Justice Breyer, Professor Kahn, and Antitrust Enforcement in Regulated Industries

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In his scholarly writings before joining the Supreme Court, Justice Breyer was skeptical of regulation and supportive of antitrust as a preferable alternative. In this regard Breyer was in express agreement with Professor Alfred Kahn, who championed airline and telecommunications deregulation while advocating antitrust enforcement to promote competition in those industries. It might therefore appear unexpected that Justice Breyer would write the opinion in one case, Credit Suisse v. Billing, and would side with the decision in another, Verizon v. Trinko, to limit antitrust enforcement in regulated industries. This Essay examines the reasoning of Credit Suisse and Trinko. Then, focusing on Breyer’s 1987 California Law Review article and the accompanying commentary by Professor Kahn, it explains why those cases are more predictable than paradoxical in light of Justice Breyer’s earlier scholarly work.

Introduction..................................................................................................... 488
I. Breyer and Kahn on Regulation and Antitrust ............................................ 490
   A. Regulation and Its Discontents ............................................................. 490
   B. Antitrust as an Alternative, or Supplement, to Regulation .............. 492
II. Antitrust, Regulation, and the Supreme Court ........................................... 496
   A. The State of the Law on Antitrust and Regulation in 1987 .............. 496
   B. Twenty-Five Years Later: Antitrust and Regulation After Trinko and Credit Suisse ............................................................................... 497
      1. Credit Suisse: Widening the Regulatory “Buffer Zone” ............. 498
      2. Verizon v. Trinko and a Diminished Supplementary Role for Antitrust ................................................................. 500

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C. Consequences of *Credit Suisse* and *Trinko* for Deregulating Markets ................................................................. 505

III. Breyer in 1987 and in 2007: Were *Credit Suisse* and *Trinko* Puzzling or Predictable? .................................................. 507
   A. Change in Perspective? ........................................................................... 507
   B. Breyer’s Earlier Writings and the Roots of *Credit Suisse* and *Trinko* .................................................................. 509
   C. Consistency, but Some Open Questions .............................................. 514

Conclusion ...................................................................................................... 516

INTRODUCTION

In 1987, the *California Law Review* (CLR) published a symposium in advance of the 100th anniversary of the Sherman Antitrust Act.¹ That symposium, convened by Professor Milton Handler, brought together leading scholars to address pressing questions in antitrust law and policy. One of those questions concerned the relationship between antitrust and regulation, focusing on the applicability of antitrust law in markets undergoing deregulation. To tackle that issue, the organizers chose their writers well: then-Judge Stephen Breyer wrote the central article,² and Alfred Kahn³ and Louis Schwartz⁴ provided commentaries. This Essay will focus on Breyer’s contribution and Kahn’s commentary.⁵ In 1987, Breyer was a highly regarded judge and leading scholar of regulatory law. His earlier research as a Harvard law professor and experience as a senior Senate staff member involved in airline deregulation led to his publication of *Regulation and Its Reform* in 1982.⁶ By the 1980s, Kahn had achieved nearly mythical status as the person who deregulated the airline industry while serving as Chair of the Civil Aeronautics Board in the Carter administration. Kahn had previously published his landmark book, *The Economics of Regulation: Principles and Institutions*,⁷ which more than forty years after its initial publication remains a standard in the field.

Now, a quarter century after CLR’s publication of Breyer’s article and the associated commentaries by Kahn and Schwartz, the question of how antitrust and regulation should interrelate remains as critical as it was in 1987. New efforts at both regulation (as in financial services) and deregulation (as in some areas of telecommunications) have led courts and policy makers to rethink the relevance of regulation for the application of antitrust law. As a result, law bearing on the relationship between antitrust and regulation has changed significantly since 1987. Interestingly, Breyer and Kahn, who in their 1987 CLR contributions laid out their respective thoughts regarding antitrust enforcement in regulated industries, both played important roles in this later development of the relevant law and policy. Professor Kahn remained an influential commentator on regulatory matters until his death in 2010. Breyer, as a Supreme Court Justice, has written important decisions in both antitrust and regulation, and has played a key role in Court decisions reformulating the relationship between the two.

Breyer’s 1987 CLR article provides a lens through which to examine and explain that reformulation. As Part II of this Essay will discuss, through Breyer’s opinion in Credit Suisse9 and the opinion that he joined in Trinko,10 the Supreme Court has redrawn the boundary between antitrust and regulation in a way that reduces the applicability of antitrust law in regulated markets. This retraction of antitrust in favor of regulation seems to create a paradox: although Breyer was and appears to remain a regulatory skeptic with a preference for antitrust, he has authored and voted for rulings that reserve certain claims for regulatory enforcement at the expense of antitrust. A close reading of Breyer’s 1987 CLR article can help explain this apparent paradox. At the same time, Breyer’s article and the accompanying commentaries provide the basis for a critical assessment of the Supreme Court’s evolving stance on the relationship between antitrust and regulation.

This Essay offers such an assessment, and examines the extent to which Justice Breyer’s CLR article, written twenty-five years ago, presaged the Supreme Court’s current jurisprudence on antitrust enforcement in regulated industries. Part I discusses the 1987 article’s implications for antitrust enforcement in regulated industries transitioning toward market-based governance. Part II then explores how the relationship between antitrust and regulation has changed as a result of Supreme Court decisions in which Justice

Breyer participated, and examines the extent to which those changes are consistent with the concerns that he and his commentators raised in 1987.

I.

BREYER AND KHAN ON REGULATION AND ANTITRUST

A. Regulation and Its Discontents

By 1987, industrial regulation, both on its own account and in comparison with antitrust law, faced substantial skepticism. Many commentators considered regulation a necessary evil appropriate only when market failures were so severe that, for all its shortcomings, government intervention would lead to better consumer outcomes than would the free market. Breyer described this “classical” view of regulation in his CLR article: “Classical theory emphasizes the many systematic institutional features of regulatory systems that prevent them from ever coming close to replicating the effects of well-functioning competitive markets.”\(^\text{11}\) Under the classical view, “[r]egulation is viewed as a substitute for competition, to be used only . . . as a heroic cure reserved for a serious disease.”\(^\text{12}\)

Both in theory and in practice, regulation presents a number of challenges that justify this reluctant reception, including “high cost; ineffectiveness and waste; procedural unfairness, complexity, and delay; unresponsiveness to democratic control; and the inherent unpredictability of the end result.”\(^\text{13}\) A brief examination of traditional price regulation serves to illustrate some of these concerns.\(^\text{14}\)

One underlying challenge for regulators in 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 where the regulated firms are incentivized to manipulate underlying accounting data.\(^\text{15}\) Even where regulators can resolve such information asymmetries and obtain accurate cost data and other relevant market information, retail regulation raises additional problems. For example, regulators must determine which costs the seller may pass on to buyers with a mark-up (allowing 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.\(^\text{16}\) Regulators must therefore distinguish allowable expenditures, such as

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\(^{11}\) Breyer, supra note 2, at 1006.

\(^{12}\) Id. at 1007.

\(^{13}\) Breyer, supra note 6, at 4.


\(^{15}\) See, e.g., HAL R. VARIAN, INTERMEDIATE MICROECONOMICS 725–26 (8th ed. 2010) (discussing moral hazard and other regulatory difficulties).

\(^{16}\) See In re Policy & Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd. 2873, 2883–84 (1989); see also W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 381
those for physical capital and operational costs, from those that should not be allowed, such as spending on executive pay bonuses or imprudent investments.

Another criticism of regulation is that it is usually slow to adapt to new market conditions. Once a statutory program is in place, it can be very difficult to change and may therefore outlast the conditions that motivated it in the first place. A recent study examines the delays in deregulating airlines, natural gas, banking, railroad freight, and mobile telephone service and finds those delays to have had substantial social costs. Another example is the Federal Communication Commission’s (FCC) protracted deregulation of AT&T as a dominant long-distance carrier, which did not occur until more than a decade after the Bell system divestiture, or well after significant competition had developed in the long-distance telephone service market. Michael Boudin, who would later serve as a Deputy Assistant Attorney General for Antitrust and become one of Breyer’s colleagues on the First Circuit, summarized the practical problem of dislodging regulation as follows:

Once imposed, regulation almost always will be very difficult to dislodge, even if it proves mistaken. Almost any regulatory regime will develop a constituency, armed with congressmen and self-interested bureaucrats. Moreover, almost any regulatory program, whether well conceived or not, becomes the foundation on which private arrangements are constructed, arrangements that cannot easily be discarded.

