, I conclude only that Trinko and its siblings do not bar such claims as a matter of law.
I. TRINKO, LINKLINE, AND CREDIT SUISSE REDEFINE THE RELATIONSHIP BETWEEN ANTITRUST AND REGULATION

Since Trinko was decided in 2004, scholars have debated how far the Court should go in shielding regulated firms from antitrust scrutiny. This debate has intensified since the decisions in Credit Suisse and Linkline. Although Trinko is somewhat ambiguous in isolation, the Court’s reasoning and future direction become clearer when the case is analyzed alongside Linkline and Credit Suisse.

This Part interprets Trinko in light of the Court’s recent guidance in those decisions. Section I.A provides a quick primer on the antitrust laws at issue in the three cases and illuminates the different legal standards that apply in each case. Section I.B surveys the historical (pre-Trinko) relationship between antitrust law and regulation. Section I.C reviews Trinko, Linkline, and Credit Suisse and identifies the circumstances under which regulation supplants antitrust law.

A. A Primer on U.S. Antitrust Laws

American antitrust laws prohibit anticompetitive activity by firms acting either alone or coordinately. Coordinated anticompetitive activity (“collusion”) is prohibited by section 1 of the Sherman Act (“Section 1”), which states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Generally, firms violate Section 1 any time they coordinate their activities with the intent to restrain trade and increase prices. Coordinated acts may be condemned either as per se violations of the antitrust laws or under a “rule of reason” analysis that weighs the procompetitive and anticompetitive effects of the conduct.

23. Compare Candeub, supra note 11 (arguing that Trinko should not be read to impair the operation of antitrust law in regulated industries), with Thorne, supra note 11 (arguing that Trinko suggests a “categorical rule” limiting the application of antitrust law in regulated industries).


25. Id. § 1.

26. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940) (finding that “the law does not permit an inquiry into” the reasonableness of price-fixing arrangements and that all such agreements are “banned because of their actual or potential threat to the central nervous system of the economy”).

27. E.g., id. at 218 (“[P]rice-fixing agreements are unlawful per se under the Sherman Act.”).

28. E.g., Standard Oil Co. v. United States, 221 U.S. 1, 61–62 (1911) (stating that the “rule of reason” guides Section 1 inquiries).
Other antitrust laws, most notably section 2 of the Sherman Act ("Section 2"), prohibit a firm from unilaterally "monopolizing" a market.\textsuperscript{29} To monopolize a market, a firm must have "monopoly power," which is generally characterized as the ability to profit by unilaterally raising prices.\textsuperscript{30} All monopolization claims are evaluated using a "rule of reason" analysis.\textsuperscript{31} Antitrust laws condemn those practices that, on balance, harm consumers by harming competition.\textsuperscript{32}

B. The Traditional View of Antitrust and Regulation as Complements

Traditionally, antitrust law has operated alongside regulation, including rate and access regulation. For example, antitrust law and regulation were applied in tandem in 1912 in the foundational case United States v. Terminal Railroad Ass'n of St. Louis.\textsuperscript{33} Terminal Railroad concerned the monopolization of access to railroad bridges and ferries crossing the Mississippi River into St. Louis by a joint venture of several leading railways.\textsuperscript{34} The joint venture foreclosed competitors' access to the crossings,\textsuperscript{35} prompting its competitors to file an antitrust suit in federal court. The Court found this denial of access anticompetitive.\textsuperscript{36} It ordered injunctive relief granting new members nondiscriminatory access to the crossings.\textsuperscript{37} Mindful of the power of the Interstate Commerce Commission to regulate railroad rates, terms, and conditions of service, however, the Court concluded that the resulting consent decree should contain a savings clause recognizing and preserving "the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company . . . or any other power conferred by law upon such Commission."\textsuperscript{38} In other words, the Court explicitly allowed the antitrust laws to operate alongside regulation.


\textsuperscript{30} See, e.g., United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition." (footnote omitted)).

\textsuperscript{31} Standard Oil, 221 U.S. at 61–62 (noting the applicability of the "rule of reason" to Sections 1 and 2 of the Sherman Act); see also Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) (establishing the "rule of reason" as an individualized inquiry).

\textsuperscript{32} Bd. of Trade of Chi., 246 U.S. at 238.

\textsuperscript{33} 224 U.S. 383 (1912).

\textsuperscript{34} Terminal R.R., 224 U.S. at 391–98.

\textsuperscript{35} See id. at 406–09 (discussing the terminal railroad's anticompetitive conduct).

\textsuperscript{36} Id. at 410–12.

\textsuperscript{37} Id. at 411–12.

\textsuperscript{38} Id. at 412.
The Court also recognized the complementary nature of antitrust law and regulation in other industries. In 1973, the Court in *Otter Tail Power Co. v. United States* found that antitrust laws operate alongside regulation in the electric power industry.\(^3\)\(^9\) Otter Tail, an incumbent generator and distributor of electricity, refused to sell wholesale access to its electricity distribution system to local municipalities that sought to enter the market for retail electricity sales.\(^4\)\(^0\) It argued that, as a firm regulated by the Federal Power Commission, it was exempt from antitrust scrutiny.\(^4\)\(^1\) Rejecting this claim, the Court concluded that “[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws,”\(^4\)\(^2\) unless such regulatory regimes were “intended to be a substitute for . . . antitrust regulation.”\(^4\)\(^3\) Finding no evidence that the regulation was intended to supplant antitrust law,\(^4\)\(^4\) the Court affirmed a finding of antitrust liability and held that the district court had the power to supervise Otter Tail’s future conduct vis-à-vis municipalities seeking to enter the power market.\(^4\)\(^5\)

*Terminal Railroad* and *Otter Tail* provided a “well settled” rule that regulated entities remained subject to the antitrust laws.\(^4\)\(^6\) Under this rule, antitrust law applied in the presence or absence of explicit price regulation\(^4\)\(^7\) as long as the given regulation did not explicitly supplant antitrust regulation.\(^4\)\(^8\) Antitrust remedies—which in these cases compelled access at regulated or unregulated prices—were deemed necessary complements to

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41. Id. at 372.
42. Id. *But see* City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 656 (10th Cir. 1992) (distinguishing *Otter Tail* and finding no antitrust duty to deal where the regulatory regime *required*, rather than *encouraged*, certain commercial arrangements with rivals), *overruled by* Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137 (10th Cir. 1997).
43. *Otter Tail*, 410 U.S. at 374–75.
44. Id. (“Thus, there is no basis [in the legislative history] for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations.”).
45. Id. at 381–82.
46. See Town of Concord v. Bos. Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) (“The basic legal principles that govern this monopolization case are well settled. Even though Bos-ton Edison is a regulated firm, it has no blanket immunity from the antitrust laws.” (citing *Otter Tail*, 410 U.S. at 372–75)); *see also* Cantor v. Detroit Edison Co., 428 U.S. 579, 596 n.35 (1976) (“[S]ince our decision in *Otter Tail* . . . there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities.”).
the existing regulatory regime. Federal judges, including future Justice Stephen Breyer, continued to follow the *Otter Tail* decision and the rule it announced.

The application of antitrust law alongside regulation reflected, in large part, the Court's historical view of antitrust law as a key policy tool. This sentiment is exemplified by the Court's famous announcement in *United States v. Topco Associates*: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." This view remained unquestioned for many years and, as the subsequent *Otter Tail* decision indicates, extended even to regulated industries.

### C. Trinko and Its Siblings Redefine Antitrust Law and Regulation as Substitutes

The Court has announced a far different view of the relationship between antitrust law and regulation in recent years. The Court no longer follows the maxim that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." Rather, the Court now holds that "[w]here regulatory statutes are silent in respect to antitrust . . . courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws." Despite the Court's pronouncement that the antitrust laws remain the "Magna Carta of free enterprise," they are now mutable by either compatible or incompati-

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49. See id. at 381–82 (compelling interconnection and wholesale sales on terms supervised by the district court); *Terminal R.R.*, 224 U.S. at 411–12 (compelling access on the same rates enjoyed by current members).

50. See *Town of Concord*, 915 F.2d at 21 (Breyer, C.J.) (applying "[t]he basic legal principles" enumerated in *Otter Tail*).


