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FROM *BORDEN* TO *BILLING*: IDENTIFYING A UNIFORM  
APPROACH TO IMPLIED ANTITRUST IMMUNITY FROM THE  
SUPREME COURT'S PRECEDENTS

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INTRODUCTION

The federal antitrust laws<sup>1</sup> “represent a fundamental national economic policy.”<sup>2</sup> They govern virtually every business activity in the country, and seek to protect “unfettered competition in the marketplace.”<sup>3</sup> As economics teaches, unrestrained competition generally produces the best allocation of society’s resources,<sup>4</sup> and creates incentives for innovation and product development by rewarding the more efficient firms in an industry.<sup>5</sup> Accordingly, the antitrust laws prohibit and punish conduct which unreasonably restrains competition, including agreements to restrain trade,<sup>6</sup> and attempted and actual monopolization.<sup>7</sup>

Despite the importance and broad scope of the antitrust laws,<sup>8</sup> certain conduct is immune from antitrust scrutiny. Immunities from the antitrust laws generally take one of two forms: express or implied.<sup>9</sup> Express immunity exists where Congress enacts a law that expressly exempts certain activity from antitrust scrutiny.<sup>10</sup> But because Congress typically says

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1. The majority of substantive federal antitrust laws are found in the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2000), and the Clayton Act, 15 U.S.C. §§ 12–27 (2000). See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 49 & n.17 (2d ed. 1999).

2. *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966).

3. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985).

4. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

5. Jerome Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 5 (1976).

6. 15 U.S.C. § 1.

7. *Id.* § 2.

8. See *Northern Pac. Ry.*, 356 U.S. at 4 (“The Sherman Act was designed to be a comprehensive charter of economic liberty . . . .”); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) (The Sherman Act is “a charter of freedom.”).

9. See HOVENKAMP, *supra* note 1, at 702.

10. *Id.* Express antitrust immunities appear in regulatory statutes governing the agriculture, fishing, telecommunication, and banking industries, to name only a few, and immunize what might other-

nothing about how a particular law affects the enforcement of the antitrust laws, most antitrust immunities are implied from the text of a statute.<sup>11</sup>

This note focuses on the type of antitrust immunity arising in federally-regulated industries, a doctrine commonly referred to as “implied antitrust immunity” or “implied immunity.”<sup>12</sup> Federally-regulated industries present a unique problem in antitrust law. Specifically, when Congress enacts federal regulation, it does so in part because it has determined that the public interest is better served by *restraining* competition in a particular industry, contrary to the main purpose the antitrust laws.<sup>13</sup> The doctrine of implied antitrust immunity allows courts to resolve conflicts between a particular regulatory scheme and the antitrust laws in order to reconcile the operation of both statutes.<sup>14</sup> Simply put, it instructs that the “antitrust laws [should] not come into play when they would prohibit an action that a regulatory scheme permits.”<sup>15</sup>

To illustrate, consider the securities industry, an industry currently subject to extensive federal regulation.<sup>16</sup> The Securities and Exchange Commission (SEC) plays a key role in this regulatory scheme. Created by the Securities Exchange Act of 1934,<sup>17</sup> the SEC is responsible for enforce-

wise be *per se* violations of the antitrust laws. See Jonathan Rubin, Regulation-Based Antitrust Quasi-Immunity 13–14 (Mar. 30, 2005) (unpublished article), <http://www.antitrustinstitute.org/archives/files/401.pdf>. Express immunities from the antitrust laws are strictly construed. Fed. Mar. Comm’n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973).

11. HOVENKAMP, *supra* note 1, at 703.

12. For some time, both commentators and the Supreme Court had confused the doctrine of implied antitrust immunity—also known as exclusive jurisdiction—with the related doctrine of primary jurisdiction. Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 YALE L.J. 254, 256 n.15, 259 n.28 (1975) [hereinafter *AT&T and the Antitrust Laws*]. In contrast to exclusive jurisdiction, which deprives the court of any and all jurisdiction over a particular antitrust claim, the doctrine of primary jurisdiction simply requires a court to defer its exercise of jurisdiction until a later date. Specifically, where Congress has granted a regulatory agency the authority to resolve certain issues, the court must refer the matter to that agency before it decides the case. *Id.* at 256 n.15. For the remainder of this note, any reference to implied antitrust immunity is intended to refer to the doctrine of exclusive jurisdiction only. For an analysis of the types of antitrust immunity not discussed in this note, including *Noerr-Pennington* immunity, state action immunity, *Buford* abstention doctrine, and filed-rate doctrine, see Rubin, *supra* note 10. Another closely related doctrine not addressed in the above-referenced article is the federal instrumentality doctrine; this doctrine is discussed at length by the court in *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 580–82 (2d Cir. 2000).

13. *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1312 (7th Cir. 1985).

14. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963).

15. *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d Cir. 1990).

16. U.S. Securities & Exchange Comm’n, The Laws that Govern the Securities Industry, <http://www.sec.gov/about/laws.shtml> (last visited Apr. 29, 2008). The laws governing the securities industry include the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2000), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78nn (2000), the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa–77bbbb (2000), the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64 (2000), the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (2000), and the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

17. 15 U.S.C. § 78d (2000).

ing the federal securities laws, and does so with several goals in mind: (1) protecting investors, (2) ensuring the efficient and fair operation of securities markets, and (3) facilitating the formation of capital.<sup>18</sup>

Occasionally, the SEC's goals conflict with the primary goal of antitrust law, that of preserving competition.<sup>19</sup> For instance, although the SEC may allow a particular securities exchange to use a system of fixed commissions in order to preserve market efficiencies,<sup>20</sup> the exchange's conduct would also appear to violate Section 1 of the Sherman Act in that it represents an agreement to fix prices.<sup>21</sup> In the event that an antitrust plaintiff complains about the exchange's system of fixed commissions, the court will face a conflict. On the one hand, Congress has authorized the SEC under the Securities Exchange Act to decide what policies will best serve the interests of the securities industry.<sup>22</sup> But on the other hand, Congress obviously expects the courts to enforce the antitrust laws. Viewed in this light, implied antitrust immunity simply presents an issue of statutory construction.<sup>23</sup> The court must decide whether to infer a congressional repeal of an earlier law (the Sherman Act) due to its conflict with a later one (in this case, the Securities Exchange Act).

It is a familiar rule of statutory construction that repeals of earlier statutes by implication are not favored.<sup>24</sup> Because courts presume that Congress enacts new laws with full knowledge of existing ones, the general doctrine of "implied statutory repeal" instructs that courts should not infer a repeal of an earlier statute unless (1) the two statutes are irreconcilable, or (2) Congress has clearly manifested its intent to repeal.<sup>25</sup> As this note will illustrate, the Supreme Court has applied an even stricter test to claims for implied repeal of the antitrust laws—i.e., claims for implied antitrust immunity.<sup>26</sup> Because of the antitrust laws' "indispensable role" in our econ-

18. U.S. Securities & Exchange Comm'n, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwe.do.shtml> (last visited Apr. 30, 2008).

19. See Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003).

20. See *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 664–65 (1975).

21. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (discussing the Supreme Court's consistent prohibition of price-fixing agreements as *per se* illegal restraints under the Sherman Act).

22. See *Gordon*, 422 U.S. at 667.

23. Robert Simon Balter & Christian C. Day, *Implied Antitrust Repeals: Principles for Analysis*, 86 DICK. L. REV. 447, 450 (1982).

24. See *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

25. *Id.*

26. See *infra*, Part IV.B.

omy,<sup>27</sup> the Court has declared that such claims are “strongly disfavored.”<sup>28</sup> Antitrust immunity is to be implied “only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary.”<sup>29</sup> Following these principles, the Supreme Court has granted just one claim for implied antitrust immunity since 1975.<sup>30</sup>

Despite the Supreme Court’s reluctance to grant claims for implied antitrust immunity, the lower federal courts have granted six such claims in the last five years.<sup>31</sup> Moreover, although such a small group of cases is not normally cause for concern, it is significant here because federal courts had granted just four implied immunity claims in the previous nineteen years, and none since 1991.<sup>32</sup> At the very least, the increased frequency of successful claims suggests that courts today are more willing to find implied antitrust immunity. Has the doctrine of implied antitrust immunity been diluted?