This tendency of regulation to become entrenched further supported the classicists’ view that it should only be used as a last resort.

Breyer’s own views on regulation shared much but not all of this skepticism. In his 1982 book on regulatory reform, Breyer took a nuanced view (2d ed. 1995).
of the diversity of regulatory methods and objectives and recognized that not all were subject to the same problems or criticisms.\(^{22}\) He moreover acknowledged that some regulatory programs could point to specific achievements and improvements over unregulated market outcomes.\(^{23}\) He concluded, however, that regulation administered through sensible, comparative analysis of policy approaches was an aspiration “often honored in the breach.”\(^{24}\) Breyer’s book then presented a set of case studies designed to argue for comprehensive regulatory reform on the premise that “where regulation is concerned, less is presumptively better.”\(^{25}\) Breyer’s final section focused on reforms designed to accomplish such a reduction in regulation.\(^{26}\)

In addition to the general concerns with regulation identified by Breyer, a variety of more specific problems confront regulators in any given industry. Breyer’s book examines some of these challenges, including “excessive competition” in the airline and trucking industries, setting lease rates for natural gas fields, and apportioning the costs of natural monopoly in telecommunications.\(^{27}\) As will be discussed in more detail below, in their respective \textit{CLR} pieces, Breyer and Kahn examined other specific challenges that emerged as regulators attempted to restructure the airline and telecommunications industries.

\textbf{B. Antitrust as an Alternative, or Supplement, to Regulation}

Although hardly considered flawless, antitrust enforcement was not—at least in 1987—tarred with the same brush as regulation. To be sure, antitrust suffered a black eye in 1982 when the government came away empty-handed from a costly, decade-long investigation into alleged monopolization by IBM. But on the same day the Department of Justice (DOJ) closed the IBM investigation, it announced arguably the most important antitrust enforcement action in decades: the settlement that dismantled AT&T’s monopoly.\(^{28}\) Meanwhile, the Civil Aeronautics Board had dismantled its increasingly counterproductive regulation of the airline industry and the FCC had recognized its own regulatory shortcomings in managing competitive entry into the long-distance and telephone equipment markets.\(^{29}\) Thus, to put it roughly, if

\begin{itemize}
  \item \textbf{22.} Breyer, supra note 6, at 4.
  \item \textbf{23.} \textit{Id.} at 191–94.
  \item \textbf{24.} \textit{Id.} at 5.
  \item \textbf{25.} Boudin, supra note 21, at 1104.
  \item \textbf{26.} Breyer, supra note 6, at 315–68.
  \item \textbf{27.} \textit{Id.} at 197–260, 285–314. Breyer defines natural monopoly as “where economies of scale are so large that a single firm can produce an industry’s entire output at lowest cost.” Breyer, \textit{supra} note 2, at 1007.
  \item \textbf{29.} AT&T, 552 F. Supp. at 168 (discussing the FCC’s acknowledgement that its regulation had been ineffective in preventing the conduct at issue in the government’s antitrust suit).
\end{itemize}
at the time regulation’s win-loss record in its major battles was 0 and 2, antitrust law’s record was at least 1 and 1.

While antitrust can be considered a form of regulation, both Kahn and Breyer resisted such a characterization. Kahn argued that antitrust may involve competitive handicapping where it prevents certain firms from engaging in conduct that is permissible for other firms. 30 However, these limits turn not on the firm’s underlying conduct, but on whether in particular cases such conduct would lead to anticompetitive consequences. As Kahn explains, “that notion justifies proscriptions that are incontrovertibly regulatory.” 31 Nevertheless, Breyer, and for the most part Kahn as well, described antitrust and regulation as distinct policy tools that are fundamentally in tension with one another. Breyer distinguished antitrust as seeking to create or maintain competition while regulation seeks to replicate the results of competition. 32 In his 1987 article, Breyer described this classical view that “antitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative.” 33 Kahn concurred in strikingly similar terms: “the antitrust laws are not just another form of regulation but an alternative to it—indeed, its very opposite.” 34

Yet, neither Breyer nor Kahn portrayed antitrust as necessarily exclusive of simultaneous regulation. Breyer described the most desirable economic situation as an unregulated competitive market in which “antitrust may help maintain competition.” 35 Where such competition is inadequate, however, “one must turn to regulation as a supplement or substitute.” 36 Previously, Breyer had posited that this complimentary relationship could operate in the reverse direction as well, with antitrust providing a valuable supplement to ongoing regulation. 37 Kahn argued that the deregulations in which he had been involved, where rules and regulatory oversight diminished but did not disappear, “greatly accentuated the importance of antitrust enforcement.” 38

Kahn’s last point raises a question about the difference between a regulated industry and an industry undergoing deregulation. As Kahn suggests, while the role of antitrust may grow as an industry undergoes deregulation, regulation continues to play a key role as well. Deregulation is a lengthy process, and often involves interim regulatory steps during the transition from full regulation to governance by market forces.

31. Id.
32. Breyer, supra note 6, at 156–57.
33. Breyer, supra note 2, at 1007.
34. Kahn, supra note 3, at 1059.
35. Breyer, supra note 2, at 1007.
36. Id.
37. Breyer, supra note 6, at 156.
38. Kahn, supra note 3, at 1059.
Numerous examples, both past and ongoing, demonstrate the often-piecemeal nature of the deregulatory process. For example, as is clear from Breyer’s 1987 article and the associated commentaries, the Department of Transportation continued to oversee airlines during that industry’s deregulation. In the telecommunications industry, the newly opened long-distance telephone market faced a variety of regulations following the government’s break-up of AT&T. Similarly, the electricity industry’s deregulation has left that sector under the aegis of state and federal regulatory agencies as the industry restructures and evolves. The transition from classical regulation to competition, therefore, has generally occurred through the revision of regulation rather than its wholesale removal. While antitrust would seem to have a strong role to play in this process, antitrust in a deregulating industry acts as a supplement rather than a complete alternative to regulation.

Kahn and Breyer generally agreed about the relative desirability and roles of antitrust and regulation, but appeared to differ in their assessments of antitrust itself, at least as enforced in regulated or deregulating markets. Both were generally positive about antitrust, finding it to be helpful in maintaining competition and averring a shared “belief in vigorous enforcement of the antitrust laws.” Breyer, however, identified several regulatory tasks for which antitrust would be inadequate, notably the correction of moral hazard and information asymmetry problems and the management of natural monopolies.

In the course of his CLR article, Breyer expressed additional reservations about antitrust law’s ability to take into account the “special circumstances” of deregulating industries. This failure increased risks of misguided merger enforcement, over-protection of particular competitors to the detriment of competition, and poor handling of discriminatory conduct by monopoly “bottlenecks.” With respect to merger enforcement, Breyer supported “a shift away from present antitrust attitudes” in favor of a broader “public interest” test

39. Id. at 1063–65; Breyer, supra note 2, at 1016.
43. Breyer, supra note 2, at 1007; Kahn, supra note 3, at 1059.
44. Kahn, supra note 3, at 1059.
45. As noted above, regulated firms can often affect a regulatory agency’s decisions by manipulating accounting data to which only the firms themselves have access. See supra note 15 and accompanying text.
46. Breyer, supra note 6, at 159.
47. Breyer, supra note 2, at 1018.
48. Id. at 1018–19, 1032.
for mergers administered by an agency.\textsuperscript{49} As for the management of remaining monopoly bottlenecks in deregulating markets, he argued that the “problem seems more amenable to regulatory control” than to antitrust enforcement.\textsuperscript{50}

The conclusions of Breyer’s CLR article are subject to debate. His arguments that regulatory agencies can handle bottlenecks better than antitrust law and that telephone regulators do not have a history of regulatory failure\textsuperscript{51} ignore the FCC’s historic inability to regulate AT&T’s local bottlenecks sufficiently to allow long-distance competition. The FCC itself acknowledged this failure during the antitrust case that ultimately achieved that result.\textsuperscript{52} Also, while Breyer was an advocate for the Department of Transportation’s “public interest” review of airline mergers, Kahn took issue with such regulatory review. To Kahn, the Department of Transportation’s dismissal of a number of DOJ complaints was “unconscionable.”\textsuperscript{53} Kahn therefore appears more confident than Breyer that antitrust is necessary in deregulating markets, concluding that concerns about laissez faire hold just as strongly today as they did when Congress passed the Sherman Act in 1890.\textsuperscript{54}

Breyer and Kahn analyzed the relationship between antitrust and regulation as a matter of normative policy, asking what should be the role of antitrust enforcement in certain industrial circumstances where regulatory agencies also play a role. Conclusions about whether or not antitrust should apply in certain circumstances may, however, have little bearing on whether or not antitrust can apply as a matter of law. Those who believe that antitrust enforcement in regulated industries is generally good policy will want a legal regime that allows such enforcement. Conversely, those who think antitrust enforcement in regulated industries is generally counterproductive will want regulation more broadly to imply immunity from antitrust. As the next Part will discuss, while courts do not easily imply immunity from antitrust law, the Supreme Court has exhibited increased willingness to limit the scope of antitrust enforcement in regulated industries.