52. See FTC v. Ticor Title Ins. Co., 504 U.S. 621, 632 (1992) (citing *Topco* for the proposition that the preservation of the free market through antitrust enforcement "is essential to economic freedom"); Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 538 n.38 (1983) (citing *Topco* for the proposition that the Sherman Act is "the Magna Carta of free enterprise").

53. See supra notes 46–49 and accompanying text. Note that *Otter Tail* (1973) was decided one year after *Topco* (1972).


ble regulatory regimes. Such preemption may occur even when antitrust law and regulation would both forbid a given form of conduct. In short, the presumed relationship between antitrust law and regulation has changed from one of complements to one of substitutes.

1. Trinko, Credit Suisse, and Linkline

The Court’s revised view of the relationship between regulation and antitrust law was announced in three cases concerning regulated industries—Trinko (decided in 2004), Credit Suisse (2007), and Linkline (2009). Trinko concerned antitrust claims brought in a consumer class action against Verizon, the incumbent local exchange (telephone) carrier in New York. The plaintiffs alleged that Verizon’s violation of certain network-sharing obligations—imposed by the FCC pursuant to the Telecommunications Act—also constituted an antitrust violation. The Court found that the antitrust claims were not cognizable for two reasons, one narrow and one broad. First, the Court held that Verizon’s “regulatory” duty to deal was created under the Telecommunications Act, not the Sherman Act. As a result, the class’s claims were not cognizable under the Sherman Act. Second, the Court, in dicta, declined to recognize the consumer’s antitrust claims because the regulatory regime adequately performed “the antitrust function” and thereby displaced antitrust law. As discussed below in Section II.A, the Court loosely outlined its conception of the “antitrust function” in terms of its ability to punish and deter anticompetitive conduct.

Credit Suisse concerned the securities market, an area regulated by the Securities and Exchange Commission (“SEC”). The case involved antitrust claims brought against brokerage houses who engaged in various regulated

57. See Credit Suisse, 551 U.S. at 273 (discussing how securities law precluded the operation of antitrust law in Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 691 (1975), even though both laws pointed to the same result). But see id. at 271–72 (noting how the Supreme Court did not find preemption of antitrust laws in Silver v. New York Stock Exchange, 373 U.S. 341 (1963), because, in part, “nothing [was] built into the regulatory scheme which performs the antitrust function of insuring that rules that injure competition are nonetheless justified as furthering legitimate regulatory ends” (quoting Silver, 373 U.S. at 358) (internal quotation marks omitted)).

58. Credit Suisse, 551 U.S. at 273 (“The upshot is that, in light of potential future conflict, the Court found that the securities law precluded antitrust liability even in respect to a practice that both antitrust law and securities law might forbid.” (discussing Gordon, 422 U.S. at 691).

59. Trinko, 540 U.S. at 402.

60. Id. at 404–05.

61. See id. at 410 (noting that “[t]he sharing obligation [was] imposed by the 1996 Act” and that plaintiff’s claim “is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents”).

62. Id. at 413–16.

63. See infra Section II.A; see also Trinko, 540 U.S. at 413 (discussing the speed and severity of FCC and state regulatory fines).
underwriting practices.\textsuperscript{64} Although the Court assumed that the conduct at issue could have constituted violations of SEC regulations, it declined to recognize the applicability of the antitrust laws.\textsuperscript{65} The Court cited two primary concerns: (1) the risk that antitrust law could "seriously alter underwriter conduct in undesirable ways" and (2) the "unusually small" need for antitrust enforcement in the securities industry.\textsuperscript{66} In doing so, the Court refused to consider the effect of any statutory savings clause,\textsuperscript{67} formerly a key factor that, under older precedent, would likely have preserved antitrust claims.\textsuperscript{68}

Finally, \textit{Linkline}, the most recent case, considered internet service infrastructure regulated by the FCC. Like \textit{Trinko}, \textit{Linkline} involved antitrust claims arising from Telecommunications Act sharing duties; here these duties were imposed on a different incumbent local exchange carrier (and another AT&T successor), Pacific Bell.\textsuperscript{69} \textit{Linkline} extended the \textit{Trinko} decision by finding that the only applicable duties to deal were imposed by regulation (the Telecommunications Act), not by the antitrust laws.\textsuperscript{70}

Few scholars agree on the extent or scope of the changes wrought by the Court's recent jurisprudence. To some scholars, the Court's recent decisions represent a radical departure;\textsuperscript{71} to others, they are merely a clarification of the traditional view exemplified by \textit{Terminal Railroad} and \textit{Otter Tail}.\textsuperscript{72} The ultimate scope of \textit{Trinko} and other recent cases is also unclear. To Professor John Thorne, \textit{Trinko} stands for a "categorical rule" limiting the application of antitrust laws in "duty to deal" cases involving the telecommunications infrastructure.\textsuperscript{73}

\begin{footnotes}
65. \textit{Id.} at 279.
66. \textit{Id.} at 283.
67. \textit{Id.} at 275 (refusing to "reexamine" antitrust savings clause arguments). \textit{But see id.} at 290 (Thomas, J., dissenting) ("A straightforward application of the saving clauses to this case leads to the conclusion that respondents' antitrust suits must proceed.").
68. \textit{See id.} (arguing that the savings clause applies); United States v. Phila. Nat'l Bank, 374 U.S. 321, 350-51 (1963) ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored . . . ." (footnote omitted)).
70. \textit{Id.} at 1123 (refusing to recognize "a new form of antitrust liability never before recognized by this Court"). \textit{But see id.} at 1118 (recognizing that an antitrust violation may occur under "limited circumstances" where an antitrust duty to deal is found).
71. \textit{See, e.g.,} Stacey L. Dogan & Mark A. Lemley, \textit{Antitrust Law and Regulatory Gaming,} 87 Tex. L. Rev. 685, 685-86 (2009) ("A cluster of Supreme Court decisions in the past decade have fundamentally altered the relationship between antitrust and regulation, placing antitrust law in a subordinate relationship . . . ."); Thorne, \textit{supra} note 11 (finding a new "categorical rule").
\end{footnotes}
industry. Other scholars interpret Trinko more narrowly. For example, Professor Adam Candeub argues that Trinko cannot be read to foreclose antitrust claims based on vertical theories of foreclosure. And Professor Daniel Crane provides yet another view that Trinko and Linkline speak less to the merits of regulation or antitrust law than to the Court’s “institutional suspicions,” which he suggests include a preference for public, technocratic enforcement over private treble damage plaintiffs.

2. When Regulation Supplants Antitrust Law

Although the significance and scope of recent decisions is debatable, Trinko, Linkline, and Credit Suisse announce a relatively clear test for determining when antitrust must yield to regulation. If read narrowly on their facts, Trinko and Linkline suggest that antitrust claims based on newly created regulatory sharing duties are not cognizable. More generally, however, Trinko, Linkline, and Credit Suisse hold that regulation that performs the “antitrust function” supplants antitrust law. This holding would presumably extend to cable regulations, including those discussed in Part II, to the extent that a cable firm’s duty to deal with rivals arises solely from regulations and not from market dominance. Although some commentators have questioned the Court’s practical commitment to blanket regulatory

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73. See Thorne, supra note 11, at 296–97 (noting that the challenges inherent to creating and policing telecommunications network sharing “historically have been left to regulatory regimes, not the antitrust system”).


75. Candeub, supra note 11, at 824 (arguing that “Trinko must be read to allow antitrust law to adjudicate [vertical foreclosure] claims” concerning network industries).


78. Although not the focus of this Note, there may be sufficient evidence to support a finding that cable operators have an antitrust duty to deal (rather than a regulatory duty to deal) arising from their dominant distribution role in major cities. For example, the FCC has long recognized vertically integrated cable firms’ “incentive and ability” to discriminate against independent programmers and rival distributors (“MVPDs”). E.g., Implementation of the Cable Television Consumer Prot. & Competition Act of 1992, 22 FCC Rcd. 17,791, 17,841 para. 72 (2007) (report & order & notice) [hereinafter 2007 Program Access Rules], aff’d sub nom. Cablevision Sys. Corp. v. FCC, 597 F.3d 1306 (D.C. Cir. 2010). The FCC believes that “the market share of the cable operator relative to other competitors” is the “key consideration.” Id.
preemption of antitrust law, this Note takes *Trinko* and *Credit Suisse* at their word that a regulation that "performs the antitrust function" may displace antitrust law.