This note examines the current state of the implied immunity doctrine in antitrust to determine whether courts have in fact become more willing to grant claims for implied immunity, to explore possible reasons for such a change, and to argue how and why courts should reverse this trend. Part I of this note reviews the Supreme Court cases that established the doctrine of implied antitrust immunity. Part II summarizes how the lower federal courts have applied the doctrine based on these Supreme Court cases. Generally, the lower courts fail to use the same factors in their analysis, and their application of the doctrine has become both inconsistent and unpredictable.<sup>33</sup>

In Part III, this note discusses the Supreme Court’s two recent implied immunity decisions, *Verizon Communications Inc. v. Law Offices of Curtis*

27. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 348 (1963).

28. *Id.* at 350.

29. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963).

30. *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2387 (2007).

31. *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006); *JES Properties, Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224, 1228 (11th Cir. 2006), *cert. denied*, No. 06-576, 2007 WL 506043 (Feb. 20, 2007); *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 148 (2d Cir. 2003); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 803 (2d Cir. 2002); *Last Atlantis Capital LLC v. Chi. Bd. Options Exch., Inc.*, No. 04-C-397, 2005 WL 3763262, at \*3 (N.D. Ill. Mar. 30, 2005); *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 499 (S.D.N.Y. 2003), *vacated*, *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005).

32. *Finnegan v. Campeau Corp.*, 915 F.2d 824, 826 (2d Cir. 1990); *Am. Ass’n of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.*, 911 F.2d 786, 788 (D.C. Cir. 1990); *Behagen v. Amateur Basketball Ass’n*, 884 F.2d 524, 525 (10th Cir. 1989); *Am. Agric. Movement, Inc. v. Bd. of Trade of City of Chi.*, 770 F. Supp. 407, 415 (N.D. Ill. 1991), *rev’d*, 977 F.2d 1147 (7th Cir. 1992).

33. *Parker C. Folse, III, Note, Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 TEX. L. REV. 751, 756 (1979).

*V. Trinko*<sup>34</sup> (*Verizon v. Trinko*) and *Credit Suisse Securities v. Billing*.<sup>35</sup> Together with the lower courts' confused application of the doctrine, these two decisions threaten to undermine the fundamental importance of the antitrust laws by prompting a surge in successful implied immunity claims. Accordingly, Part IV of this note attempts to clarify the doctrine of implied antitrust immunity. After explaining why three commentators' proposed modifications to the doctrine are inadequate, this note demonstrates why the Court should instead adhere to the framework for implied immunity analysis already established by its prior decisions. Though similar to the general test for implied statutory repeal, the Court's test for implied antitrust immunity is understandably more rigorous due to the importance of the statute that has arguably been repealed. Unless a defendant can show (1) irreconcilability between the antitrust laws and a later regulatory statute, and (2) clear evidence of congressional intent to repeal the antitrust laws, the Court's test requires that the claim for implied immunity be denied.

#### I. THE SUPREME COURT'S IMPLIED IMMUNITY PRECEDENTS

The use of implied repeal as a method of reconciling overlapping statutes is well-established in our country's legal history. In 1842, for example, the Supreme Court considered whether a forfeiture statute enacted in 1830 had impliedly repealed part of an earlier law governing import tariffs. The Court held that such a result would require "a positive repugnancy between the provisions of the new laws, and those of the old."<sup>36</sup> It was not until 1939, however, in the case of *United States v. Borden Co.*,<sup>37</sup> that the Supreme Court first used the "implied repeal" language to address a potential conflict between the antitrust laws and a regulatory statute.<sup>38</sup>

34. 540 U.S. 398 (2004).

35. 127 S. Ct. 2383 (2007).

36. *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842). Though implied repeal was unnecessary in *Wood* because the statutes were not in conflict, *id.* at 364, the Court's use of the doctrine demonstrates its general acceptance at that time.

37. 308 U.S. 188 (1939).

38. See Balter & Day, *supra* note 23, at 454–57. Though the Supreme Court's decision in *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 478–79, 488 (1932), appears to grant exclusive jurisdiction to the United States Shipping Board to regulate the defendant's conduct—in effect, implying an immunity from the antitrust laws—the Supreme Court has since stated that this decision only involved principles of primary jurisdiction. Balter & Day, *supra* note 23, at 456 n.63 (citing *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 220–21 (1966)). In any event, the Supreme Court's opinion in *Borden* is the first in which the court used the now-familiar "implied repeal" language in discussing the potential conflict between the antitrust laws and a later-enacted regulatory statute. See *Borden*, 308 U.S. at 198.

From 1939 to 2003, the Supreme Court issued eleven opinions in which it ruled on claims for implied antitrust immunity.<sup>39</sup> For organizational purposes, this note divides the Court's implied immunity decisions into two groups: (A) cases decided before 1975 (the "Early Era"), and (B) cases decided from 1975–2003 (the "Modern Era"). *Verizon v. Trinko* and *Credit Suisse Securities v. Billing*, the Court's most recent implied immunity decisions, are discussed at length in Part III.

A. *The Early Era: Implied Immunity Decisions Pre-1975*

In *United States v. Borden*, the Supreme Court held that several defendants' efforts to control the price and quantity of milk in the Midwest were not impliedly immune from the antitrust laws as a result of either the Agricultural Marketing Agreement Act of 1937<sup>40</sup> or the Capper-Volstead Act.<sup>41</sup> Under the Agricultural Marketing Agreement Act, Congress had required that all milk marketing agreements be approved by the Secretary of Agriculture. The district court found for the defendants, holding that the Secretary's authority to approve agreements, even unexercised, "wholly destroy[ed] the operation of Section 1 of the Sherman Act."<sup>42</sup> The Supreme Court disagreed. It cited the familiar principle that two statutes covering the same conduct should both be given effect unless there is "a positive repugnancy" between the two laws.<sup>43</sup> In the Court's opinion, this case lacked such a repugnancy because the Agricultural Marketing Agreement Act only expressly immunized those agreements that the Secretary had previously approved.<sup>44</sup> As to non-approved agreements, such as the defendants', the Court found that the regulatory scheme did not "impinge[] upon the prohibitions and penalties of the Sherman Act."<sup>45</sup>

39. *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981); *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *California v. Fed. Power Comm'n*, 369 U.S. 482 (1962); *United States v. Radio Corp. of Am.*, 358 U.S. 334 (1959); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Borden*, 308 U.S. 188. This list does not include cases dealing with the closely-related doctrine of primary jurisdiction, such as *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289 (1973), or cases with little impact in the overall development of the implied immunity doctrine, such as *Carnation Co.*, 383 U.S. at 213, discussed in part at *infra* note 45, or *Md. & Va. Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458 (1960), discussed at *infra* note 47.

40. 7 U.S.C. §§ 671–74 (2000).

41. 7 U.S.C. §§ 291–92 (2000).

42. *Borden*, 308 U.S. at 197–98.

43. *Id.* at 198–99.

44. *See id.* at 200–01.

45. *Id.* at 200; *see also Carnation Co.*, 383 U.S. at 216–17 (briefly rejecting analogous argument made under the Shipping Act of 1916).