\textsuperscript{49} \textit{Id.} at 1018. An example of a public interest test is that used by the FCC to analyze proposed mergers not only for whether they will reduce competition, but also for whether they will bring affirmative benefits to consumers and further the FCC’s policy objectives. \textit{See} STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 1057–59 (2d ed. 2006).

\textsuperscript{50} Breyer, \textit{supra} note 2, at 1043.

\textsuperscript{51} \textit{Id.} at 1026, 1032.

\textsuperscript{52} United States v. AT&T, 552 F. Supp. 131, 168 (D.D.C. 1982).

\textsuperscript{53} Kahn, \textit{supra} note 3, at 1065.

\textsuperscript{54} \textit{See id.} at 1068.
II.
ANTITRUST, REGULATION, AND THE SUPREME COURT

A. The State of the Law on Antitrust and Regulation in 1987

The law prevailing by 1987, for its part, did not stand in the way of a preference for antitrust enforcement. In regulated settings, the law permitted Kahn’s comparatively aggressive enforcement approach and did not incorporate the kinds of comparative institutional considerations that led Breyer to suggest a more modest role for antitrust. The courts had found regulation to imply antitrust immunity in limited circumstances, but generally only to the minimum extent necessary for the regulatory program to function.

By the time of the 1987 CLR symposium, federal courts had allowed public enforcement agencies and private parties to base antitrust claims on regulated conduct in a variety of industries. The DOJ had three times sued AT&T (in 1912, 1949, and 1974) for exclusionary practices against rivals in several telephone equipment and service markets. While the Supreme Court found the conditions for implied immunity to exist in a few cases, another string of cases illustrated a clear presumption in favor of preserving antitrust. 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 directing its members not to provide wire transfer services to the nonmember plaintiffs. While the Court found that the Securities Exchange Act of 1934 allowed the exchanges some degree of self-regulatory conduct, it held that the group boycott at issue was outside the permissible scope of such self-regulation and therefore not exempt from antitrust suits. The Court’s decision maintained a presumption against immunity in order to advance the core objective of section 1 of the Sherman Act: preventing anticompetitive collusion. Similarly, in 1973 the Court affirmed the government’s application of section 2 of the Sherman Antitrust

57. See BENJAMIN ET AL., supra note 49, at 713 (discussing the antitrust actions).
58. See, e.g., United States v. Nat’l Ass’n of Sec. Dealers, Inc. 422 U.S. 694, 721–22 (1975) (implying immunity based on repugnancy between the antitrust claim and the regulation); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 300–02 (1973) (finding the regulatory agency to have primary jurisdiction to make determinations under its authority prior to judicial hearing on civil antitrust claims).
60. Id. at 357–61.
Act to interconnection among rival electric utilities. The Federal Power Commission (FPC) had independent authority under the Federal Power Act to order and regulate such interconnection. The Court nonetheless upheld the lower courts’ decision to block a dominant utility from excluding a rival power distributor and monopolizing the relevant power market.

The presumption in these cases that antitrust and regulation operate simultaneously was consistent with the respective statutory texts, none of which expressly conferred immunity from antitrust law. Thus, where Congress was silent on the statute’s relationship with antitrust law, the Supreme Court maintained a presumption against antitrust immunity. To flesh out this presumption, the Court stipulated that a high level of conflict—“plain repugnancy” in the Court’s words—between antitrust and a statute must exist before courts could imply immunity from antitrust. Thus, by the 1980s the Supreme Court had narrowed the scope of implied antitrust immunity, its reasoning particularly applicable to industries undergoing deregulation.

This state of the law would appear to align with the preferences of regulatory skeptics and advocates of antitrust law, Congress could keep antitrust enforcement out of an industry by specifically stating that intention in a regulatory statute. Otherwise, courts would bar antitrust claims only where allowing them would directly frustrate specific regulatory objectives. The government’s divestiture of AT&T’s integrated telecommunications monopoly in 1984 appeared to confirm the wisdom of this presumption against antitrust immunity; that case has been called one of the most important antitrust cases ever. It would not, however, lead to a broadening of antitrust enforcement in regulated industries. In fact, the Supreme Court would move away from its strong presumption against implied immunity and toward a more limited application of antitrust law to regulated firms.

B. Twenty-Five Years Later: Antitrust and Regulation After Trinko and Credit Suisse

Seven years after Breyer wrote his 1987 article, he took his seat as Associate Justice of the United States Supreme Court. Since Breyer’s ascent to

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64. Id. at 373.
65. Id. at 373–75.
67. Boudin, supra note 21, at 1107.
68. 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. Dep’t of Justice, Address Before the Commonwealth Club of Calif.: Innovation and Antitrust (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).
the Court, the law governing the scope of antitrust enforcement in regulated industries has become less accommodating to antitrust, mostly as a result of the Court’s decisions in *Verizon v. Trinko* and *Credit Suisse v. Billing*. Justice Breyer played an important role in that change by joining the unanimous decision in *Trinko* and, more directly, by writing the majority opinion in *Credit Suisse*. This Section will discuss the evolution of legal doctrine regarding antitrust in regulated industries in recent years, focusing first on Justice Breyer’s opinion in *Credit Suisse*, and then on the *Trinko* opinion, which Breyer joined. Part III will then examine whether Breyer’s positions in those cases are consistent with the views and analysis he expressed in 1987, or whether they mark a shift toward skepticism of antitrust, a more favorable view of regulation, or both.

*Trinko* and *Credit Suisse* marked a distinct break from the Court’s previous requirement of a direct conflict between antitrust and specific regulatory directives before implying antitrust immunity. *Trinko* expanded the scope of, and rationale for, implied antitrust immunity with regard to a statute containing a savings clause that expressly preserved 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 the statutory prerogatives of regulators. The effect of each case was to reduce the scope of antitrust enforcement in regulated industries.

1. **Credit Suisse: Widening the Regulatory “Buffer Zone”**

Justice Breyer wrote for the seven-to-one majority in *Credit Suisse*, a private antitrust suit charging collusion among competing firms in the underwriting of securities’ initial public offerings. The Securities Act gives the SEC authority to review joint underwriting activities. While the statute contains no antitrust-specific savings clause, it does include a general savings clause stating that “the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.” The Court nonetheless found the securities laws to imply immunity from the plaintiffs’ antitrust claim. Its reasoning marked an important departure from precedent.

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71. *Id.* at 276.

72. 15 U.S.C. § 78bb(a); see also § 77p(a) (repeating the same general savings provision in the specific context of class action suits).

73. The majority per Justice Breyer gave two reasons for putting aside the savings clauses, neither of them convincing. First, the Court noted that the plaintiff had failed to raise the effect of the savings clauses in the lower courts. *Credit Suisse*, 551 U.S. at 275. That is an odd argument given that
The plaintiffs in *Credit Suisse* claimed that defendants violated section 1 of the Sherman Act, which prohibits “contracts, combinations, and conspiracies in restraint of trade,” by setting securities prices through joint conduct that went beyond what securities laws allow.\(^ {74}\) They also alleged that the defendants had violated antitrust and securities laws by impermissibly engaging in tying and similar activities.\(^ {75}\) Importantly, the Court took as given that the securities laws did, and “inevitably” would, render defendants’ conduct unlawful.\(^ {76}\) The Court nonetheless extended the potential-conflict rationale for immunity established by *Gordon* to apply even where a correctly construed antitrust claim would not actually conflict with regulation.\(^ {77}\) 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 . . . .”\(^ {78}\) Therefore, the Court expanded the notion of plain repugnancy to incorporate not just the genuine conflict that arises where antitrust could bar conduct that regulation might allow, but even conflict that could arise only from judicial mistake or confusion.