If the Court's broad language in *Trinko* and its siblings is taken at face value, regulation may supplant antitrust law for either of two reasons. First, *Trinko* and its siblings suggest that regulation may supplant antitrust law when the two mechanisms would reach similar results. A regulation "performs the antitrust function" if it achieves traditional antitrust objectives in a regulatory, rather than judicial, context. Such regulation is "effective"—and therefore sufficient to supplant the operation of antitrust law—if it quickly adjudicates allegations of monopolistic abuse. Second, antitrust laws may be preempted if the regulation conflicts with the application of antitrust laws. Such conflicts have been most apparent in the securities context, where antitrust law and securities regulation produce incompatible requirements on financial firms. Preemption is particularly likely where the conduct in question lies "at the very heart" of a regulatory regime; when the law grants the regulator authority to supervise the parties' conduct; where the regulator has "continuously exercised its legal authority to regulate" activity similar to the challenged conduct; and where the regulator


81. See *Credit Suisse*, 551 U.S. at 278–79 (accepting that "both securities law and antitrust law aim to prohibit the same undesirable activity," but nonetheless foreclosing antitrust claims); *Trinko*, 540 U.S. at 412, 415 (noting that the regulations were "much more ambitious than the antitrust laws").

82. I use "judicial" for simplicity when discussing traditional methods of adjudicating antitrust disputes. This term includes Federal Trade Commission adjudications, suits by the U.S. Department of Justice Antitrust Division, and private antitrust suits.

83. Cf. *Trinko*, 540 U.S. at 413 (describing FCC and state regulatory actions that collectively showed that "the [regulatory] regime was an effective steward of the antitrust function").

84. Cf. id. (discussing how "the FCC and PSC responded" to rivals' complaints, that the FCC "soon concluded that Verizon was in breach," and that the state regulators "found Verizon in violation of [its obligations] even earlier" (emphasis added)).

85. *Credit Suisse*, 551 U.S. at 273, 285 ("[T]he securities law precluded antitrust liability even in respect to a practice that both antitrust law and securities law might forbid." (discussing Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659 (1975))).

86. See id. at 275–76 (summarizing Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659 (1975), and United States v. Nat'l Ass'n. of Sec. Dealers, Inc., 422 U.S. 694 (1975)).

87. See id. at 276.

88. See id. at 275–77.

89. *Id.*
may consider competitive dynamics as part of its regulatory policy. Other factors also remain in play, as “[a]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.”

In summary, Trinko and its siblings—if read broadly and taken at face value—represent a significant departure from past precedent. Regulatory regimes have implicitly supplanted (Trinko and Linkline) or explicitly preempted (Credit Suisse) judicially enforced antitrust law. In each case, a central question was whether the regulatory apparatus alone was sufficient to achieve the level of competition that the antitrust laws seek to maintain.

II. CABLE TELEVISION REGULATIONS CANNOT PERFORM THE ANTITRUST FUNCTION

The telecommunications industry has been at the heart of the recent debate on the proper relationship between antitrust and regulation. Several factors may explain this industry's relative importance in the regulation-and-antitrust canon. First, the telecommunications industry is a significant part of the American economy, accounting for billions of dollars annually in revenue. Second, certain sectors of the telecommunications industry have been considered natural monopolies. For example, AT&T operated the nation's local telephone network as a natural monopoly for much of the twentieth century. Similarly, cable companies have faced little competition over the past forty years. Third, perhaps owing to the

90. Id. at 283 (finding that “any enforcement-related need for an antitrust lawsuit is unusually small” because “the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations”).


92. Both Trinko and Linkline concerned the applicability of the Sherman Act to regulatory duties supervised by the FCC. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1115 (2009) (concerning DSL internet transmission service); Trinko, 540 U.S. at 401 (concerning Telecommunications Act sharing obligations in the telephone industry).


94. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS ix (2007) (discussing industries once “thought to be natural monopolies”).


past natural monopolies in telecommunications, the industry is regulated by the FCC.\textsuperscript{97}

At first glance, the technological and legal similarities among the telephone, internet, and cable industries may suggest that the principles in \textit{Trinko} and its siblings also apply to the cable television industry. Specifically, telephone, internet, and cable services have converged to the point where they increasingly overlap.\textsuperscript{98} As a result of technological convergence and regulatory liberalization, cable companies (such as Comcast, Time Warner Cable, and others) and telephone carriers (such as Verizon and AT&T) compete to offer a "triple play" of cable, internet, and telephone services.\textsuperscript{99} Reflecting this convergence, courts and regulators have increasingly applied legal doctrines uniformly across the three services.\textsuperscript{100}

This Part argues that \textit{Trinko} and its siblings, despite the superficial similarities between their facts and the conditions in the cable industry, should not be extended to immunize all refusals to deal by vertically integrated cable firms because FCC cable regulations do not "perform[\ldots] the antitrust function."\textsuperscript{101} Specifically, this Part suggests that the FCC's existing cable television regulations have not been able to, and cannot, effectively punish and deter anticompetitive behavior. Section II.A briefly defines the "antitrust function," including the centrality of deterrence and punishment in the mod-

\textsuperscript{97} E.g., Cable Television Consumer Protection and Competition Act of 1992 \textit{passim} (amending the scope of FCC regulation of the cable industry by adding, modifying, and eliminating various requirements); United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968) (holding that the FCC has the authority to "regulat[e] \ldots CATV [cable] systems").

\textsuperscript{98} See, e.g., \textit{THIRTEENTH MVPD REPORT, supra} note 93, at 545 para. 6 (noting the expansion of cable, telephone, and broadband service firms into adjacent markets).

\textsuperscript{99} E.g., id. (discussing how cable operators, broadband service providers, and telephone companies all offer competing "triple play" products).

\textsuperscript{100} See, e.g., Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1119 (2009) (providing a "straightforward application" of \textit{Trinko}). As noted above, \textit{Linkline} concerned internet service, \textit{id.} at 1115, whereas \textit{Trinko} concerned telephone service, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (2003). In the regulatory context, see Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, 25 FCC Rcd. 746, 771–72 para. 36 (2010) (first report & order) [hereinafter Philadelphia Order], for a discussion of how continuing to allow the terrestrial loophole, described \textit{infra} Section II.B.1, "would undermine the goal of promoting the deployment of advanced [broadband] services that Congress established as a priority for the Commission."

\textsuperscript{101} \textit{Trinko}, 540 U.S. at 412 (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963)) (internal quotation marks omitted).
ern antitrust scheme. Section II.B argues that present FCC cable regulations lack key attributes of an effective antitrust regime. This analysis in particular identifies (1) slow adjudicative processes and (2) inherent limits on regulatory fines—and thus on deterrence—as key shortcomings of cable television regulation. This Section concludes that, despite appearing to meet the *Trinko* standard of effective regulation, the FCC’s cable television regulations are a poor substitute for the antitrust laws.

A. Defining the Antitrust Function

Congress enacted the antitrust laws for two reasons: to “punish past, and to deter future, unlawful conduct.” Although there is some debate on the proper purposes and goals of antitrust law, the prevailing view—reaffirmed by the Court in *Trinko*—places punishment and deterrence at the heart of the antitrust function. To achieve these goals, the antitrust laws authorize the imposition of injunctions, monetary penalties, and damage awards. Damages are often seen as the key antitrust enforcement

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102. Slow-moving regulations are not exactly unique to the cable industry. To the extent that regulators elsewhere (and particularly in the telephone and internet industries) have recognized anticompetitive conduct for years and failed to act (whether due to perceived lack of power or simply inertia), the cable industry may not separate so cleanly from *Trinko* and *Linkline*. Considering the speed and force of regulatory action in *Trinko*, see infra Section II.B, existing case law in regulated industries is probably distinguishable from the sluggish pace of adjudications in the cable space.


105. *Trinko*, 540 U.S. at 412 (finding little benefit to applying antitrust law when “a regulatory structure designed to deter and remedy anticompetitive harm” exists).