The defendants in *Borden* also argued that the Capper-Volstead Act had given the Secretary of Agriculture exclusive jurisdiction over their conduct.<sup>46</sup> However, although Section 2 of this statute did establish a limited procedure by which the Secretary could review potentially anticompetitive conduct within the agricultural industry, the Court concluded that Congress did not intend to immunize all anticompetitive conduct “unless or until” the agency took action. Indeed, because there was nothing to that effect in the statute, the Court characterized the regulatory procedures as auxiliary to the Sherman Act. It concluded that Congress had not intended to exempt conduct such as the defendants’ from antitrust scrutiny.<sup>47</sup>

Several years after its decision in *Borden*, the Supreme Court again illustrated the “positive repugnancy” requirement for implied repeal of the antitrust laws. In *Georgia v. Pennsylvania Railroad Co.*,<sup>48</sup> the Court held that the defendants’ conspiracy to fix interstate railroad rates was not impliedly immune from antitrust scrutiny.<sup>49</sup> Though it acknowledged that interstate rates were governed exclusively by the Interstate Commerce Commission (ICC),<sup>50</sup> the Court in *Pennsylvania Railroad Co.* also observed that the ICC had no regulatory authority to enjoin conspiracies among railroad companies to fix such rates.<sup>51</sup> Since the plaintiff merely sought an injunction to break up the defendants’ conspiracy and did not challenge the fixed rates, the Court found there to be no repugnancy between the antitrust laws and the ICC’s regulatory authority. It therefore rejected the defendants’ claim for implied antitrust immunity.<sup>52</sup>

Over the next thirty years, the Supreme Court considered the implied immunity doctrine on six separate occasions,<sup>53</sup> but granted immunity in

46. *Borden*, 308 U.S. at 203–06.

47. *Id.* at 205–06; *see also* *Md. & Va. Milk Producers Ass’n, Inc. v. United States*, 362 U.S. 458, 463–64 (1960) (extending the *Borden* Court’s implied immunity decision to claims brought under Section 2 of the Sherman Act).

48. 324 U.S. 439 (1945).

49. *See id.* at 456–57.

50. *See id.* at 452. The source of the ICC’s regulatory authority is two-fold. Congress established the ICC in 1887 when it enacted the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). Christina E. Coleman, Note, *The Future of the Federalism Revolution: Gonzalez v. Raich and the Legacy of the Rehnquist Court*, 37 *LOY. U. CHI. L.J.* 803, 807 n.26 (2006). However, the ICC’s authority over interstate railroad rates comes both from the Interstate Commerce Act and from the Clayton Act. *See Pennsylvania R.R. Co.*, 324 U.S. at 456, 461. Thus, while Congress clearly could not have impliedly repealed the Sherman Act (1890) when it enacted the Interstate Commerce Act (1887) three years earlier, the Court here considered whether Congress’s grant of authority to the ICC in both the Interstate Commerce Act and the Clayton Act operated together as an implied repeal of the Sherman Act. *See id.* at 452–63.

51. *Pennsylvania R.R. Co.*, 324 U.S. at 456.

52. *See id.* at 457, 462.

53. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California v. Fed. Power Comm’n*, 369 U.S. 482 (1962); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963);

only one case: *Pan American World Airways v. United States*.<sup>54</sup> In *Pan American World Airways*, decided in 1963, the government argued that two airlines and a steamship company had violated the antitrust laws by dividing up transportation routes in Central and South America.<sup>55</sup> The Court disagreed and held that the defendants' conduct was instead impliedly immune from the antitrust laws due to the Civil Aeronautics Act of 1938.<sup>56</sup> First, the Court observed that the Civil Aeronautics Act had created a "pervasive" regulatory scheme in the transportation industry, and that Congress had clearly intended to change what had previously been a competitive system.<sup>57</sup> Yet this information on its own did not immunize the defendants' conduct from the antitrust laws.<sup>58</sup> The Court also considered it significant that Congress had give the Civil Aeronautics Board (CAB) power to approve, modify, or prohibit conduct similar to that of the defendants.<sup>59</sup> And because Congress had charged the CAB with policing competition in the airline industry,<sup>60</sup> the Court determined that the regulatory and antitrust regimes "might collide"—i.e., the CAB and the court might issue conflicting mandates—if it were to allow the government's suit to proceed.<sup>61</sup> Thus, even though the defendants' conduct had occurred prior to Congress's en-

*Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *United States v. Radio Corp. of Am.*, 358 U.S. 334 (1959).

54. *See* 371 U.S. at 313.

55. *Id.* at 298.

56. Pub. L. No. 75-706, 52 Stat. 973 (1938).

57. *Pan Am. World Airways*, 371 U.S. at 300–01.

58. *See id.* at 304–05 ("There are various indications in the legislative history that the Civil Aeronautics Board was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned. . . . [Y]et we hesitate here, as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—absent an unequivocally declared congressional purpose to do so.").

59. *See id.* at 305–06. Despite acknowledging that the CAB had "no power to award damages or to bring criminal prosecutions," *id.* at 311, the Court held that the alleged acts of monopolization were immune from antitrust scrutiny because they were "precise ingredients" of the CAB's regulatory authority. *Id.* at 305. Namely, the agency could grant certificates to allow airlines to operate on certain routes, could modify or deny such certificates, and could also disallow affiliations between carriers. *Id.*

60. *Id.* at 302.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

*Id.* (quoting the Federal Aviation Act § 411, 72 Stat. 731 (1958)) (emphasis omitted).

61. *Id.* at 310.



actment of the regulatory statute,<sup>62</sup> the Court concluded that the statute still conferred exclusive jurisdiction over the conduct to the CAB.<sup>63</sup>

The other cases during this period in which the Supreme Court denied claims for implied immunity are also instructive. In *United States v. Radio Corp. of America*,<sup>64</sup> for example, the Court concluded that the defendants' agreement to exchange radio stations in order to obtain market power in the broadcasting industry, though approved by the Federal Communications Commission (FCC), was not impliedly immune from the antitrust laws.<sup>65</sup> The Court agreed that the Communications Act of 1934<sup>66</sup> required FCC approval for any proposed station exchanges,<sup>67</sup> but concluded that Congress did not intend FCC approval to preclude courts' enforcement of antitrust laws.<sup>68</sup> It based this decision on several factors. First, it cited to several statements in the statute's legislative history as evidence of Congress's intent.<sup>69</sup> Second, the Court observed that, in contrast to the telephone and transportation industries,<sup>70</sup> the broadcasting industry was not subject to a pervasive regulatory scheme;<sup>71</sup> Congress had not yet "abandoned the principle of free competition" in the industry.<sup>72</sup> Finally, the Court relied on the fact that although Congress had required the FCC to base its approval or disapproval on "public interest, convenience, and necessity," it had not required the FCC to specifically consider competition.<sup>73</sup>

62. *Id.*

63. *Id.* at 313. In *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), decided ten years after *Pan American World Airways*, the Supreme Court appeared to once again grant a claim for implied immunity based on the CAB's regulatory authority. *See Hughes Tool Co.*, 409 U.S. at 366. However, this case actually required the Court to interpret the scope of an express antitrust immunity already in the text of the Federal Aviation Act of 1958, 72 Stat. 731 (1958). *See Hughes Tool Co.*, 409 U.S. at 369; Balter & Day, *supra* note 23, at 461 n.108. Ultimately, the Court in *Hughes Tool* found the defendants' conduct to be immune from antitrust scrutiny, but only after first concluding that the CAB's actions had triggered the statutory provision that conferred express antitrust immunity. *Hughes Tool Co.*, 409 U.S. at 387–88.

64. 358 U.S. 334 (1959).

65. *See id.* at 350–51.

66. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

67. *Radio Corp. of Am.*, 358 U.S. at 337.

68. *Id.* at 346.

69. *See id.* at 340–46. One statement in particular evidenced the Senate's opinion that the bill, once enacted, would not preclude application of the antitrust laws to regulated activity:

The bill provides that in case anybody has been convicted under the Sherman antitrust law or any other law relating to monopoly he shall be denied a license; but the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court.

*Id.* at 343 (quoting 67 CONG. REC. 12507 (1926) (statement of Sen. Dill)).

70. *See id.* at 348–49.

71. *Id.* at 351.

72. *Id.* at 349 (quoting Fed. Comm'ns Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940)).