*Credit Suisse* thus went beyond prior implied immunity cases to establish a rule that blocks some claims even where they are based on legitimate antitrust principles, consistent with securities laws, and, correctly read, would not interfere with the applicable regulatory scheme. Because the underlying conduct is similar enough to regulated conduct that a judge might confuse the two and create a conflict with regulatory authority, the Court chose to err on the side of caution and bar antitrust claims. In doing so, the Court addressed its concern over a potential flood of “lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries.”\(^ {79}\) If plaintiffs could “dress what is essentially a securities complaint in antitrust clothing,”\(^ {80}\) they could bypass the expert securities regulators in favor it was not the plaintiff but the defendant who, in asking for immunity, sought a ruling in tension with the savings clauses. Second, the majority argued that in two earlier cases, *NASD* and *Gordon*, the Court had implied immunity to antitrust suits notwithstanding the same savings clauses. *Id.* (citing United States v. Nat’l Assoc. of Sec. Dealers, Inc., 422 U.S. 694 (1975); Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659 (1975)). But that reasoning ignores a crucial difference between those cases and *Credit Suisse*: in *NASD* and *Gordon* the antitrust suits could have directly conflicted with the SEC’s regulatory authority under the securities laws. In such cases the antitrust remedies would not be in addition to regulatory remedies, but “repugnant” to them, thus requiring the Court to choose between antitrust and securities law.

\(^ {74}\) *Credit Suisse*, 551 U.S. at 267.

\(^ {75}\) Tying involves conditioning the sale of one product (usually one over which the seller has market power) on the buyer’s agreement also to 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).

\(^ {76}\) *Credit Suisse*, 551 U.S. at 278–79.

\(^ {77}\) *Id*.

\(^ {78}\) *Id.* at 279.

\(^ {79}\) *Id.* at 281.

\(^ {80}\) *Id.* at 284.
of generalist courts more prone to errors and more likely to impose unwarranted costs on defendants. The Court, however, did not address the opposite effect that could result from its ruling: defendants could dress what are essentially antitrust complaints in securities clothing, thereby bringing their conduct into a gap where it would be immunized from antitrust but not reached by securities law.

The Court offered two reasons for insulating regulated firms from antitrust. First, antitrust can deter behavior that Congress sought to approve or encourage through securities statutes. The converse effect—regulation deterring the goals of antitrust—is unlikely, and where it occurs Congress is entitled to do so by specifying statutory objectives.\(^8\) Second, even if barred from pursuing antitrust claims, injured parties still have a remedy from the SEC.\(^8\) Both of these rationales, however, are open to question. \textit{Credit Suisse} potentially creates an enforcement gap, which raises concerns not over antitrust’s interference with regulatory goals but over regulation’s ignoring of antitrust’s goals. The case itself involved concerted conduct at the heart of what the antitrust laws prohibit.\(^8\) Far from providing a regulatory alternative to address the alleged antitrust injury, the SEC had not directly addressed the conduct at issue in the case.\(^8\) Thus, the likely practical effect of \textit{Credit Suisse} is to limit the scope of antitrust enforcement and expand the scope of implied immunity in regulated industries.

By eliminating antitrust as a remedy for harms that regulation likewise might not address, Justice Breyer’s \textit{Credit Suisse} opinion raises questions about the clarity and practical feasibility of antitrust law. Breyer’s concern that antitrust claims cannot be framed coherently enough for courts to distinguish them from regulatory claims suggests reservations not just about antitrust in relation to an existing regulatory scheme, but about antitrust generally. Were Breyer’s reservations as a Justice novel in light of his scholarly writings twenty and twenty-five years earlier? To address that question, it is important first to understand that Breyer in 2007 was not writing on a blank judicial slate.

2. Verizon v. Trinko and a Diminished Supplementary Role for Antitrust

In \textit{Credit Suisse}, Breyer’s emphasis on the costs and institutional shortcomings of antitrust enforcement built on themes the Court had articulated

\(^{8\text{1}}\) \textit{Id.} at 282–84.

\(^{8\text{2}}\) \textit{Id.} at 283.

\(^{8\text{3}}\) Section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” Joint price setting by competitors has long been illegal \textit{per se} under section 1. See, e.g., U.S. v. Trenton Potteries Co., 273 U.S. 392 (1927).

\(^{8\text{4}}\) Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 169–70 (2nd Cir. 2005) (finding the SEC neither to have permitted nor to have expressly prohibited the conduct at issue, while acknowledging it could not envision circumstances in which such conduct would be permitted).
three years earlier in *Verizon v. Trinko*, when it addressed the appropriate balance of antitrust and regulation under the Telecommunications Act of 1996. The Court in *Trinko* had already found reasons to limit certain antitrust claims against regulated firms even where the regulatory statute at issue expressly preserved simultaneous antitrust enforcement and absent the kinds of “repugnancy” the Court had required in its earlier implied immunity cases. *Trinko* arose in the context of local telephone competition pursuant to the Telecommunications Act of 1996. That statute attempts to foster competition among local telephone services by requiring the incumbent monopolies to provide new market entrants with access to their networks. When a new company wishes to provide service to customers in a given area, the 1996 Act thereby allows it to ask the incumbent to connect the customer’s line to the new entrant’s routing and billing equipment. In this way, the new company can provide service without building “last mile” lines to each customer. AT&T, which had been out of the local telephone business since the company’s divestiture in 1984, re-entered that market as a competitor after the 1996 Act. AT&T faced delays in providing service to the plaintiff because of a dispute with incumbent provider Verizon over AT&T’s access to Verizon’s network facilities.

Unlike the securities laws at issue in *Credit Suisse*, the regulatory statute in *Trinko* contains a specific antitrust savings clause, which states that “nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws” in telecommunications markets. The plaintiff claimed that Verizon violated section 2 of the Sherman Antitrust Act and the Communications Act by refusing to supply rivals like AT&T with the requisite network connections to provide service to customers like Plaintiff Trinko’s law office.

The case reached the Supreme Court after the Second Circuit reversed the district court’s dismissal of *Trinko’s* suit. The Supreme Court phrased the

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88. See *Trinko*, 540 U.S. at 404.
90. *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. Commc’ns Corp. v. Calif. Catalog & Tech., 594 F.3d 1149 (9th Cir. 2010) *cert. denied*, 131 S. Ct. 645 (2010). Whether the plaintiff had standing to sue under the antitrust laws as an “indirect purchaser” is also unclear; the *Trinko* majority does 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. *Trinko*, 540 U.S. at 416–18 (Stevens, J., dissenting).
92. *Id.* at 405.
question presented in Trinko as “whether a complaint alleging a 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.” The Court found the allegation did not constitute a legitimate antitrust claim, and reversed the Second Circuit.

The concern with Trinko is not the ruling against the plaintiff in that particular case, but the decision’s susceptibility to broad interpretations by lower courts that would preclude legitimate private and public antitrust claims. This concern arises out of the Court’s failure to make its ruling contingent on three critical factors that were present in Trinko but which might be lacking in other regulatory settings. First, incumbent telephone carriers’ duties to competitors under the 1996 Act were stronger than any such duties under section 2 of the Sherman Act. Second, the FCC had issued a set of rules that directly regulated the misconduct alleged in the case. Finally, the FCC actively administered these duty-to-deal regulations under the 1996 Act. The Court, however, did not identify any of these factors as necessary either to its ruling in Trinko or to that ruling’s future application, opening the door to varying interpretations of the Court’s opinion.

Lower courts could interpret Trinko narrowly to say that where a competent agency actively administers a rule whose standard for the competitive conduct is more demanding on the defendant than antitrust law, a violation of the agency’s rule does not constitute a separate violation of the antitrust laws. Such a reading of Trinko makes sense because it operates where the regulatory requirement might go beyond what antitrust would mandate and where there are marginal gains from adding antitrust to regulation. It is moreover faithful to the Court’s ruling that “just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards.” The conflict rationale of implied immunity precedent also would apply because where regulation goes further than antitrust, it is more likely that imposition of a duty to deal under antitrust law could contradict a regulatory judgment not to order mandatory dealing in particular circumstances.