106. See Vt. Agency of Natural Res., 529 U.S. at 786 (finding that treble damages are designed to “punish past, and to deter future, unlawful conduct” (quoting *Tex. Indus. Inc.*, 451 U.S. 630, 639 (1981)) (internal quotation marks omitted)); *Antitrust Modernization Comm’n*, supra note 94, at 1 (“The antitrust laws seek to deter or eliminate anticompetitive restraints that impede free-market competition.”).

107. Generally, “penalties” are paid to public enforcement agencies such as the DOJ Antitrust Division and the Federal Trade Commission; “damages” are paid to private plaintiffs. Robert Pitofsky, Harvey J. Goldschmid & Diane P. Wood, *Trade Regulation* 54–55 (6th ed. 2010) (noting private treble damage and public (government) fine and penalty remedies). Disgorgement, although not usually sought as a remedy, may also be available to
Although the optimal size of damage awards (single, double, or treble) has been endlessly debated, few scholars believe that the antitrust goals could be achieved without the ability to impose damages at least commensurate to the anticompetitive harm.\textsuperscript{109}

\textit{Trinko} itself suggests that sizeable monetary sanctions and speedy regulatory adjudication are both necessary to deter anticompetitive conduct. \textit{Trinko} suggests that a regulator may perform "the antitrust function" only when it "provide[s] a strong financial incentive for ... compliance" that prevents "backsliding."\textsuperscript{110} This concern is consistent with extensive scholarship that suggests that optimal deterrence is achieved when the size of the penalty eliminates the financial incentive to engage in anticompetitive behavior.\textsuperscript{111} \textit{Trinko} also suggests that deterrence is achieved by speedy action. Specifically, a regulator is an "effective steward of the antitrust function" if it acts "soon" to assess a violation, impose penalties, and monitor remediation.\textsuperscript{112} Congress provided the regulatory penalties discussed in \textit{Trinko} to provide an "effective deterrent" to anticompetitive conduct.\textsuperscript{113} \textit{Trinko} thus suggests that regulations cannot deter anticompetitive activity, and thus perform the "antitrust function," if they cannot impose sufficient financial penalties and cannot do so quickly.

**B. Why Cable Television Regulations Are Inadequate**

Recent experience suggests that regulation may not perform the antitrust function if regulators do not act to correct an apparent harm to competition. Scholars have identified at least two limitations. First, regulators may decline to curb an apparent competitive abuse if they are unsure whether their

\begin{itemize}
  \item \textsuperscript{108} See, e.g., \textit{Antitrust Modernization Comm'n, supra} note 94, at 241 ("With respect to private civil actions, ... the availability of treble damages has been ... lauded as the key to an effective enforcement system 
  \item \textsuperscript{109} See, e.g., Herbert Hovenkamp, \textit{Antitrust's Protected Classes}, 88 Mich. L. Rev. 1, 31 (1989) ("Given the existence of [injuries to competitors], there is little to justify a rule denying a damages action to competitors, provided that the damages are measured properly.").
  \item \textsuperscript{110} See \textit{Trinko}, 540 U.S. at 413 (citations and internal quotation marks omitted). The Court's discussion centers upon the extent of FCC and state regulations, which it characterizes as "an effective steward of the antitrust function." \textit{Id}.
  \item \textsuperscript{112} See \textit{Trinko}, 540 U.S. at 413 (noting the speed of state and federal regulatory investigations and sanctions).
  \item \textsuperscript{113} See S. Rep. No. 95-580, at 8 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 116 (expressing the Committee's resolve to raise forfeiture limits because the preexisting limits "are unrealistic and totally inadequate to deter large communications businesses"). The FCC did impose forfeiture penalties ($3 million) resulting from the breach at issue in \textit{Trinko}. \textit{Trinko}, 540 U.S. at 403-04.
\end{itemize}
statutory authority encompasses the particular anticompetitive conduct. Second, even if regulators decide (and courts affirm) that they have the power to remedy a competitive problem through regulation, the regulator may decline to act for a variety of reasons, including "regulatory capture" and evidentiary concerns. As described in the Section below, the FCC’s handling of a cable television provision commonly known as the "terrestrial loophole" exemplifies both problems.

1. The FCC’s Terrestrial Loophole

The terrestrial loophole grew out of congressional efforts to increase competition in the cable television marketplace. Under the Cable Act of 1992, Congress specifically granted the FCC authority to promote competition in the cable television industry. Concerned with increasing vertical integration in the cable industry—the arrangement whereby a cable company owns (1) the connections to its consumers’ houses and (2) critical inputs such as the cable networks (for example, NBC) that it carries on its service—Congress specifically empowered the FCC to ensure that vertically integrated cable companies could not deny their competitors access to certain networks. The statutory language specifically regulated “satellite-delivered” programming, but remained silent on whether the FCC was also authorized to regulate programming delivered territorially to the cable head-end. The FCC initially determined that this silence meant that territorially delivered signals were exempt from this rule—the “terrestrial loophole.”

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114. See infra notes 131-138 and accompanying text.
115. See generally Dogan & Lemley, supra note 71 (discussing regulatory capture and Trinko).
116. See, e.g., 2007 Program Access Rules, supra note 78, at 17,843-44 para. 77 (noting that the record "does not provide sufficient evidence" to justify an FCC rule prohibiting certain vertically integrated cable firms from denying programming to rival MVPDs).
117. See Philadelphia Order, supra note 100, at 749 para. 5 (noting that the gap in FCC authority "is commonly referred to as the "terrestrial loophole"); infra Section II.B.1.
119. Id. § 628.
121. Id. § 628(c)(2).
122. See infra note 136 and accompanying text. A cable “head-end” is a central station that collects and distributes cable network programming to cable subscribers. Head-ends receive their programming feeds via satellite or fiber-optic cable and distribute these signals to nearby cable subscribers through cable wires. A cable company will maintain one head-end to serve thousands of subscribers. For example, a single head-end might serve all of one cable company’s subscribers in Ann Arbor, Michigan.
123. Philadelphia Order, supra note 100, at 749 para. 5 (describing the history of the terrestrial loophole).
The significance of the terrestrial loophole was not lost on vertically integrated cable firms. Some firms used the terrestrial loophole to deny competing firms access to certain “must-have” channels. Most prominently, in 1997 Comcast denied its Direct Broadcast Satellite (“DBS”) rivals access to its wholly owned subsidiary, Comcast SportsNet Philadelphia, which carries local sports games for Philadelphia’s professional baseball, basketball, and hockey teams. The FCC has long recognized that such refusals to deal may harm competition.

Despite several findings that the terrestrial loophole harmed competition, the FCC moved slowly to close the loophole. The FCC first considered the matter in 1998 when it evaluated the effectiveness of its program access rules, including the terrestrial loophole. At that time—only one year after Comcast first denied DBS firms access to its Philadelphia sports channel—the FCC found no evidence that the terrestrial loophole caused competitive harm. In 2000, the FCC denied an administrative complaint brought by the DBS firms seeking access to Comcast’s Philadelphia sports content. The FCC again noted the apparent lack of competitive harm and also disclaimed statutory authority to regulate. By 2002, however, the Commission concluded that the refusal to deal may have reduced competition in Philadelphia. Nonetheless, the FCC reiterated that it did not

124. See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 17 FCC Rcd. 12,124, 12,150 para. 55 (2002) (report & order) [hereinafter 2002 Program Access Rules] (“The withholding of programming from competitors as a competitive tactic also has been evidenced by the acquisition of such rights in terrestrial-delivered content not covered by the statutory restriction.” (footnote omitted)). The FCC especially noted (1) cases brought by DIRECTV and EchoStar (now DISH Network) against Comcast and (2) a case brought by overbuilder RCN against Cablevision. Id. para. 55 n.182.


126. See, e.g., 2002 Program Access Rules, supra note 124, at 12, 139 para. 33 n.107, 12,152 para. 59 (concluding, after reviewing Comcast’s behavior in Philadelphia, that the evidence “tends to confirm that, where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators”).

127. See Philadelphia Order, supra note 100, at 793 para. 70 (closing the loophole with respect to Comcast SportsNet Philadelphia in particular); supra note 125 and accompanying text.