73. *See id.* at 351.

The Court expanded upon the scope of its ruling in *Radio Corp.* in two subsequent cases: *California v. Federal Power Commission*,<sup>74</sup> and *United States v. Philadelphia National Bank*.<sup>75</sup> In *Federal Power Commission*, the Court held that the Federal Power Commission's (FPC) decision to approve a merger between a gas company and a pipeline company under the Natural Gas Act<sup>76</sup> did not immunize the merger from antitrust scrutiny.<sup>77</sup> While the Court in *Radio Corp.* had denied immunity in part because the FCC was not required to consider competition,<sup>78</sup> here, the Court implied that even an affirmative duty to consider competition would not compel a finding of antitrust immunity. The Court's analysis suggested that it would not grant implied immunity unless the regulatory agency were required to *enforce* competition, something not present in the instant case.<sup>79</sup> At the same time, however, the Court also justified its decision to deny immunity by pointing out that the agriculture industry was not subject to a pervasive regulatory scheme like that in the transportation industry.<sup>80</sup> Thus, despite the likelihood that the FPC's merger decisions would conflict with decisions of antitrust courts,<sup>81</sup> the Court held that Congress had not impliedly repealed the antitrust laws when it enacted the Natural Gas Act.<sup>82</sup>

In *Philadelphia National Bank*,<sup>83</sup> the Supreme Court relied on its decision in *Federal Power Commission* to hold that a bank merger approved by the Comptroller of the Currency (the "Comptroller") was not impliedly immune from antitrust law.<sup>84</sup> Similar to the FPC's authority in *Federal Power Commission*, the Comptroller in *Philadelphia National Bank* had a statutory duty under the Bank Merger Act of 1960<sup>85</sup> to consider the effect on competition in deciding whether to approve particular mergers.<sup>86</sup> Again,

74. 369 U.S. 482 (1962).

75. 374 U.S. 321 (1963).

76. 15 U.S.C. §§ 717-717w (2000).

77. *Federal Power Commission*, 369 U.S. at 489. Though the larger issue in *Federal Power Commission* was whether the FPC's decision to approve or disapprove of the particular merger should be put on hold pending the outcome of the government's antitrust suit, *id.* at 487, subsequent implied immunity decisions have nevertheless relied on *Federal Power Commission* as binding precedent. *See, e.g., Phila. Nat'l Bank*, 374 U.S. at 351.

78. *See* 358 U.S. at 351.

79. *See Federal Power Commission*, 369 U.S. at 485-86 (noting that the FPC is not an administrative agency "authorized to enforce" the antitrust laws).

80. *See id.* at 485-86.

81. *See id.* at 488 (observing that an antitrust decision condemning the merger would necessitate an "unscrambling").

82. *See id.* at 489.

83. 374 U.S. 321 (1963).

84. *Id.* at 354.

85. Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended in scattered sections of 12 U.S.C.).

86. *Phila. Nat'l Bank*, 374 U.S. at 350.

however, the Court concluded that implied immunity was improper, both because the Comptroller's regulatory authority did not require him to enforce competition,<sup>87</sup> and because the banking industry was not subject to pervasive regulation.<sup>88</sup> In addition, the Court also relied on several statements in the Act's legislative history as evidence of congressional intent *not* to immunize bank mergers from antitrust scrutiny.<sup>89</sup>

In contrast to these decisions, which involved the effect of specific regulatory action, the Court's final two implied immunity decisions during this period required it to interpret the meaning of regulatory *inaction*. In *Silver v. New York Stock Exchange*,<sup>90</sup> the Court held that the defendant stock exchange was not immune from the antitrust laws where it attempted to prevent the plaintiff, a nonmember securities dealer, from accessing vital information from the exchange.<sup>91</sup> The regulatory scheme at issue in *Silver* was set forth in the Securities Exchange Act of 1934.<sup>92</sup> Under this statute, Congress required individual exchanges to self-regulate—i.e., to adopt and enforce their own rules.<sup>93</sup> The statute granted supervisory authority to the SEC, but only to request that an exchange modify its rules. The SEC did not have jurisdiction to review particular instances of enforcement of exchange rules, and thus did not take any action in response to the defendants' activities in this case.<sup>94</sup> Congress believed that this particular structure was the most effective way to protect the interests of individual investors.<sup>95</sup>

In trying to reconcile the Securities Exchange Act with the antitrust laws, the Court in *Silver* considered the extent to which an antitrust suit would conflict with Congress's goal in creating a scheme of exchange self-regulation. In other words, it sought to determine whether implied immunity was "necessary to make the Securities Exchange Act work."<sup>96</sup> It found the lack of SEC jurisdiction over the defendant's conduct to be decisive on this issue. Because nothing prevented an exchange from enforcing its rules in a manner that would lead to a competitive injury (contrary to the goals of

87. *See id.* at 351–52 (concluding that the Comptroller's authority bore "little resemblance" to the CAB's authority in *Pan American World Airways*).

88. *Id.* at 352.

89. *Id.*

90. 373 U.S. 341 (1963).

91. *Id.* at 343, 360.

92. 15 U.S.C. §§ 78a–78nn (2000).

93. *Silver*, 373 U.S. at 352–53.

94. *Id.* at 357.

95. *See id.* at 352.

96. *Id.* at 357–58. The court also stressed that implied repeal, if required, should be "only to minimum extent necessary." *Id.* at 357.

antitrust law) and yet would fail to protect investors (contrary to the goals of self-regulation), the Court held that allowing judicial review was not altogether inconsistent with the goals of the Securities Exchange Act. Judicial review in such a situation might actually secure more protection for investors than they would otherwise receive.<sup>97</sup> That is, because there was a possibility that judicial review of an exchange's actions would not be "incompatible with the fulfillment of the aims of the Securities Exchange Act," the Court found that implied immunity from the antitrust laws was not required.<sup>98</sup> Instead, it simply considered whether the defendant's conduct was justified under a rule of reason analysis.<sup>99</sup>

Ten years after *Silver*, the Court in *Otter Tail Power Co. v. United States*<sup>100</sup> held that the Federal Power Act<sup>101</sup> did not confer implied immunity to a power company charged with monopolizing the retail distribution of electrical power in parts of Minnesota, North Dakota, and South Dakota.<sup>102</sup> Though the regulatory agency here, similar to the agency in *Silver*, took no action in response to the defendant's conduct, this case presented a slightly different issue because the agency chose not to exercise its regulatory authority. More specifically, Congress had authorized the FPC to "compel involuntary interconnections of power" to allow smaller municipal customers to purchase electrical power, but the FPC had not done so in the defendant's case.<sup>103</sup> Despite this affirmative grant of power, the Court concluded that the Federal Power Act did not exempt the defendant from the antitrust laws. From legislative history, the Court inferred that Congress had intended to encourage "voluntary interconnections of power," and that compelled interconnection was to be used only as a last resort.<sup>104</sup> Therefore, it held that "Congress had rejected a pervasive regulatory scheme . . . in favor of voluntary commercial relationships," and had intended for the "fundamental national policies embodied in the antitrust laws" to prevail.<sup>105</sup>

97. *Id.* at 358–59.

98. *Id.* at 359.

99. *Id.* at 361–66. The court ultimately concluded that the defendant had violated Section 1 of the Sherman Act because its actions were not justified by the Securities Exchange Act. *Id.* at 364. In particular, nothing in the Act justified taking "anticompetitive collective action" without offering the plaintiff prior notice and a hearing at which to contest the action. *Id.*; see also *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 165 (2d Cir. 2005) (discussing *Silver*'s use of rule of reason analysis), *rev'd*, 127 S. Ct. 2383 (2007).

100. 410 U.S. 366 (1973).

101. 16 U.S.C. §§ 791a–825r (2000).

102. *Otter Tail*, 410 U.S. at 374–75.

103. *Id.* at 373.

104. *Id.* at 373–74.

105. *Id.* at 374.