93. Id. at 401.
94. As the Court itself said in Trinko, the duty of a firm to deal with its competitor is disfavored in antitrust law and liability for failure to do so lies “at or near the outer boundary” of antitrust law. Id. at 409. In contrast, the Telecommunications Act of 1996 affirmatively requires incumbent local telephone companies to deal with their rivals and to provide them with access to the incumbents’ network facilities. Telecommunications Act of 1996 § 101(a), 47 U.S.C. § 251(c)(3) (2006). Whereas antitrust law presumptively protects a firm’s ability to refuse to deal with a rival, the 1996 Act imposes obligations to so deal. Id.
96. Id.
97. Id. at 407.
The concern for antitrust enforcement, however, is that lower courts could just as easily read the *Trinko* opinion broadly as blocking antitrust claims even when regulation does not address the alleged competitive harm as directly or effectively as the Supreme Court found the FCC rules at issue in *Trinko* to do. *Trinko* states 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.” 98 The Court also described the contrasting scenario, in which simultaneous antitrust enforcement might be worthwhile, in a very limited way—where “[t]here is nothing built into the regulatory scheme which performs the antitrust function.” 99 The resulting risk is that, given the *Trinko* Court’s emphasis on the “sometimes considerable disadvantages” of antitrust, 100 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. 

Had the Court made clear that to preclude antitrust claims a regulatory structure must, like the one at issue in *Trinko*, be (1) directly relevant to the conduct at issue, (2) more demanding than antitrust law, and (3) actively administered, one might worry less about any collateral consequences for legitimate antitrust cases. Now, after *Trinko*, the existence of regulatory authority over a competition-related matter may make it more difficult for a plaintiff to pursue an antitrust challenge to the same conduct, regardless of how the regulatory agency exercises its authority, and even where Congress has expressly preserved simultaneous antitrust enforcement. 

The Court’s ruling technically bars only antitrust claims that exceed the clear boundaries of antitrust precedent.101 But as a practical matter, the Court’s line between the “novel” claims its rule would preclude and established antitrust claims that could proceed in light of the 1996 Act’s savings clause may be difficult to draw, especially in activities analyzed under the fact-intensive rule of reason.102 The more factual dimensions there are to a liability determination, the more likely it is that every example of some kind of conduct

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98. *Id.* at 412.
99. *Id.* (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963)).
100. *Id.*
101. *Id.* at 412–13.
102. “Under the Rule of Reason, the courts must undertake an extensive evidentiary study of (1) whether the practice in question in fact is likely to have a significant anticompetitive effect in a relevant market and (2) whether there are any procompetitive justifications relating to the restraint. Under the Rule of Reason, if any anticompetitive harm would be outweighed by the practice’s procompetitive effects, the practice is not unlawful.” *Antitrust Resource Manual: 7. Elements of the Offence*, U.S. DEP’T OF JUSTICE (Oct. 2011), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title7/ant00007.htm.
will be distinguishable from every other example and, therefore, to some extent be a novel expansion of the doctrine that came before.

*Trinko* therefore not only scaled back on antitrust enforcement in the presence of regulation, but also limited the boundary of antitrust liability for refusals to deal regardless of regulation. In concluding that the duties to deal under the 1996 Act went beyond relief recognizable under the antitrust laws, the *Trinko* Court read antitrust precedent on unilateral refusals to deal very restrictively. Despite several cases in which the Supreme Court and lower courts had found grounds to hold dominant firms liable for denying an essential input to competitors, the Court in *Trinko* disclaimed ever having sanctioned an “essential facilities” doctrine or any other general basis for refusal-to-deal liability. While the Court acknowledged that it had upheld liability for a unilateral refusal to deal in *Aspen Skiing v. Aspen Highlands*, it emphasized the unusual and specific facts of that case and described *Aspen* as being “at or near the outer boundary of Section 2 liability.” Because the facts in *Trinko* differed from those of *Aspen*, the Court held that the plaintiff did not state a recognized antitrust claim. As a doctrinal matter, the Court found that Trinko’s claim simply fell outside the reasonable scope of established section 2 liability. In so holding, the Court greatly limited section 2’s application to any unilateral refusal to deal.

Perhaps the most illustrative way to explain *Trinko*’s effect is this: had the decision been in place forty years ago, the government would likely not have been able to pursue the antitrust suit that led to the break-up of AT&T. To the

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103. A unilateral refusal to deal, the kind of conduct at issue in *Trinko*, is where a single firm declines to deal with a rival. This kind of conduct is usually legal as firms presumptively have no obligation to help their competitors or deal with them on any particular terms. Such unilateral refusals to deal are distinct from concerted refusals to deal, in which otherwise competing firms agree not to supply a particular party. Concerted refusals to deal are generally illegal *per se*. See Donald M. Falk, *Antitrust and Refusals to Deal After Nynex v. Discon*, PRAC. LAW., Apr. 2000, at 25, available at [http://www.appellatenet/articles/20465477.pdf](http://www.appellatenet/articles/20465477.pdf) (comparing unilateral and concerted refusals to deal and their respective treatment under the antitrust laws).

104. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); MCI Comm’ns Corp. v. AT&T, 708 F.2d 1081, 1092 (7th Cir. 1983); Phonotele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981).

105. *Trinko*, 540 U.S. at 410–11. The essential facilities doctrine was a multipart test that some federal courts had applied to find that a monopolist under some circumstances would have a duty to deal with rivals. For further discussion, see, for example, Howard A. Shelanski, *Unilateral Refusals to Deal in Intellectual and Other Property*, 76 ANTITRUST L.J. 369 (2009).

106. See *Trinko*, 540 U.S. at 409. In *Aspen* the Court found that a jury could reasonably find a refusal to deal to be anticompetitive where the defendant had previously had a long course of dealing with the plaintiff, and where defendant’s refusal to deal with plaintiff was comparatively less profitable. *Aspen*, 472 U.S. at 608.


108. 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).
extent that regulatory authorities have become more successful or active in enforcing competition-enhancing rules than they were in the past, one might be inclined to worry less about the loss of such antitrust enforcement. But the *Trinko* opinion can be read to hinge on the mere existence of a regulatory structure, not on its effectiveness, so the decision risks blocking antitrust cases where regulation looks good on paper but leaves an enforcement gap in practice.

**C. Consequences of Credit Suisse and Trinko for Deregulating Markets**

*Credit Suisse* and *Trinko* reduced the supplementary role of antitrust in governing the conduct of firms in regulated industries. Where regulation is strong and covers the full range of conduct plausibly proscribed by antitrust law, the rationale for additional antitrust enforcement is weak. But where regulation is not co-extensive with antitrust or exists only in principle rather than in actual practice, antitrust can play a valuable role, one that is more complementary than marginal or overlapping. This is particularly true in the case of industries undergoing deregulation and a transition from administrative oversight to market governance. The reduced ability after *Credit Suisse* and *Trinko* to raise antitrust challenges, even if the regulation would not as a legal or practical matter apply, could in fact impede deregulation. Regulators who might be willing to reduce enforcement of their rules in the presence of an antitrust safety net may be more reluctant to do so where that safety net has been weakened or removed.

A regulator’s reliance on antitrust as a safety net may be especially likely when a statute directs an agency to review its rules and exercise its discretion to eliminate those that may no longer be necessary. An example is the mandate in the Communications Act that the FCC review its media regulations every two years and modify or repeal those that are no longer in the public interest. In relaxing and modifying some of those rules, the FCC expressly relied on the availability of antitrust law. The agency first found that regulation was no longer necessary to achieve the Communication Act’s competitive objectives: “[W]e do not agree . . . that modifying the local TV ownership rule will increase the likelihood of anticompetitive conduct by broadcasters that own more than one station in a market, or that a certification requirement is necessary to protect against such conduct.” The FCC then made clear that it

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112. *In re* 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of
expected antitrust law to step in to make up for the reduced regulation: “Certainly, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes.” Antitrust can therefore help to bridge a gap for policy makers between inefficiently heavy regulation and insufficient prevention of anticompetitive conduct, a choice they are stuck with to the extent that Trinko and Credit Suisse reduce recourse to antitrust while a regulatory statute remains in place.

Concern over such a gap was central to both Breyer’s and Kahn’s arguments in their 1987 CLR articles. Kahn, however, was more sanguine than Breyer was about the need for antitrust during deregulation, and he remained so after Trinko. Writing in 2006, Kahn expressed his sympathy with shifting responsibility from the FCC to antitrust authorities over refusals to deal. He pointed to the FCC’s “objectionable extension of its own vague ‘public interest’ authority” as a reason to move all merger review exclusively to the antitrust agencies as well. Kahn, on the other hand, had greater reservations about the ability of antitrust agencies to assess mergers in markets undergoing deregulation, to prevent incumbents’ abuse of remaining pockets of monopoly power, or conversely, to avoid overprotecting new competitors. The change in the relationship between antitrust and regulation after Credit Suisse and Trinko therefore seems to fit more comfortably with Breyer’s more critical view of antitrust than with Kahn’s more confident assessment. But it is less clear how the more recent changes in the relevant law comport with the even greater skepticism about regulation that Breyer expressed in his 1987 CLR article and prior writings, an issue that this Essay now examines.