129. Id. at 15,856–57 para. 71.

130. DIRECTV Order, supra note 125, at 22,807 para. 13.

131. Id. at 22,807 paras. 12–13 (approving a lower ruling that the refusal to deal in Philadelphia did not constitute unfair or anticompetitive behavior).

132. 2002 Program Access Rules, supra note 124, at 12,151 para. 59 (“[W]here permitted [by the terrestrial loophole], vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators.” (footnote omit-
believe it had sufficient statutory authority.\textsuperscript{133} The FCC also found harm to competition in two proceedings in 2006\textsuperscript{134} and 2007,\textsuperscript{135} but again declined to prohibit the conduct, citing lack of statutory authority.\textsuperscript{136} Cognizant of the harm, however, in 2007 the FCC initiated a rulemaking proceeding to determine whether it had the statutory authority to close the terrestrial loophole.\textsuperscript{137} Finding it did possess the requisite authority, the FCC finally closed the loophole in 2010,\textsuperscript{138} thirteen years after Comcast first denied service and eight years after the FCC first concluded that the conduct may harm competition.\textsuperscript{139}

The terrestrial loophole saga suggests that some regulatory regimes charged with protecting competition move slowly, if at all. Competitive abuses may go unchecked in the interim, allowing firms engaging in anticompetitive activities to reap large rewards. If firms are to be deterred from considering abuse of slow-moving regulatory processes, they must face the risk of a financial penalty that exceeds any anticompetitive gains.

2. FCC Cable Television Regulations Provide Inadequate Deterrence

Some regulatory antitrust regimes suffer from the inability to impose calibrated damages to punish past anticompetitive behavior. In many industries,
including telecommunications\textsuperscript{140} and energy,\textsuperscript{141} regulators have the ability to impose monetary penalties. However, regulatory fines are often standardized in a one-size-fits-all matrix.\textsuperscript{142} As a result, regulatory fines may be insensitive to the extent to which punished conduct harms competitors and consumers.\textsuperscript{143} By comparison, both public and private antitrust lawsuits allow parties to seek damages calibrated to the level of harm inflicted.\textsuperscript{144}

The inability of regulatory regimes to impose adequate monetary damages, and thus to singlehandedly perform the punitive and deterrence functions of antitrust, is aptly demonstrated by the FCC's cable agreement proceedings,\textsuperscript{145} which are governed by the Commission's "program access" and "program carriage" rules (collectively, the "programming rules").\textsuperscript{146} This process uses an administrative law process to impose access and pricing terms on cable companies (such as Time Warner Cable) and networks

\textsuperscript{140} See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 404–05 (2004) (noting that the FCC and New York Public Service Commission both imposed fines ($3 million and $10 million, respectively) related to Verizon's purported violation of sharing obligations).


\textsuperscript{142} See, e.g., 47 C.F.R. § 1.80(b)(4) note § 1 (2010) (providing the FCC's matrix).

\textsuperscript{143} For example, the Civil Aviation Board had "no power to award damages or to bring criminal prosecutions" of antitrust violations within its purview. Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 311 (1963). Telecommunications rules are heterogeneous. Most regulatory proceedings set clear statutory penalty maxima. See infra notes 171–173 and accompanying text. Some proceedings, such as the cable carriage proceedings noted in the text, authorize additional "appropriate remedies." Carriage Agreement Proceedings, 47 C.F.R. § 76.1302(g)(1)-(2). The statute clearly specifies equitable relief, but may upon some readings allow for the imposition of damage-like monetary awards as well. See id. (allowing "appropriate remedies, including, if necessary" injunctive relief, and thus providing a non-exhaustive list of remedies (emphasis added)).

\textsuperscript{144} See generally Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338–39 (1971) (holding that a plaintiff is entitled "to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion"); Pitofsky, Goldschmid & Wood, supra note 107, at 55, 75, 93–96 (discussing (1) public agencies' ability to seek either disgorgement or double damages under the Criminal Fine Improvements Act of 1987, 18 U.S.C. § 3571(d), and (2) private litigants' right to seek damages up to three times the actual damages); Hovenkamp, supra note 109, at 4 (illustrating his argument that "[o]ptimal deterrence is a function of the anticipated profitability of conduct to a violator" by arguing that the anticipated penalty for anticompetitive conduct that yields $100 should be "something greater than $100").

\textsuperscript{145} 47 C.F.R. § 76.1302.

\textsuperscript{146} The program access and program carriage rules are two sides of the same coin. The program access rules govern an MVPD's ability to access programming owned by rival MVPDs, whereas the program carriage rules govern an unaffiliated programmer's right to access an MVPD's network. A duty to deal may arise separately in antitrust; in the FCC's regulatory setting, it specifically arises under the "non-discrimination" prong of the program access and program carriage rules. See Prohibited Practices, 47 C.F.R. § 76.1301(c). These rules are typically enforced by carriage agreement proceedings before an FCC ALJ. See infra notes 147–152 and accompanying text.
(such as CNN) that dispute the terms of access. The programming rules developed in response to concerns that vertically integrated cable firms were demanding onerous and anticompetitive conditions on their counterparties. The process has been updated and expanded several times, most recently in 2010.

Complainants prevailing in cable programming proceedings are authorized to seek injunctive relief imposing “mandatory carriage . . . or the establishment of prices, terms, and conditions” of carriage. Any such remedy may be imposed in addition to the FCC’s penalties and remedies. Prevailing complainants may not, however, seek damage awards to “make [a complainant] whole” from a defendant’s anticompetitive conduct. The FCC’s Media Bureau has concluded that no authority “expressly provide[s] for the award of damages,” a finding that the FCC has not disturbed. Although an ongoing FCC rulemaking procedure may eventually decide the issue, the terrestrial loophole saga discussed above suggests that, even if the FCC does ultimately find statutory authority, any such discovery may be years in the future. In the meantime, FCC programming adjudications have yet to

147. 47 C.F.R. § 76.1302 (establishing and prescribing the procedure for cable “carriage agreement proceedings”).
148. See Adelphia Order, supra note 96, at 8,227–28 para. 43 (describing the foundations of the program carriage complaint process).
149. For example, the process was significantly streamlined in 2006 when the FCC imposed a parallel complaint process for complaints against Comcast and Time Warner Cable which, unlike the existing system, required a decision within 165 days of the filing of a complaint. See id. at 8,786 para. 190. See generally Philadelphia Order, supra note 100, at 777–97 paras. 46–75 (describing the 2010 extension of the program access complaint process to cover terrestrially delivered programming).
150. 47 C.F.R. § 76.1302(g)(1).
151. Id. § 76.1302(g)(2).
152. TCR Sports Broad. Holding, L.L.P., 23 FCC Rcd. 15,783, 15,814 para. 54 (2008) (order on review) [hereinafter TCR Sports I], rev’d, 25 FCC Rcd. 18,099 (2010) (mem. opinion & order) [hereinafter TCR Sports II]. But see 47 C.F.R. § 76.1003(d) (providing for damages in program access proceedings). Although many program access complaints have been filed, none have to date resulted in an award of damages under 76.1003(d).
153. See TCR Sports I, supra note 152, at 15,815 para. 54. The full Commission reversed the Media Bureau’s decision on liability grounds, and thus did not necessarily have occasion to consider whether damages were authorized under any applicable authority.
154. See Leased Commercial Access, 22 FCC Rcd. 11,222, 11,228 para. 18 (2007) (seeking comment on “any other issues that would properly inform our program carriage inquiry”); Comments of TCR Sports Broadcasting Holding, L.L.P. at 2, Amendment of Certain of the Comm’r’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Comm’r Org., GC Docket No. 10-44 (May 10, 2010) (responding to the FCC’s request for comments by seeking a “clarification that monetary damages are available for past discriminatory withholding of carriage”); Letter from Neal M. Goldberg, Nat’l Cable & Telecomms. Ass’n, to Marlene H. Dortsch, Sec’y, FCC 4 (July 30, 2010) (on file with the FCC as a comment to GC Docket Number 10-44) (opposing TCR Sports’s request and arguing that “[t]he FCC has no authority to assess damages payable to a complainant in these [program carriage] cases”).
award damages (or any other monetary award) to a successful complainant.\textsuperscript{155}