B. *The Modern Era: Implied Immunity Decisions from 1975 to 2003*

The Supreme Court issued three implied immunity decisions from 1975 to 1981,<sup>106</sup> but did not revisit the doctrine again until *Trinko* in 2004. Nevertheless, two of the Court's decisions during this era, *Gordon v. New York Stock Exchange*<sup>107</sup> and *United States v. National Ass'n of Securities Dealers (NASD)*,<sup>108</sup> are especially noteworthy for their impact on the doctrine of implied antitrust immunity. Since the mid-1970s, litigants and courts alike have interpreted the language from these cases in favor of an expanded view of implied antitrust immunity.<sup>109</sup>

In *Gordon*, the Court once again sought to determine “the proper reconciliation” of the Securities Exchange Act and the antitrust laws.<sup>110</sup> But this case presented a different issue than in *Silver*. Whereas in *Silver*, the plaintiff complained about the manner in which a single exchange had enforced one of its rules—conduct over which the SEC had no regulatory authority—the plaintiffs in *Gordon* simply complained about one of the rules. Specifically, the plaintiffs sought antitrust relief from the system of fixed commission rates established by several exchanges,<sup>111</sup> a system that, as price-fixing, would normally constitute a *per se* violation of the Sherman Act.<sup>112</sup> Under section 19(b) of the Securities Exchange Act, however, Congress had authorized the SEC to “alter or supplement” exchange rules dealing with the “fixing of reasonable rates of commission.”<sup>113</sup> Thus, unlike in *Silver*, the SEC in *Gordon* actually had specific authority to approve or permit the defendants’ “conduct.” Furthermore, the SEC had exercised its authority. It had continually studied the effects of fixed commissions on the securities market, and had formally requested that the exchanges modify

106. *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981); *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694 (1975); *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659 (1975).

107. 422 U.S. 659.

108. 422 U.S. 694.

109. *Balter & Day*, *supra* note 23, at 461. As one federal district court judge said of the phenomenon:

What we have, then, after a review of most of the cases, is an ocean of antitrust punctuated by isolated islands of implied immunity. GTE claims, however, that the most recent of the relevant Supreme Court pronouncements, *Gordon* and *NASD*, have pushed up a whole continent of exemption and have sent the waters rolling.

*Id.* (quoting *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 449 F. Supp. 1158, 1166 (D. Hawaii 1978)).

110. 422 U.S. at 685.

111. *Id.* at 661.

112. *Id.* at 682 (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)).

113. *Id.* at 666–67 (quoting the Securities and Exchange Act of 1934 § 19(b)).

their rates when it determined that such action was in the best interests of the securities industry.<sup>114</sup>

The Court in *Gordon* considered “whether antitrust immunity, as a matter of law, must be implied in order to permit the Securities Exchange Act to function as envisioned by the Congress.”<sup>115</sup> It found that implied repeal was necessary in this case because judicial review would unduly interfere with the intended operation of the Act.<sup>116</sup> To be sure, Congress had expressed its intention to leave the supervision of the defendant’s conduct to the SEC, and judicial review would likely “subject the exchanges and their members to conflicting standards.”<sup>117</sup> In addition, the Court observed that the Securities Exchange Act had allowed the SEC to permit an activity that the Supreme Court had previously declared to be a *per se* violation of the antitrust laws.<sup>118</sup> As such, Congress’s enactment of the Securities Exchange Act showed an affirmative intent to repeal the antitrust laws with respect to the defendant’s activity.<sup>119</sup>

In *NASD*,<sup>120</sup> decided on the same day as *Gordon* in 1975, the Court granted another claim for implied immunity.<sup>121</sup> Unlike in *Gordon*, however, the Court in *NASD* evaluated the scope of the SEC’s authority under two statutes: the Maloney Act<sup>122</sup> and the Investment Company Act of 1940.<sup>123</sup> Specifically, the plaintiffs alleged that an association of securities dealers and several individual dealers had violated the antitrust laws by entering into vertical<sup>124</sup> and horizontal<sup>125</sup> agreements to fix the resale prices of mutual funds.<sup>126</sup> The Court considered the two types of agreements separately in its implied immunity analysis. Not surprisingly, it de-

114. *See id.* at 668–82.

115. *Id.* at 688.

116. *Id.* at 685–86.

117. *Id.* at 689.

118. *Id.* at 682.

119. *See id.* at 691; Balter & Day, *supra* note 23, at 463.

120. 422 U.S. 694 (1975).

121. *Id.* at 697.

122. Pub. L. No. 75-719, 52 Stat. 1070 (1938). Because section 3(b) of the Maloney Act prevented a securities association from registering as a national securities association unless its rules were designed “to remove impediments to and to perfect the mechanism of a free and open market,” at least one commentator has argued that the SEC was required to enforce competition in the securities industry. *See* Balter & Day, *supra* note 23, at 465 (citing 15 U.S.C. § 790-3(b) (1976) (emphasis omitted)).

123. 15 U.S.C. §§ 80a-1-64 (2000).

124. In antitrust law, a vertical restraint is “[a] restraint of trade imposed by agreement between firms at different levels of distribution (as between manufacturer and retailer).” BLACK’S LAW DICTIONARY 1340 (8th ed. 2004).

125. A horizontal restraint is “[a] restraint of trade imposed by agreement between competitors at the same level of distribution.” *Id.*

126. *Nat’l Ass’n of Sec. Dealers*, 422 U.S. at 700.

terminated that the dealers' vertical agreements would normally constitute *per se* violations of section 1 of the Sherman Act.<sup>127</sup> After reviewing the Investment Company Act, however, the Court discovered that Congress had actually authorized the SEC to permit these same types of agreements, and that the SEC had done so "for more than three decades."<sup>128</sup> The Court concluded that it could not reconcile the SEC's clear authority to authorize the vertical agreements with the antitrust laws' clear prohibition of the same agreements; the two statutes were diametrically opposed. It agreed with the SEC that the agency's authority would be "compromised seriously" if the Court allowed the antitrust challenge to the vertical agreements to proceed.<sup>129</sup> Therefore, it held that implied antitrust immunity was necessary to allow the Investment Company Act to work as Congress intended.<sup>130</sup>

As for the horizontal agreements, the Court found that the Investment Company Act had not authorized the SEC to permit or even to supervise the dealers' conduct.<sup>131</sup> Nevertheless, the Court held that the horizontal agreements were impliedly immune from the antitrust laws as a result of the SEC's "pervasive" regulatory authority under this statute and under the Maloney Act.<sup>132</sup> Specifically, Congress had required the association to obtain SEC approval of its proposed operating rules, and had authorized the SEC to modify the association's rules at any time.<sup>133</sup> In the Court's opinion, the dealers' horizontal agreements were basically extensions of the association's rules, and restricted competition in a manner similar to the dealers' vertical agreements.<sup>134</sup> In addition, the Court found it significant that the SEC was charged with protecting the public interest and claimed to weigh competitive concerns in exercising its regulatory authority.<sup>135</sup> As in

127. *Id.* at 729. The Court has since declared that vertical price restraints are subject to rule of reason analysis. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007).

128. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 728.

129. *Id.* at 729.

130. *Id.* at 729–30.

131. *See id.* at 730.

132. *Id.* The Court in *Gordon* also briefly addressed the issue of pervasive regulation, suggesting that a finding of pervasive regulation in a particular industry could, on its own, "oust" the antitrust laws. 422 U.S. 659, 688–89 (1975). However, the Court's discussion of this issue in *Gordon* was dictum, *see id.*, and was also inconsistent with the Court's earlier decisions. Most notably, in *Pan American World Airways*, the Court concluded that the transportation industry was subject to pervasive regulation, but held that this fact alone would not support a finding of implied antitrust immunity. 317 U.S. 296, 300–01, 304–05 (1963). The Court's lax discussion of the pervasive regulation "factor" in both *Gordon* and *NASD* has undoubtedly contributed to the lower courts' confusion regarding the doctrine of implied immunity. *See also* Balter & Day, *supra* note 23, at 461.

133. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 732.

134. *See id.* at 733.

135. *Id.* at 732.

*Gordon*, the Court ultimately concluded that allowing judicial review of the defendant's horizontal agreements would create "a substantial danger" of conflicting mandates from the SEC and antitrust courts.<sup>136</sup> Thus, it held that an implied repeal of the antitrust laws was "necessary to make the [regulatory scheme] work."<sup>137</sup>

In *National Gerimedical Hospital v. Blue Cross of Kansas City*,<sup>138</sup> the Supreme Court's final implied immunity decision during this period—its last until *Verison v. Trinko* in 2004—the Court denied what it called a "weaker" argument for implied antitrust immunity.<sup>139</sup> Specifically, the defendant argued that its refusal to include the plaintiff in its insurance plan was impliedly immune from antitrust law either because of a clear repugnancy between the antitrust laws and the National Health Planning and Resources Development Act of 1974,<sup>140</sup> or because this same regulatory statute had immunized all private conduct undertaken in support of the health-care planning process.<sup>141</sup> The Court denied the repugnancy argument because it found nothing in the regulatory scheme that compelled or approved the defendant's conduct, and thus no conflict with the antitrust laws.<sup>142</sup> As to the second argument, the Court concluded that even the obvious failure of competition in the industry did not exempt private conduct from antitrust scrutiny.<sup>143</sup> Rather, the Court held that such a "blanket exemption" would require a clear showing that Congress intended to abandon competition in favor of "pervasive" cooperation, something the defendant could not show in the present suit.<sup>144</sup>

## II. A MYRIAD OF APPROACHES TO THE IMPLIED IMMUNITY DOCTRINE

For the next twenty-three years, the Supreme Court's decision in *National Gerimedical Hospital* served as the Court's last authoritative statement on the doctrine of implied antitrust immunity. The lower federal

136. *Id.* at 735.

137. *Id.* at 734 (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)) (alterations in original).

138. *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981).

139. *Id.* at 390.

140. Pub. L. No. 93-641, 88 Stat. 2225 (1974).

141. *Nat'l Gerimedical Hosp.*, 452 U.S. at 382, 391–92.

142. *Id.* at 391.

143. *Id.* at 392.

144. *Id.* The court did acknowledge that an implied immunity argument might succeed in a different factual setting. Namely, if a planning agency had "expressly advocated a form of cost-saving cooperation," implied antitrust immunity might be necessary to make the statutory scheme work. *Id.* at 393 n.18.



courts were thus left with little or no guidance in their subsequent attempts to apply the doctrine.<sup>145</sup> Their efforts have produced a confusing number of approaches,<sup>146</sup> and have led to criticism of the doctrine as “a collection of unconnected legal tests.”<sup>147</sup>

In order to better understand the recent increase in successful implied immunity claims and to put the Supreme Court’s two most recent decisions into perspective, it is important to examine the various approaches used by the lower federal courts. As demonstrated below, the majority of courts seek to include factors from the Supreme Court’s decisions in their analysis. For example, federal district courts in California and Iowa have considered the following four factors in deciding whether to grant claims for implied immunity: (1) whether the defendant’s conduct involved the “precise ingredients” of the agency’s regulatory authority, (2) whether the regulatory agency is authorized to grant the remedy sought by the antitrust plaintiff, (3) whether the agency considers competition in its calculation of the public interest, and (4) whether the agency is an expert in the particular industry.<sup>148</sup>

As might be expected, not all of the lower courts have chosen to emphasize the same factors from the Supreme Court’s decisions. In contrast to the four-factor test outlined above, one judge in the Ninth Circuit has advocated for a three-factor test: (1) whether the regulatory agency has authority to regulate the defendant’s conduct, (2) whether the agency has exercised this authority, and (3) whether a court decision in favor of the antitrust plaintiff will render the agency unable to perform its regulatory duty as contemplated by the statute.<sup>149</sup> Interestingly, this test shares only the first factor in common with the four-factor test outlined above despite the fact that both tests are supposedly “gleaned” from the Supreme Court’s decisions.<sup>150</sup>

In contrast to both of these tests, the Second Circuit recently adopted a two-pronged approach to claims for implied antitrust immunity.<sup>151</sup> Under this method, a court must first determine whether there is a “potential specific conflict” between the antitrust laws and the regulatory scheme. If such

145. *AT&T and the Antitrust Laws*, *supra* note 12, at 258.

146. *See* Balter & Day, *supra* note 23, at 471–72.

147. Folse, *supra* note 33, at 756.

148. *Phonetele, Inc. v. AT&T Co.*, 435 F. Supp. 207, 212–13 (C.D. Cal. 1977), *rev’d*, 664 F.2d 716 (9th Cir. 1981); *Sound, Inc. v. AT&T Co.*, No. 76-186-2, 1979 WL 1711, at \*5 (S.D. Iowa Sept. 28, 1979).

149. *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 747 (9th Cir. 1981) (Claiborne, J., dissenting).

150. *See id.* at 747; *Sound*, 1979 WL 1711, at \*5.

151. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 164–65 (2d Cir. 2005), *rev’d*, 127 S. Ct. 2383 (2007).

a potential conflict exists, then the court is instructed to search for evidence of congressional intent to repeal as shown by: (1) the statute's legislative history and/or structure, (2) the possibility of conflicting mandates issuing from the regulatory agency and an antitrust court, (3) the possibility that application of the antitrust laws would moot a provision in the regulatory statute, (4) the agency's history of regulating the defendant's conduct, or (5) other evidence showing intent to repeal.<sup>152</sup> In the absence of a "potential specific conflict" between the two statutory schemes, the Second Circuit will only grant implied immunity if it determines that the regulatory scheme is "pervasive enough to indicate that Congress forswore the paradigm of competition" in the industry.<sup>153</sup> The Seventh Circuit also uses a similar two-pronged approach to implied immunity claims.<sup>154</sup>

Another group of courts abandons the factor counting tests altogether in favor of more subjective methods. For example, claiming to follow a rule established by the Supreme Court in *Silver*, the Tenth Circuit simply considers whether the defendant's conduct is "necessary to implement the intent of Congress," and should therefore be immunized from antitrust scrutiny.<sup>155</sup> Similarly, the Third Circuit also frames its test around congressional intent, and finds that intent can be shown through (1) legislative history, (2) a plain repugnancy between the regulatory statute and the antitrust laws, or (3) a pervasive regulatory scheme.<sup>156</sup>

From these examples, it is easy to see why the implied immunity doctrine has been criticized.<sup>157</sup> Though several courts use similar factors in their tests for implied immunity,<sup>158</sup> few of these factors are uniformly applied. For example, it remains unclear whether conduct that is merely subject to regulatory authority<sup>159</sup> also satisfies the "precise ingredients" test used by at least one federal court.<sup>160</sup> Of even greater concern is the fact that issues such as the extent to which the regulatory agency has exercised

152. *Id.*

153. *Id.* at 164.

154. *See Am. Agric. Movement, Inc. v. Bd. of Trade of City of Chi.*, 977 F.2d 1147, 1158-61 (7th Cir. 1992) (describing and applying the "two variants of implied repealer").

155. *Behagen v. Amateur Basketball Ass'n*, 884 F.2d 524, 528 (10th Cir. 1989); *see also Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 204 (5th Cir. 2000) (using the same analysis as *Behagen*).

156. *Essential Commc'n Sys., Inc. v. AT&T*, 610 F.2d 1114, 1117 n.8 (3d Cir. 1979).

157. *See* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 39 (2d ed. 2000) ("The implied immunity cases resist definitive harmonization.")

158. Both the Second and Third Circuits, for example, look for legislative intent to repeal in the regulatory statute's legislative history. *See Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 164-65 (2d Cir. 2005), *rev'd*, 127 S. Ct. 2383 (2007); *Essential Commc'ns*, 610 F.2d at 1117 n.8.