113. Id.


115. Id.

116. Interestingly, with respect to mergers the Telecommunications Act of 1996 splits the difference between Kahn and Breyer on merger review authority. Contrary to what Breyer might have favored, the 1996 Act expressly eliminates the FCC’s ability to assert exclusive jurisdiction over telecommunications mergers and subjects such mergers to normal antitrust review by the DOJ or FTC. On the other hand, the 1996 Act did not go as far as Kahn might have liked and make such jurisdiction exclusive to the antitrust agencies. The FCC still retains its independent authority to review license transfers, which essentially amounts to full merger review. See BENJAMIN ET AL., supra note 49, at 1057–59 (discussing merger review under the 1996 Act and the FCC’s exercise of its authority to review transactions among communications companies). Trinko does not bar simultaneous merger review by the FCC and the antitrust agencies because the legal standards and objectives under which the respective institutions review mergers are, at least in principle, distinct.
III.
BREYER IN 1987 AND IN 2007:
WERE CREDIT SUISSE AND TRINKO PUZZLING OR PREDICTABLE?

On the surface, Breyer’s role in Credit Suisse and Trinko might appear paradoxical: in his scholarly writing Breyer has been skeptical of regulation and supportive of antitrust law as a better, albeit sometimes flawed, alternative. One might therefore ascribe Breyer’s support for reducing the scope of antitrust in regulated industries to a shift in his thinking about antitrust or regulation. While Breyer’s thinking may have changed since he took his seat on the Court, several opinions he has written show that those changes are more subtle, and perhaps more counterintuitive, than a superficial view of Credit Suisse and Trinko might suggest. More importantly, however, Breyer’s 1987 CLR article reveals that no such changes in his thinking are necessary to explain his Credit Suisse opinion and Trinko vote. On the contrary, those decisions are quite consistent with his earlier thinking and were more predictable than paradoxical. The possible consequences of Credit Suisse and Trinko do, however, raise questions about whether those decisions will prove counterproductive to a broader policy goal of substituting antitrust for regulation where economic conditions make such substitution feasible.

A. Change in Perspective?

A simplistic explanation for Breyer’s positions in Credit Suisse and Trinko might be that Breyer has become either less critical of regulation, more critical of antitrust, or both. Such a shift might explain a move away from viewing antitrust as a valuable supplement, if not superior substitute, to regulation. The evidence, however, undermines that explanation for Breyer’s expansion of implied antitrust immunity. Breyer’s 1987 CLR article shows that he was neither radically opposed to regulation nor uncritical of antitrust. As discussed in Part I and examined in more detail below, Breyer’s preference for antitrust over regulation did not override his pragmatic, comparative analysis of how the two institutions would solve a particular problem in a given set of circumstances. This pragmatism explains his concern that antitrust might be the less appropriate institution to handle several issues in airline transportation and telecommunications.

Breyer’s opinions since joining the Supreme Court demonstrate that he has remained both critical of regulation and at times strongly defensive of antitrust, bucking the majority in several important cases. For example, in his 2002 dissent in Verizon v. FCC, Breyer dissented from a majority decision upholding access-pricing regulations that, in his view, irrationally coddled inefficient competitors while diminishing the investment and innovation incentives of incumbents,117 concerns that he raised in his 1987 article.

Similarly, Breyer’s pragmatic approach to antitrust emerged in his defense of retaining *per se* liability for vertical price restraints against the majority’s dismantling of such liability in *Leegin Creative Leather Products v. PSKS*.

The majority emphasized precedential and theoretical reasons for removing *per se* liability, whereas Justice Breyer, emphasizing empirical evidence that the prohibition of vertical price restraints led to lower prices for consumers, argued that decades of a *per se* rule against vertical price restraints had not revealed any harm from the prohibition. Likewise, in *California Dental Association v. FTC*, Breyer persuasively argued against the majority’s imposition of an unusually high burden of proof on the Federal Trade Commission in its enforcement against horizontal conduct—a rule against price advertising—that Breyer thought could reasonably be presumed anticompetitive. In that case, he did not share the majority’s concern that the FTC might be prohibiting beneficial restraints, and strongly backed antitrust law’s presumption against limitations on price competition. Whether one agrees or disagrees with those decisions, they provide a counterpoint to the more skeptical view of antitrust that one might infer from *Trinko* and *Credit Suisse*.

Breyer’s skeptical view of antitrust in *Trinko* and *Credit Suisse* therefore appears more attributable to the regulated context in which the cases arose than to a loss of faith in antitrust itself. At issue in those cases was not the choice between antitrust and regulation, but the choice between regulation alone and regulation plus antitrust enforcement. As already discussed, and as Justice Thomas forcefully argued in his *Credit Suisse* dissent, there are good arguments that Congress had already chosen the latter through its inclusion of the savings clauses in the Securities Acts and the Telecommunications Act of 1996. Once the Court maneuvered around the statutory savings clauses, however, the question it faced was not whether antitrust was better or worse than regulation, but whether antitrust would provide net benefits given that regulatory costs would be incurred no matter what. Thus the question of the marginal benefits of antitrust on top of regulation is a different question from that of the comparative benefits of antitrust and regulation standing alone. Given this, one can see how the Court might limit antitrust interventions that occur in addition to, rather than instead of, regulation. As the regulation addressing a competition issue

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119. *Id.* at 912–15 (Breyer, J., dissenting).
121. See *id.* at 785.
becomes more extensive, the addition of antitrust enforcement on top of that regulation becomes less warranted as a policy matter.

For example, consider the access to incumbent networks at issue in Trinko. The plaintiff sought access for AT&T to Verizon’s network through an anticompetitive refusal-to-deal theory under section 2 of the Sherman Act. By 2004, however, the Court was quite familiar with the FCC’s efforts to grant exactly such access through regulation under the 1996 Act. Not only did the Court find that the FCC had a regulatory regime in place for such access, but the Court had itself reviewed the FCC’s aggressive pricing regime that mandated access for competitors at extremely low cost.\footnote{See Verizon Commc’ns, Inc. v. FCC, 535 U.S. 467 (2002).} Moreover, the Court in 1999 had already found the access rules the FCC tried to impose on incumbents to be unwarrantedly broad and favorable to new entrants,\footnote{AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).} as did the U.S. Court of Appeals on three occasions between 1999 and 2004.\footnote{See generally Covad Commc’ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006) (discussing the relevant cases).} While it is hard to know how the aggressiveness of the FCC’s regulatory regime factored into Trinko, the presence of regulation that pushes the boundaries of an agency’s discretion reinforces rather than contradicts the logic of Trinko: what benefits could antitrust enforcement have where regulation already goes much farther in the conduct it requires of the defendant? The ironic result could be that the more costly the regulation, the more it drives out the antitrust enforcement that could have proven itself to be the better alternative.

Neither a diminished opinion of antitrust nor a better opinion of regulation is therefore necessary to explain Breyer’s, and the Court’s, rebalancing of antitrust and regulation in favor of the latter. Moreover, while there are signs that the Court as a whole has become more wary of antitrust, Breyer’s dissents in Leegin and Cal Dental suggest that he does not share in that view. Further, there is no evidence that either Breyer or the Court as a whole has become more enamored of regulation.

B. Breyer’s Earlier Writings and the Roots of Credit Suisse and Trinko

The discussion above shows how one could advocate limits on antitrust intervention in regulated industries despite having an abstract preference for antitrust over regulation. To be sure, implying immunity from antitrust claims becomes easier the more one finds fault with antitrust or the more one finds regulation to be comparatively effective. No shift in Breyer’s thinking about the comparative merits of the two institutions is necessary, however, to explain his decision in Credit Suisse and his vote in Trinko. Breyer’s 1987 CLR article suggests that his analysis of antitrust and regulation would lead him naturally to an implied immunity doctrine that goes beyond previous definitions of “plain repugnance,” as both Credit Suisse and Trinko do. Moreover, the article
suggests that, at least for *Trinko*, Breyer would have barred the antitrust claim even if he had been able to choose antitrust enforcement as an alternative, and not just an addition, to the applicable regulation.