Without damages, vertically integrated cable operators have ample incentive to discriminate against unaffiliated regional programmers, especially regional sports networks ("RSNs") that carry local sporting events.\textsuperscript{156} This incentive arises due to cable operators' dominance in local markets. Cable operators have "clustered" their networks to such an extent that they often serve at least 60 percent—and sometimes more than 90 percent—of MVPD subscribers in a given television market, such as Boston, Charlotte, or Philadelphia.\textsuperscript{157} Because an RSN's audience consists entirely of a sports team's "home" television market—Philadelphia Phillies games are only important to Philadelphia fans, and by league rule cannot be shown in other teams' markets such as New York City or Baltimore\textsuperscript{158}—cable operators are also the "make-or-break" customer for RSNs.\textsuperscript{159} Economic models suggest that cable operators have a variety of incentives to deny carriage to unaffiliated RSNs, which may include the incentive to force the RSN out of business, acquire its assets, and deny the "must-have" regional sports programming to rival cable and satellite firms.\textsuperscript{160} A variety of economic analyses suggest that denying upstream regional sports programming to rivals grants a cable firm additional market power in the downstream cable industry.\textsuperscript{161} Indeed, the


\textsuperscript{156} For the rather less common view that unaffiliated programmers also may engage in anticompetitive behavior, see David Waterman, Vertical Integration and Program Access in the Cable Television Industry, 47 FED. COMM. L.J. 511 (1995).

\textsuperscript{157} See, e.g., Adelphia Order, supra note 96, at 8349–50 app. D para. 28 tbl.A-2 (listing postacquisition market shares for Comcast or Time Warner in most major television markets in the United States). According to these figures, Comcast serves 94.4% of all subscribers in the Boston Designated Market Area ("DMA") and 80.9% of all subscribers in the Philadelphia DMA. Id. Time Warner, the dominant firm in the Charlotte DMA, serves 63.8% of all subscribers in that market. Id.

\textsuperscript{158} See generally id. at 8,259 paras. 125–26 (discussing the regional market for RSNs due, in part, to teams' "authorized viewing zones," and limiting the defined market to the "inner" viewing zone because that zone comprises the home team's city and most interested fan base).

\textsuperscript{159} Id. at 8,284–88 paras. 180–91 (discussing program carriage issues, agreeing with commenters that Comcast and Time Warner Cable possess "make or break" power over unaffiliated RSNs, and adopting leased access regulations as an attempt to address competitive issues).


\textsuperscript{161} For a review of the literature, see id. (noting studies by academics, the GAO, and the FCC).
FCC itself believes that dominant local cable firms have the "incentive and ability" to discriminate against RSNs.\textsuperscript{162}

The unavailability of damages in FCC program carriage proceedings only reinforces a dominant cable firm's "incentive and ability" to deny program carriage to an unaffiliated network. If the FCC rules against the cable firm, that firm need only pay the market rate set by the FCC, which presumably is the "fair price" that it would have paid absent any discrimination. Even if it loses, the cable firm is not required to pay any penalties or damages for the period during which it "should" have carried the network (that is, during the length of the FCC proceeding, which may take several years). If the cable firm wins, it can demand a lower price or refuse to carry the channel altogether. Faced with no penalty for losing and considerable reward for winning, vertically integrated cable firms have plenty of incentive to deny now and litigate later.

3. Damages Are Key Adequate Deterrence

The FCC's programming rules demonstrate that, without the ability to impose damages, regulatory action alone is insufficient to achieve optimal deterrence. The ability to seek damages—even treble damages—is an important element of both the punitive and deterrence functions of antitrust.\textsuperscript{163} Even antitrust scholars who question the efficacy of treble damages tend to support the imposition of damages sufficient to compensate for any actual losses arising out of the anticompetitive conduct.\textsuperscript{164} At first glance, the FCC's programming rules appear to be an archetypal form of \textit{Trinko}'s "effective regulation":\textsuperscript{165} they include both a sharing obligation \textit{and} a price-setting mechanism, just like the telephone regulations in \textit{Trinko}.\textsuperscript{166} If even the relatively strong programming rules cannot impose adequate monetary penalties, relatively few regulatory regimes may provide \textit{Trinko}'s "antitrust function."

Several commentators have suggested that regulation can adequately perform the antitrust function when regulators are free to assess forfeiture penalties. This view was expressed most prominently by the Court in \textit{Trinko}, where it found that the prompt "impos[ition of] a substantial fine"—$13

\textsuperscript{162} Adelphia Order, \textit{supra} note 96, at 8,267 para. 140, 8,284 para. 181 (noting that a cable acquisition making Comcast and Time Warner even more dominant would increase their "incentive and ability" to discriminate against MVPDs and unaffiliated programmers (such as MASN)).


\textsuperscript{164} \textit{See}, \textit{e.g.}, Harvey J. Goldschmid, \textit{Comment on the Policy Implications of the Georgetown Study}, in \textit{PRIVATE ANTITRUST LITIGATION} 412 (Lawrence J. White ed., 1988).

\textsuperscript{165} \textit{See infra} note 167 and accompanying text for a discussion of \textit{Trinko} and effective regulation.

\textsuperscript{166} \textit{See supra} note 150 and accompanying text for an account of remedies available under the programming rules.
million—and threat of “specific penalties for failure” demonstrated that “the regime was an effective steward of the antitrust function.” The Court credited the FCC’s account of the threatened follow-on penalties as “a strong financial incentive for post-entry compliance . . . [that] prevented backsliding.” The Court’s decision in Trinko, and its view of regulation as an effective substitute for antitrust law, hinges on the extent to which regulators can impose sanctions calibrated to deter future anticompetitive behavior by regulated entities.

Despite the Court’s rosy view of regulatory penalties, most regulators simply do not have the statutory authority to impose penalties that bear any relationship to the extent of harm to competition. The limits of regulatory authority are particularly evident in the FCC’s application of the very same forfeiture rules exalted in Trinko. As noted by the Court, the Telecommunications Act allows for “forfeiture” penalties for violations of Commission rules. Importantly, however, the statute specifies forfeiture maxima, which govern the FCC’s inflation-adjusted penalty schedule. For example, a willful violation of the cable program access rules—which include the terrestrial loophole regulations discussed above—carries a maximum forfeiture penalty of $7,500 per violation. Eleven aggravating and mitigating factors, including “substantial harm” and “substantial economic gain,” guide the FCC’s choice. Despite their apparent interest in competitive concerns, the relatively low statutory caps on fines suggest that the FCC’s forfeiture provisions cannot be tailored to deter competitive harms.

Because the statutory maximum penalty provisions appear facially inadequate, the FCC has used creative methods to avoid consideration of the statutory penalty maxima when it believes competition has been harmed. For example, in October 2002 the Commission fined SBC (Verizon’s predecessor) $6 million for the violation of certain network sharing regulations


168. Specifically, the FCC had the authority to suspend or revoke Verizon’s “long-distance approval.” Id.


171. See id.

172. See 47 C.F.R. § 1.80(b)(4) note § 1 (2010) (providing “guidelines” consistent with the statutory maxima, including $7,500 penalties for violations of the cable program access rules, cable cross-ownership rules, and cable broadcast carriage rules); Amendment of Section 1.80(b) of the Commission’s Rules, 15 FCC Rcd. 18,221 (adopted Sept. 14, 2000) (to be codified at 47 C.F.R. § 1.80(b)) (increasing the statutory fines to account for inflation).

173. 47 C.F.R. § 1.80(b)(4) note § 1. This “note,” entitled “Guidelines for Assessing Forfeitures,” provides a table with more than 40 specified maximum penalties for different violations of FCC regulations. Id.