159. *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 747 (9th Cir. 1981) (Claiborne, J., dissenting).

160. *Sound, Inc. v. AT&T Co.*, No. 76-186-2, 1979 WL 1711, \*5 (S.D. Iowa Sept. 28, 1979).

its authority are prominently featured in the test proposed by a judge in one federal circuit,<sup>161</sup> but are entirely absent from the test used in another circuit.<sup>162</sup> The variety of approaches means that the success of any claim for implied immunity may depend on the jurisdiction in which the defendant is sued. Given the overall importance of the antitrust laws and the fact that they are intended to apply uniformly to almost all forms of business activity, this possibility is unacceptable.

### III. THE NEW ERA OF IMPLIED ANTITRUST IMMUNITY: *TRINKO AND BILLING*

In 2004, following twenty-three years of silence, the Supreme Court finally revisited the doctrine of implied antitrust immunity.<sup>163</sup> Since the Court's previous implied immunity decision, seven justices had been replaced and the first two female justices had been appointed.<sup>164</sup> More importantly, the Court's previous decisions had been interpreted and applied with confusing results by the lower federal courts. It was in this context that the Court granted the defendants' petition for certiorari in *Verizon v. Trinko*. Just two years later, the Court agreed to hear another implied immunity case, *Credit Suisse Securities v. Billing*. Although different circumstances surrounded the defendants' claims for implied immunity in *Trinko* and *Billing*, the cases nevertheless provided the Supreme Court with an opportunity to clarify its approach to implied immunity analysis and put an end to the lower courts' confusion. Instead, the Court likely created even more uncertainty by deviating from its established precedents in these two decisions. As a result, the lower courts' application of the doctrine is likely to become more unpredictable and, in light of the Supreme Court's apparent inclination to grant claims for implied immunity in *Trinko* and *Billing*, more sympathetic to regulated defendants.

161. *Phonetele*, 664 F.2d at 747 (Claiborne, J., dissenting).

162. *Essential Commc'ns*, 610 F.2d at 1117 n.8.

163. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398 (2004).

164. Compare The OYEZ Project, National Gerimedical Hospital v. Blue Cross, [http://www.oyez.org/cases/1980-1989/1980/1980\\_80\\_802/](http://www.oyez.org/cases/1980-1989/1980/1980_80_802/) (last visited Apr. 30, 2008) (listing justices who participated in the Court's decision) with The OYEZ Project, *Verizon v. Trinko, LLP*, [http://www.oyez.org/cases/2000-2009/2003/2003\\_02\\_682/](http://www.oyez.org/cases/2000-2009/2003/2003_02_682/) (last visited Apr. 30, 2008) (listing justices who participated in the Court's decision).

*A. Verizon v. Trinko*

## 1. Facts and Procedure

In 1996, Congress enacted the Telecommunications Act of 1996 (the “Act” or “Telecommunications Act”)<sup>165</sup> in order to increase competition in local telephone markets.<sup>166</sup> Prior to the Act, local exchange carriers (LECs) in each market had enjoyed a monopoly over local telephone service. The Act sought to break up these monopolies and required incumbent LECs to share individual elements of their telephone network with competitive LECs.<sup>167</sup> In return, the Act allowed incumbent LECs to apply to the FCC for permission to enter the market for long-distance services.<sup>168</sup> The FCC’s approval of these long-distance applications was to be conditioned upon a finding that the incumbent LEC had provided “[n]ondiscriminatory” network access to competitive LECs.<sup>169</sup> In particular, the FCC was to consider whether the incumbent LEC had allowed competitive LECs access to its operations support systems, without which the companies could not fill their customers’ orders.<sup>170</sup>

The Act also granted the FCC continuing oversight authority to ensure that incumbent LECs continued to provide local network access to competitive LECs.<sup>171</sup> In the event that an incumbent LEC failed to meet its sharing requirements, the FCC was authorized to order that the deficiency be corrected, to impose penalties, or to suspend or revoke its approval of the incumbent LEC’s long-distance application.<sup>172</sup> Upon agreement by an incumbent LEC, state regulators would also supervise their conduct. Such agreements benefited the incumbent LEC by increasing the likelihood that the FCC would approve its long-distance application.<sup>173</sup>

Verizon Communications Inc. (“Verizon”) was, and still is, the incumbent LEC for the State of New York.<sup>174</sup> Pursuant to the Act, Verizon signed interconnection agreements with competitive LECs, and also ap-

165. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

166. *Trinko*, 540 U.S. at 401.

167. *Id.* at 402.

168. *Id.*

169. *Id.* at 402–03.

170. *See id.* at 403.

171. *See id.* at 412–13.

172. *Id.* at 413.

173. *See id.*

174. *Id.* at 402.

plied with the FCC to enter the long-distance market.<sup>175</sup> The FCC approved Verizon's application in 1999, in large part because Verizon had also agreed to state regulatory supervision.<sup>176</sup> Later that year, however, several competitive LECs complained that Verizon had violated its obligation to provide access to its operations support systems. The competitive LECs were unable to fill many of their customers' orders, and risked losing customers to Verizon.<sup>177</sup> Following investigations by the FCC and state regulators, Verizon agreed to pay penalties totaling \$13 million<sup>178</sup> and to face additional supervision and reporting requirements in the future.<sup>179</sup>

The Law Offices of Curtis V. Trinko, LLP ("Trinko"), a New York City law firm and a local customer of AT&T, brought suit against Verizon for violating of section 2 of the Sherman Act.<sup>180</sup> Trinko claimed that Verizon had intentionally refused to fill its competitors' orders as required under the Telecommunications Act in order to "discourage customers from becoming or remaining customers" of its competitors.<sup>181</sup> The United States District Court for the Southern District of New York dismissed Trinko's suit for failure to state a claim under section 2. After the Court of Appeals for the Second Circuit partially reinstated the complaint, the Supreme Court granted Verizon's petition for writ of certiorari.<sup>182</sup>

## 2. The Supreme Court's Opinion

In an opinion written by Justice Scalia, the Supreme Court held that Trinko had failed to state a claim under section 2 of the Sherman Act.<sup>183</sup> Before addressing this issue, however, the Court first considered whether Congress's enactment of the Telecommunications Act in any way affected the Court's ability to enforce the antitrust laws.<sup>184</sup> It noted that the Act had imposed a variety of duties upon incumbent LECs, and in general had created a detailed regulatory scheme.<sup>185</sup> As such, the Court observed that the scheme was "a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regula-

175. *Id.*

176. *Id.* at 403, 413.

177. *Id.* at 403.

178. Of the \$13 million, \$3 million went to the United States Treasury as a "voluntary contribution," and \$10 million went directly to competitive LECs. *Id.* at 403-04.

179. *Id.* at 404.

180. *Id.* at 404-05.

181. *Id.* at 404.

182. *Id.* at 405.

183. *Id.* at 416.

184. *Id.* at 405.

185. *Id.* at 405-06.

tory scheme.”<sup>186</sup> Congress, however, had precluded such a conclusion by inserting an antitrust “savings” clause into the Telecommunications Act. Specifically, section 601(b)(1) of the statute stated that “nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws,”<sup>187</sup> and thus prevented the Court from granting implied antitrust immunity to Verizon.<sup>188</sup>

Satisfied that the antitrust laws still applied to Verizon’s conduct, the Court next considered whether Trinko had stated a claim under section 2 of the Sherman Act.<sup>189</sup> The Court’s analysis on this issue was twofold. First, because the refusal to deal with a competitor is generally not a violation of section 2, the Court considered whether Trinko’s allegations fit under any of the previously recognized exceptions to this rule.<sup>190</sup> The Court compared the facts in Trinko’s case to those in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,<sup>191</sup> a case it described as “at or near the outer boundary” of section 2 liability, as well as to several other cases, and held that Verizon’s conduct did not fall within any of the existing exceptions.<sup>192</sup>

Second, and more important to this discussion, the Court concluded that it should not recognize a new exception to the general rule for refusals to deal under section 2.<sup>193</sup> The Court began its analysis by considering whether the regulatory scheme at issue here was “designed to deter and remedy anticompetitive harm.”<sup>194</sup> It noted that in such schemes, the benefit to competition of additional antitrust enforcement is small because the regulatory scheme decreases the likelihood of significant antitrust harm.<sup>195</sup> In this case, the Court found the regulatory structure established by the Telecommunications Act to be “an effective steward of the antitrust function.”<sup>196</sup> Specifically, the Act made Verizon’s entry into the long-distance market contingent upon a finding by the FCC that Verizon had provided network access in a “nondiscriminatory” manner.<sup>197</sup> In addition, both the FCC and state regulators had continuing oversight over Verizon’s duty to

186. *Id.* at 406.