The heart of Breyer’s 1987 CLR article is his examination of the risks that antitrust could pose if substituted for regulation in industries making the transition from classical regulation to governance by market forces. Breyer identifies three specific policy risks likely to arise from opting for antitrust instead of regulation.¹²⁵

The first risk was that antitrust policy, particularly merger enforcement, will create problems because it “will overlook the special features of particular industries.”¹²⁶ Breyer begins by observing that antitrust could prove either too lenient or too strict in its assessment of mergers because deregulated industries have “special characteristics” that might make standard presumptions about the relationship between market structure and market performance inapplicable.¹²⁷ With respect to airlines, for example, Breyer argued that “empirical generalizations that support current merger policy do not necessarily reflect the special circumstances of the deregulated carriers. . . . Some of these features recommend a more stringent policy; others counsel us toward a more lenient one.”¹²⁸ Breyer recognized that there was some risk in the fact that Congress had given the Department of Transportation authority to approve airline mergers in the wake of deregulation given the Department’s inexperience with merger review.¹²⁹ But he ultimately concluded that, due to the special facts that arise in regulated markets, administrative review of mergers under a broad “public interest” test would be better suited to airlines than review by antitrust enforcers under general merger law,¹³⁰ a proposition with which, as noted above, Kahn appeared to disagree.¹³¹

Breyer’s concern about general antitrust review of mergers among firms with a particular regulatory history could partly explain his *Credit Suisse* opinion. As discussed above, that case involved an attempted antitrust suit against collusion in the underwriting of initial public offerings of securities. The relevant regulatory statutes gave the SEC authority to review some joint underwriting activities, even if it likely did not have authority to permit the

¹²⁵. Breyer, *supra* note 2, at 1011–31. Breyer identifies the remaining policy risk as one of regulation, not of antitrust: that regulators will fail in their treatment of remaining regulated portions of otherwise deregulated industries. The main problem Breyer identifies is that of “bypass,” where new entrants allow certain customers to bypass regulated facilities, leaving those facilities to be funded through increasingly higher prices to the remaining users for whom bypass is not feasible. *Id.* at 1027–28. Breyer discusses several possible regulatory approaches to the bypass problem in his article. *Id.* at 1027–31.

¹²⁶. *Id.* at 1011.

¹²⁷. *Id.*

¹²⁸. *Id.* at 1012.

¹²⁹. See *id.* at 1016.

¹³⁰. *Id.* at 1018.

precise kinds of activity the plaintiffs alleged in their antitrust suit. The concern Breyer expressed with antitrust review of airline mergers in 1987 was that the unique circumstances of that deregulating industry might make normal antitrust decisions about market structure and competition inapt. The same concern is relevant to securities markets, or indeed any market in which there might be reasons that cooperation among rivals is desirable for certain regulatory objectives.

Although mergers and collusion present distinct legal and policy questions and receive different antitrust treatment (mergers are often harmless to competition and therefore permissible whereas price collusion among competitors is per se illegal), both kinds of conduct can have anticompetitive effects if unrestrained. That Congress gave the SEC some authority to review joint underwriting activities in the special environment of the securities market may have signaled to Breyer that, as he thought would occur with airlines, regular antitrust intervention in the market could wind up blocking conduct that in context was more beneficial than harmful for the relevant markets. Breyer’s early concern with governing the market structure of deregulating industries through antitrust enforcement therefore could explain his later view in Credit Suisse that little would be lost by leaving structural governance of securities markets to expert regulators rather than to antitrust courts.

The second risk Breyer identified was that “antitrust policy will protect competitors to the detriment of competition.” It is well established in antitrust that certain prohibitions, particularly those that address monopolization under section 2 of the Sherman Act, risk handicapping aggressive competition and, in so doing, harm the process of competition. The line between aggressive, pro-consumer competition and anticompetitive conduct that will harm consumers can be a fine one. Both kinds of conduct harm particular competitors. The difference is that aggressive competition does so in a good way: by beating competitors on the merits of price and/or quality to the benefit of consumers. Anticompetitive conduct, on the other hand, harms the competitive process to the ultimate detriment of consumers. A notable example of the difficulty antitrust law can have in drawing the line between aggressive but good conduct and anticompetitive conduct was United States v. Alcoa. In that case, the Second Circuit acknowledged Alcoa’s conduct to be commendable commercial practice and good for consumers, but at the same time felt compelled by precedent to condemn Alcoa’s conduct as impermissibly harming competitors under section 2. Antitrust law had, by 1987, evolved significantly from the time of Alcoa and drew an important distinction between the beneficial objective of protecting competition and the more likely harmful

133. Breyer, supra note 2, at 1018.
134. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416 (2d Cir. 1945).
135. See id.
one of protecting particular competitors. The concern that Breyer raised, focusing particularly on entry by new carriers into the long distance market in the wake of the AT&T divestiture, is that antitrust would unduly restrict AT&T’s conduct in the long-distance market to ensure the success of then-emerging rivals MCI and Sprint.

Somewhat curiously, the specific limitations on AT&T that Breyer focused on were the result of regulatory action by the FCC, not of antitrust enforcement. For example, Breyer notes that in trying to prevent predatory pricing—pricing below cost to drive a competitor from the marketplace only to raise prices again later—regulators might go too far, thereby hobbling pro-competitive price-cutting by the incumbent and reducing normal competitive pressure on rivals. He argues that the threat of an antitrust suit is enough of a deterrent to predatory pricing to make regulation of such conduct unnecessary. There is a bit of irony in this suggestion given that, in 1983, Breyer authored the opinion in *Barry Wright v. ITT Grinnell*, which expressed skepticism toward predatory pricing suits under section 2 of the Sherman Act. In this opinion, Breyer imposed a high burden on plaintiffs to show that a defendant not only cut prices, but did so to a level below an economically reasonable definition of the defendant’s costs. Even before the Supreme Court limited predatory pricing claims in *Brooke Group v. Brown & Williamson*, Breyer’s *Barry Wright* decision blunted the deterrent effect of potential antitrust liability for predatory pricing and at the same time made it less likely that such overprotection of competitors would result from antitrust enforcement. Perhaps in implicit acknowledgment of this fact, Breyer, by the end of this section of his article, refers to the overprotection of competitors more generically as “one of the policy risks” and not as one of the *antitrust* policy risks in a deregulated market. The fact that Breyer begins this section of his article by treating overprotection of particular rivals as a problem for antitrust nonetheless shows his cautious, if not skeptical, view of antitrust under particular regulatory circumstances.

Breyer’s final concern was that “antitrust policy will be unable to prevent anticompetitive bottlenecks in partially deregulated industries.” The bottleneck problem arises where monopoly power has waned to the point that deregulation is warranted, but not to the point where all pockets of market power are eliminated from the marketplace. The result is that integrated,
deregulated firms might use their remaining market power at one level of a market (the bottleneck) to harm competition at another, more competitive level of the market. Consider an example from telecommunications. After the break-up of AT&T in 1984, local telephone companies remained monopolies by owning the only lines physically reaching final consumers. So, if a long-distance company wanted to sign up a subscriber, it had to get the local phone company to interconnect the long-distance company to the local network and, in turn, to the final consumer. The local carrier could potentially use its control over the bottleneck to discriminate in favor of its own long-distance affiliate, perhaps by charging exorbitant rates for interconnection to long-distance competitors or refusing to connect rivals at all.

There are several potential solutions to the bottleneck problem, all of them flawed. For example, one could—as the consent decree that broke up AT&T did—simply forbid local telephone companies from entering the long-distance business. Without its own long-distance business to protect, the local telephone carrier does not have incentive to discriminate against unaffiliated long-distance carriers competing to serve the local carrier’s subscribers. This restriction, however, reduces long-distance competition to the extent that it keeps the local carrier from competing against the unaffiliated long-distance providers. Alternatively, one could require the local company to interconnect on non-discriminatory terms or at a particular price. But this runs two risks. First, some subtle forms of discrimination could go undetected (such as degrading the connection quality of rivals or dropping occasional calls). Second, setting access terms is difficult. If access prices are too low they can deter investment and innovation by the monopolist in the local network; if they are too high they may not solve the discrimination problem. Breyer argues that antitrust is at a disadvantage to regulation in addressing such complexities because courts have less ability than regulatory agencies to investigate facts, experiment with remedies, balance competing considerations, or draw on a history of experience and expertise. He therefore concludes that bottleneck problems “[seem] more amenable to regulatory control” than to antitrust enforcement.143

Whether or not one agrees with Breyer’s conclusion, it is carefully worked out in his 1987 article and, for current purposes, relevant to understanding how Breyer voted in *Trinko*. At issue in that case was the use of section 2 to attack alleged discrimination at an economic bottleneck—a bottleneck already being managed by an elaborate set of FCC rules. Given that in 1987 Breyer believed “our basic institutional instinct seems backward” in using an antitrust court to supervise issues related to local telephone bottlenecks instead of using

143. *Id.* at 1043.
regulation, \(144\) it is not surprising that in 2004 he would restrain antitrust intervention when that institutional order had reversed.