174. Id. note § 2 (“Adjustment Criteria for Section 503 Forfeitures”).

175. Unless, of course, the magnitude of harm is appropriate for small-claims court.
five Midwestern states.\textsuperscript{176} The FCC penalty schedule prescribed a maximum fine of $120,000 per day, up to an overall maximum of $1.2 million “for any single act or failure to act.”\textsuperscript{177} Finding that the violation in question impacted competition (a plus factor under the FCC’s penalty schedule), the FCC assessed the maximum $1.2 million fine. However, perhaps finding this meager sum inadequate given the competitive harm and one-year duration of the violation, the FCC found five parallel $1.2 million violations of its regulations—one for each state where SBC did not provide the required service—for a total fine of $6 million.\textsuperscript{178} The FCC found that this ad hoc fine was “not excessive” because “a smaller forfeiture would lack adequate deterrent effect.”\textsuperscript{179} Yet subsequent FCC statements indicate that the fine was not calibrated to the level of harm but rather represented “the statutory maximum for the violations at issue.”\textsuperscript{180}

The FCC’s attempts to expand the magnitude of its regulatory penalties demonstrate the inadequacy of the regulatory penalty provisions celebrated in \textit{Trinko}. Despite the FCC’s explicit authority to consider harm to competition when setting its fines, these fines still cannot exceed the statutory maxima and thus cannot be calibrated to punish any conduct with effects of a magnitude greater than a few million dollars. The incentive is clear: if you engage in anticompetitive conduct, think big, because the fines will pale in comparison with the rewards. As the FCC’s SBC case indicates, the Commission has sought to address this limitation through ad hoc measures on at least one occasion, finding five violations for engaging in the same conduct in five states.\textsuperscript{181} Yet there are clear limits to the FCC’s ability to stretch this principle if its judgments are to survive appellate review. If, for example, the FCC determined that only a $30 million fine would deter anticompetitive activity, it would need to find twenty-five parallel violations. Such manipulations undermine the FCC’s stated purpose for defining specific maximum penalties: predictability.\textsuperscript{182}

The unpredictability of FCC penalties cuts especially strongly against those scholars who have argued that, because regulation provides defendants greater certainty, regulation must supplant judicially enforced antitrust

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  \item \textsuperscript{177} 47 C.F.R. § 1.80(b)(2) (2002). Note that the penalty schedule has been revised since 2002; the current maximum penalty is $325,000 per day for a total of $3,000,000. 47 C.F.R. § 1.80(b)(2) (2010).
  \item \textsuperscript{178} SBC Commc’ns, 17 FCC Rcd. at 19,934–37 paras. 22–27 (2002).
  \item \textsuperscript{179} \textit{Id.} at 19,935 para. 24.
  \item \textsuperscript{180} InPhonic, Inc., 22 FCC Rcd. 8,689, 8,702 para. 30 (2007) (order of forfeiture & further notice of apparent liability for forfeiture).
  \item \textsuperscript{181} \textit{See supra} note 178 and accompanying text (assessing five parallel violations against SBC).
  \item \textsuperscript{182} Forfeiture Proceedings, 62 Fed. Reg. 43,474, 43,474 para. 2 (1997) (“The Commission agreed with the majority that guidelines would add a measure of predictability and uniformity to the forfeiture process.”).
\end{itemize}
\end{footnotesize}
law. The standard argument is well stated by Professor Thorne, who finds the regulatory regime approved in *Trinko* eminently reasonable because it was “flexible . . . in designing performance measures[,] with accompanying levels of penalties . . .”. Professor Thorne argues that antitrust litigation, by contrast, should be disfavored because it entails “vague legal standards . . . and uncertain litigation” that would overdeter anticompetitive conduct. Yet it is unclear how the FCC’s method of avoiding the statutory penalty cap is any less “vague” or “uncertain.” Nor is it clear why regulatory underdeterrence is preferable to litigation-induced overdeterrence. It is only clear that such manipulations are legal.

Moreover, the interaction between slow-moving regulation and inadequate regulatory fines only exacerbates the lack of deterrence inherent in the FCC’s cable regulations. As noted above, regulatory fines are often inadequate to deter all but the very smallest competitive harms. Regulatory inaction—perhaps exemplified by the FCC’s thirteen-year quest to close the terrestrial loophole—only lengthens the duration (and thus the magnitude) of competitive harm. *Trinko* is perhaps unique in the brevity of the challenged conduct, which occurred over a period of fewer than three years. By comparison, the competitive harms associated with the terrestrial loophole extended for thirteen years. The FCC’s regulatory fines are inadequate for even small harms of short duration; they are an even more inadequate remedy for competitive harms extended due to the FCC’s relative inaction. And they are surely inadequate to meet *Trinko’s* requirement that they “deter and remedy anticompetitive harm” and Credit Suisse’s caveat that regulation may displace antitrust law if regulators “actively enforce[] the rules and regulations that forbid the conduct in question.”

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184. Thorne, supra note 11, at 301.

185. Id. at 300.

186. See, e.g., SBC Commc’ns Inc. v. FCC, 373 F.3d 140, 151–52 (D.C. Cir. 2004) (approving the FCC’s $6 million dollar fine and finding that the penalty was not arbitrary and capricious).


188. See supra note 139 and accompanying text.

189. See *Trinko*, 540 U.S. at 399 (emphasis added).

III. PROPOSED SOLUTION: TRINKO AND CREDIT SUISSE SHOULD OUST ANTITRUST LAW ONLY WHERE REGULATORY PENALTIES ARE SUFFICIENT TO MAINTAIN COMPETITION

The inadequacy of the FCC's cable regulations demonstrates the need for a continued role for antitrust law in the cable competition regime. Yet, given the Court's concern with overlapping antitrust and regulatory regimes, clear rules are necessary to determine when Trinko and its siblings really do oust antitrust law from regulated industries. This Part suggests the following clarification to the Court's new approach: Trinko and its siblings should be construed as ousting antitrust law only where regulatory penalties are sufficient to eliminate monopoly rents and deter anticompetitive conduct. That is, courts should look at the extent and actual effectiveness of potential regulations before concluding that they "perform the antitrust function." As urged by Trinko, any such inquiry should be individualized to the particularities of the industry, including the regulator's authority to impose remedies.191

A. Applying the Proposed Solution to the Cable Industry

This Section tests the proposed solution by applying it to the cable industry. First, Section III.A.1 compares the regulatory regimes examined in Trinko and its siblings to cable regulations. Finding the cable regulations substantially weaker, Section III.A.2 concludes that the proposed rule would decline to apply Trinko and its siblings to the cable industry. Given the weakness of cable regulations, declining to apply Trinko and its siblings is probably the correct result.

1. Different Competitive and Regulatory Facts

The regulatory regime in Trinko and its siblings differ from those in cable television industry in three respects: (1) the activity (or inactivity) of the regulator; (2) the regulatory remedies available to regulators and injured parties; and (3) the scope of the sharing obligation imposed. First, the FCC has been far more passive in the cable space than regulators have been in other areas such as telephone and securities. As noted above in Section I.C.2, Trinko and Credit Suisse imply that a regulator is an effective "steward of the antitrust function" only when it (1) acts quickly to remedy competitive harms192 and (2) "has continuously exercised its legal authority

191. See Trinko, 540 U.S. at 411 ("[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies." (alteration in original) (emphasis added) (quoting Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990)) (internal quotation marks omitted)).

192. See id. at 413 (noting that the FCC responded "soon," that the New York Public Service Commission responded "even earlier," and that such action performed the antitrust function).
to regulate" the challenged conduct. Those facts simply are not present in the cable industry. Although the FCC has clear regulations that provide for timely adjudication of program access complaints, it has not always acted within the required time. And—as the terrestrial loophole saga indicates—the FCC has not continuously exercised its (newfound) legal authority, a key requirement under *Credit Suisse*.

Second, the regulatory remedies available to litigants in cable proceedings are far more limited than those the Court has found sufficient to displace antitrust remedies. Whereas the Court in *Credit Suisse* emphasized that "private litigants" successfully used securities statutes to "obtain[] damages," the FCC interprets the program access rules to bar damages. Similarly, the Court in *Trinko* emphasized that regulators could withdraw operating licenses, which provided “a strong financial incentive for . . . compliance.” In the cable realm, by contrast, the FCC has never threatened to revoke cable licenses for cable programming rule violations. In short, *Trinko* and its siblings relied on far more muscular regulatory remedies than those available to litigants in cable programming cases. Because the FCC’s meager regulatory fines have proven inadequate to deter vertical foreclosure of cable inputs—a fact the FCC has itself recognized—*Trinko*

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195. *See, e.g.*, Herring Broad., Inc., 74 Fed. Reg. 3,037, 3,037 para. 2 (Fed. Commc’ns Comm’n Jan. 16, 2009) (notice) (finding that the ALJ assigned to adjudicate five program access complaints failed to act within the required sixty-day period); NFL Enters. LLC, 74 Fed. Reg. 4,035, 4,035 para. 2 (Fed. Commc’ns Comm’n Jan. 22, 2009) (notice) (finding that the ALJ assigned to adjudicate the program access complaint failed to act within the required sixty-day period).


197. *Credit Suisse*, 551 U.S. at 277.

198. *Id.* (discussing the availability and use of damage recoveries for similar securities-specific causes of action).

199. *See TCR Sports I*, supra note 152 at 15,814–15 para. 54. The full Commission reversed the Media Bureau’s decision on liability grounds, and thus did not necessarily have occasion to consider whether damages were authorized under any applicable authority. TCR Sports II, *supra* note 152 at 18,099 para. 1.


202. *See, e.g.*, Adelphia Order, *supra* note 96, at 8,264 para. 134 (noting a commentator’s assertion that “the use of exclusive distribution agreements that foreclose competing MVPDs from access to the programming . . . is already done”); *id.* at 8270 para. 146 (affirming a commentator’s assertion by noting that “[t]here are three [television markets] where the games of some of the local professional sports teams are not available to DBS subscribers: Charlotte, Philadelphia, and San Diego”). The FCC has also acknowledged that its existing regulations are inadequate by using merger conditions, rather than universally applicable regulations, to
and its siblings should not foreclose all manner of antitrust suits, and in particular should not prevent suits that do not allege a regulatory duty to deal.203

Third, the scope of the sharing obligation imposed by cable regulations differs fundamentally from the scope of the sharing obligations at issue in Trinko and Linkline. The regulations in both Trinko and Linkline arose under the Telecommunications Act, which the Court noted “imposes a large number of duties upon incumbent [local exchange carriers]—above and beyond those basic responsibilities it imposes upon all carriers.”204 By contrast, the Cable Act’s program access rules apply universally to large and small cable firms.205 The type of product and the identity of the regulatory beneficiary also differ. Whereas Trinko and Linkline both required incumbents (who were previously regulated monopolists) to provide certain inputs that are not sold at retail to their horizontal competitors,206 the FCC’s program access rules govern the terms of sale of inputs—cable programming—sold at retail to firms’ downstream customers.207 As illustrated in Trinko, the Court appears to place substantial weight on both factors.208

2. Courts Should Decline to Apply Trinko and Its Siblings to the Cable Industry

Given its weaknesses, courts should decline to apply Trinko and its siblings to the cable industry. As noted above in Section III.A.1, the remedies available to cable regulators simply do not compare in kind or strength to those available to the regulators overseeing the telephone (Trinko), internet (Linkline), and securities (Credit Suisse) industries. And as the terrestrial address competitive harms involving vertical foreclosure of sports programming. See, e.g., id. 8,269 para. 144, 8,274 para. 156 (finding a risk of harm in fifteen television markets absent merger-specific regulations).

203. For example, an unaffiliated programmer could allege an antitrust duty to deal that does not arise from regulation. Under Trinko and especially Credit Suisse, regulation appears to bar any antitrust claims, not just those arising out of a regulatory duty to deal. See Credit Suisse, 551 U.S. at 279 (holding that “securities law and antitrust law are clearly incompatible,” and thus that securities law preempts antitrust law); Trinko, 540 U.S. at 412 (dictum).

204. Trinko, 540 U.S. at 405 (emphasis added). The Court in particular highlighted an incumbent’s “UNE” sharing obligation as a special Telecommunications Act-imposed duty. Id. at 405–06.


206. Trinko, 540 U.S. at 403–06 (noting that the regulatory structure compelled sales of UNEs to Verizon’s horizontal “rivals”); Pac. Bell Tel. Co. v. Linkline Comms’n, Inc., 129 S. Ct. 1109, 1119 (2009) (analogizing to Trinko by noting that there was “no antitrust duty to deal with its rivals at wholesale”).


208. See Trinko, 540 U.S. at 409–10 (distinguishing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), on the retail/wholesale distinction); id. at 402 (noting Verizon’s status as an incumbent local exchange carrier whose former “exclusive franchise” was opened to competition by the telecommunications regulations at issue).
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loophole saga illustrates, the relatively weak cable regulations have proven unable to deter what the FCC itself deems to be anticompetitive conduct—vertical foreclosure. Considering that the Court has itself defined deterrence as the key "antitrust function," it would be inappropriate to apply Trinko and its siblings to the cable television industry.

B. Qualification: Limiting Injunctive Relief under the Antitrust Laws

Although it would be inappropriate to apply Trinko and its siblings to the cable industry, allowing antitrust law to operate unfettered alongside cable regulation might still violate the principles underlying Trinko and its siblings in one important respect: it would risk exposing firms to conflicting prospective mandates. This risk has long haunted the Court. For example, the Court found in Credit Suisse that allowing antitrust laws to operate alongside securities regulation risked "produc[ing] conflicting guidance, requirements, duties, privileges, or standards of conduct." Although the Court did not identify any actual conflict, its rhetoric suggests a concern with conflicting requirements on prospective action. Limiting injunctive relief seems like the obvious solution. But, as noted above, the Court solved this problem instead by preempting incompatible antitrust laws entirely.

Yet a concern with conflicting mandates cannot justify the Court's decision to mute antitrust suits for damages. Conceptually, an antitrust damage award is compatible with regulatory action punishing the same behavior: damages punish retrospectively, whereas regulatory punishments—apart from those enforced by fines—are prospective requirements. The Court itself has recognized that a regulatory regime that preempts or otherwise displaces an antitrust suit for injunctive relief does not displace an antitrust suit for damages. For example, the Court found as follows in Pan American World Airlines, Inc. v. United States:

If it were clear that there [were] a [damages] remedy in this civil antitrust suit that was not available in a § 411 proceeding before the [regulator], we would have the kind of problem... where litigation is held by a court until the basic facts and findings are first determined by the administrative agen-

209. See supra Section II.B.1.
210. See supra note 202 and accompanying text.
211. See supra Section II.A.
213. Id. at 279 (finding that "securities law and antitrust law are clearly incompatible" when applied to certain underwriting activities).
214. See Carnation Co. v. Pac. Westbound Conference, 383 U.S. 213, 224 (1966) (stating that the petitioner had "its choice" between antitrust and regulatory remedies); Far E. Conference v. United States, 342 U.S. 570, 574 (1952) (noting that facts found by competent regulators may "serve as a premise for legal consequences to be judicially determined").
cy, so that the judicial remedy, not available in the other proceeding, can be granted.\textsuperscript{215}

This precedent remains good law today.\textsuperscript{216} Thus a reading of \textit{Trinko} that preserves public and private suits for damages—at least when regulators cannot impose suitable penalties—is consistent with the Court’s prior statements. It also avoids (or at least mitigates) the risk of inconsistent prospective remedies. Finally, it addresses potentially anticompetitive conduct in the cable industry in a far less intrusive and more calibrated manner than other suggestions, such as discouraging vertical integration or requiring à la carte channel pricing.\textsuperscript{217}

\textbf{Conclusion}

Although \textit{Trinko} and its siblings may individually be narrow, they collectively announce the Court’s determination to displace antitrust law when regulation “performs the antitrust function.”\textsuperscript{218} It would be a mistake to read this mandate too broadly. Not all regulatory regimes can perform the antitrust function, which the Court has in the past defined as deterring and punishing anticompetitive conduct. Regulations that cannot impose calibrated financial penalties or damages—including the FCC’s cable programming regulations—are particularly unsuitable substitutes for antitrust law. Antitrust law should retain a role in such circumstances. As \textit{AT&T, Otter Tail, Standard Oil,} and \textit{Terminal Railroad} demonstrate, antitrust law complements even strong regulatory regimes. Recognizing its continuing role would go a long way toward deterring anticompetitive conduct in the cable television industry.

\textsuperscript{216} At least according to a leading antitrust treatise. \textit{See 1A Phillip E. Areeda \\ Herbert Hovenkamp, Antitrust Law }\textsuperscript{244c3-c4} (3d ed. 2006).