Breyer’s discussion of the bottleneck problem also highlights a concern that was an important factor twenty years later in Breyer’s \textit{Credit Suisse} opinion: the limited ability of courts to deal with complicated competition problems. The Court speaks explicitly in both \textit{Credit Suisse} and \textit{Trinko} about the hazards of diverting claims from expert agencies to non-expert courts. \(145\) The risk is that plaintiffs’ ability to seek through antitrust what they could not obtain through the regulatory process could lead to a flood of costly litigation that, when multiplied by the likelihood that generalist courts will make errors at both the pleading and merits stages of litigation, could distort firms’ competitive and innovative incentives in a way that will be costly to society.

While perhaps less explicitly concerned about judicial errors in his 1987 article, Breyer was nonetheless concerned at that time with the institutional limits of antitrust courts. After noting in his \textit{CLR} article that antitrust policy is administered primarily by courts, Breyer identified three basic difficulties that courts face in that task: they are bound by their decisions and cannot flexibly “reverse direction or . . . have a change of heart” thereafter; they have difficulty investigating a case because they depend on a record generated through the adversarial process; and they “find it difficult to balance factors tending in opposite directions, for they are uncomfortable in the absence of standards for weighing each factor in the balance.” \(146\) Breyer’s concern with judicial capabilities reappears in \textit{Credit Suisse}. The principal reason Breyer gave for barring the plaintiff’s claim against the underwriters was that other, slightly different claims that should be brought under the securities laws would be erroneously labeled by courts as antitrust claims; the courts’ disposition of those claims in antitrust risked causing conflict with securities regulation. \(147\)

\textbf{C. Consistency, but Some Open Questions}

The discussion above shows that Breyer’s positions in \textit{Trinko} and \textit{Credit Suisse}, despite their apparent favoring of regulation over antitrust enforcement, do not depend on Breyer’s having either a diminished opinion of antitrust or an improved view of the effectiveness of regulation. While such a shift in thinking would lead to finding antitrust immunity in regulated industries more frequently, Breyer’s past writings suggest that the explanation lies elsewhere. Instead, \textit{Credit Suisse} and \textit{Trinko} reflect the implied immunity doctrine’s incorporation of long-standing reservations that some, including Breyer, held about antitrust in the regulatory context. As expressed in his \textit{CLR} article and his

\begin{footnotesize}
\begin{enumerate}
\item \(144\) Id. at 1044.
\item \(146\) See Breyer, \textit{ supra} note 2, at 1043.
\item \(147\) Credit Suisse, 551 U.S. at 279.
\end{enumerate}
\end{footnotesize}
1982 book, Breyer’s reservations are not about antitrust in general, or about antitrust law as normally preferable to regulation, but about antitrust law in the special cases where regulation would institutionally do a better job.

Somewhat less intuitively, perhaps, Trinko and Credit Suisse are consistent with (even if they do not themselves reflect) deepened pessimism about the efficiency of regulation and regulatory reform. Concern about the marginal costs of antitrust is greatest when the relevant regulatory program is likely to overreach and fail to adjust to market conditions. There is nothing inconsistent about saying that although antitrust is preferable to regulation, there is no need to incur the costs of the former if the latter will address the relevant issues and remain in place regardless of whether antitrust is allowed to proceed. The more extensive and entrenched the regulations governing competition in an industry, the more reasonable it may be to withhold the supplement of antitrust regardless of what one objectively thinks of the regulatory scheme at issue.

Credit Suisse and Trinko nonetheless leave open two questions, one doctrinal and the other more theoretical. The doctrinal question is: How relevant and actively enforced do regulations have to be before they preclude either legitimate but potentially confusing antitrust suits (Credit Suisse) or novel but potentially legitimate antitrust claims (Trinko)? Both cases leave the answer unclear. In Trinko, the regulation at issue was directly on point and actively enforced by the FCC. Confined to the particular facts of the case, the Court’s decision seems right. The way the Court decided the case, however, invites lower courts to apply the case to regulated settings where the logic of excluding antitrust enforcement is much weaker.148 In Credit Suisse, the very conduct the plaintiffs were challenging had been met in the past with regulatory inaction, suggesting that regulations could displace antitrust even where regulatory oversight of competition issues is more theoretical than actual.

The more theoretical question is why the Court did not consider the potential effects on the longer-term interactions between antitrust and regulation. As discussed above in Section C, the absence of an antitrust safety net could cause regulation to be stickier and more heavy-handed than it otherwise might be. The interaction between antitrust and regulation is similarly reflected in Professor Kahn’s statement that he found the deregulations in which he had been involved to have “greatly accentuated the importance of antitrust enforcement.”149 It would therefore seem natural, especially for one so attuned to the shortcomings of regulation as Breyer, to give more express consideration to whether an agency’s willingness and ability to make discretionary reductions in regulation to meet changing market conditions diminish as the availability of simultaneous antitrust enforcement

148. See Shelanski, supra note 110, at 702.
149. Kahn, supra note 3, at 1059.
becomes less certain. As an industry becomes more competitive, antitrust can be a more nuanced tool for governing its economic conduct and performance than regulation, even though the regulatory statute may remain on the books.\textsuperscript{150} To the extent decisions like \textit{Trinko} and \textit{Credit Suisse} deter such forbearance of regulation in favor of antitrust, they may have the unintended consequence of not only precluding antitrust where it overlaps with regulation, but where it could become a superior substitute and encourage costly regulation to retreat.

\textbf{CONCLUSION}

The relationship between antitrust and regulation has evolved significantly in recent years as a result of the Supreme Court’s decisions in \textit{Trinko} and \textit{Credit Suisse}. Those cases make it harder for plaintiffs to bring antitrust claims against firms whose relevant conduct is already governed by regulation. \textit{Trinko} and \textit{Credit Suisse} in part reflect the Court’s effort to avoid the duplicative and unnecessary costs that would arise from allowing antitrust enforcement where it would bring little additional benefit to consumers. But those decisions also raise concerns about the potential costs of antitrust enforcement itself, quite apart from whether such enforcement involves a regulated firm. These two aspects of those cases raise the question of whether the Supreme Court has become relatively less hospitable to antitrust than to regulation. That result would be surprising given the classical objections to industrial regulation and the comparatively better light in which antitrust has been seen in the past. It would pose a particular paradox in light of the central role Justice Breyer, through his authorship of the majority opinion in \textit{Credit Suisse} and his joining in the \textit{Trinko} opinion, has played in the Court’s recent antitrust and regulation jurisprudence.

This Essay has tried to show that Breyer’s views on antitrust and regulation as a Justice are more predictable than paradoxical, and have clear roots in his earlier writings as a scholar. Those writings, notably his 1987 \textit{CLR} article and his 1982 book, show that while Breyer has always been skeptical of regulation and much more favorable to antitrust enforcement, he was never as opposed to regulation as the classicists or as favorable toward antitrust as other deregulation-minded thinkers such as Kahn.

While trying to explain Breyer’s positions in \textit{Credit Suisse} and \textit{Trinko}, this Essay has also discussed two potential, harmful consequences of those cases: that lower courts would interpret them broadly to preclude antitrust enforcement even where the competition-oriented regulation is weak in substance or administration, and that regulatory agencies might be less willing to retreat from outdated regulation if they become less certain about the availability of antitrust as a backstop.

Although Breyer in his 1987 *CLR* article was less adamant about preserving antitrust and reducing the role of regulators than Kahn was in his, these outcomes would be squarely at odds not just with Kahn’s analysis but also with Breyer’s skepticism of regulation and his general preference for antitrust enforcement. In this respect the views Breyer and Kahn have in common are far greater than those on which they differ. Should *Credit Suisse* and *Trinko* in fact lead to unintentional gaps in competition enforcement or entrenchment of costly regulation, Breyer and Kahn’s shared thinking could provide the foundation for a doctrinal correction that would restore the balance of antitrust and regulation.