187. 47 U.S.C. § 152, note (2000) (Applicability of Consent Decrees and Other Law).

188. *Trinko*, 540 U.S. at 406.

189. *Id.* at 407.

190. *Id.*

191. 472 U.S. 585 (1985).

192. *Trinko*, 540 U.S. at 408–10.

193. *Id.* at 411.

194. *Id.* at 412.

195. *Id.* (citing *Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990)).

196. *Id.* at 413.

197. *Id.* at 412.

provide network access.<sup>198</sup> In the event that Verizon failed to meet its obligations, the FCC could revoke its ability to compete in the long-distance market, and both the FCC and state regulators could impose substantial fines. The Court pointed to the fact that substantial fines and reporting requirements had already been imposed as evidence that the regulatory regime was effectively performing the role of antitrust courts.<sup>199</sup>

Having decided that the benefits of antitrust enforcement in this situation were small, the Court next considered the costs associated with an antitrust suit.<sup>200</sup> It concluded that such costs could potentially be significant. Namely, the Court observed that the determination of liability under section 2 is a difficult one, and that incorrect judicial decisions would deter “the very conduct the antitrust laws are designed to protect.” The Court worried that by allowing such claims to proceed, it would encourage endless litigation over conduct that might not even constitute a violation of the Telecommunications Act.<sup>201</sup> Even if there were no potential for great costs, however, the Court felt that it would nevertheless be unable to adequately supervise any affirmative duty that it might impose. That is, since Verizon’s obligation to provide access to its local network involved detailed, day-to-day transactions, the Court concluded that regulatory agencies such as the FCC were better able to monitor and correct the conduct.<sup>202</sup>

For these reasons, the Court held that Verizon’s conduct did not violate section 2 of the Sherman Act.<sup>203</sup> It reversed the judgment of the Second Circuit, and remanded the case for further proceedings.<sup>204</sup>

### 3. Analysis

There has been some debate as to the nature of the Court’s decision. Some commentators believe the Court essentially granted Verizon and other incumbent LECs implied antitrust immunity under the Telecommunications Act.<sup>205</sup> Others distinguish the Court’s decision from traditional implied immunity doctrine, and argue that the Court in fact created a new

198. *Id.* at 413.

199. *Id.*

200. *Id.* at 414.

201. *Id.*

202. *Id.* at 414–15 (citing Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

203. *Id.* at 416.

204. *Id.*

205. See Timothy J. Brennan, *Trinko v. Baxter: The Demise of U.S. v. AT&T*, 50 ANTITRUST BULL. 635, 654 (2005).

type of antitrust immunity.<sup>206</sup> Both sides, however, would agree that the Court's decision in *Trinko* certainly placed Verizon and other incumbent LECs into the same position they would have been had the Court explicitly granted an antitrust immunity. Namely, Verizon was not liable under section 2 of the Sherman Act for its refusals to deal with rival LECs, and future antitrust plaintiffs were put on notice that similar claims would be dismissed. Yet the Court's decision did more than merely exempt Verizon and other incumbent LECs from antitrust liability. By relying on several of the factors generally used to justify grants of implied immunity<sup>207</sup> and suggesting that the Telecommunications Act presented a "good candidate" for implied immunity,<sup>208</sup> the Court expressed an increased willingness to grant claims for implied antitrust immunity in the future.<sup>209</sup>

The Court in *Trinko* identified and relied on at least three principal factors from its implied immunity precedents. First, it referred to the Telecommunications Act as a "detailed regulatory scheme," and later noted the need for antitrust courts to consider "the pervasive federal and state regulation characteristic of the industry."<sup>210</sup> As evidenced by the above discussion of the Supreme Court's implied immunity precedents, the presence of "pervasive" regulation in an industry is a significant factor in the implied immunity decision.<sup>211</sup> In *Gordon*, for example, the Court even suggested that the presence of this factor alone might be enough to justify implied immunity.<sup>212</sup> The *Trinko* Court reinforced the strength of this factor, but did so without first comparing the telecommunications industry to other regulated industries as it had in its previous implied immunity cases.<sup>213</sup> Moreover, it failed to specify what characteristics of the Telecommunications Act justified the "pervasive regulation" label. Based on the *Trinko* Court's analysis, future antitrust courts will feel less pressure to analogize a particular regulatory scheme to one that the Supreme Court has already

206. See 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 358 (3d ed. 2006) ("soft" immunity); Rubin, *supra* note 10, at 1, 12 ("quasi-immunity").

207. See AREEDA & HOVENKAMP, *supra* note 206, at 358.

208. *Trinko*, 540 U.S. at 406.

209. J. Bruce McDonald, Deputy Asst. Attorney General, U.S. Dept. of Justice, Antitrust Division, Antitrust Division Update: *Trinko* and Microsoft, Remarks Before the Houston Bar Association Antitrust and Trade Regulation Section 14 (Apr. 8, 2004), transcript available at <http://www.usdoj.gov/atr/public/speeches/204227.pdf>.

210. *Trinko*, 540 U.S. at 406, 411 (quoting *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 91 (1975)).

211. See, e.g., *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 730 (1975); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 300-01 (1963).

212. See 422 U.S. 659, 688-89 (1975).

213. See, e.g., *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 352 (1963) (comparing bank regulation to public utility regulation); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 348-49 (1959) (comparing regulation of broadcasting corporations to regulation of common carriers).



found to be pervasive. Such leniency is likely to encourage antitrust defendants to rely even more on what is already a vague factor in the Court's implied immunity analysis.<sup>214</sup>

Second, the Court in *Trinko* suggested that implied immunity for Verizon would help “avoid the real possibility” of conflicting judgments issuing from an antitrust court and the FCC.<sup>215</sup> According to the Court's implied immunity precedents, a real possibility of conflicting judgments suggests that the antitrust laws cannot be reconciled with the particular regulatory statute, and counsels in favor of implied immunity.<sup>216</sup> In *Trinko*, the Court observed that the FCC had the power to impose fines and to prohibit Verizon's participation in the long-distance market.<sup>217</sup> In essence, the FCC had specific authority—by refusing to impose any penalties—to permit conduct that might otherwise violate the Telecommunications Act. Yet the Court never identified how an antitrust judgment might conflict with this regulatory scheme, or more importantly, why conflicting judgments were a “real possibility.” Instead, the Court's analysis actually suggested that conflicting judgments were unlikely to occur. The Court observed that while the Sherman Act merely seeks to prevent *unlawful* monopoly conduct, the Telecommunications Act is “much more ambitious” because it seeks to *eliminate all monopolies* enjoyed by incumbent LECs.<sup>218</sup> Congress therefore intended the Telecommunications Act to punish more conduct than the antitrust laws. Based on this analysis, it seems unlikely that a court would impose antitrust liability on conduct that the FCC chose not to penalize. The more likely scenario is that the FCC would penalize conduct that an antitrust court would later deem permissible, as was the case in *Trinko*. This type of conflict does not merit implied antitrust immunity, however, because it does not involve the regulatory agency's endorsement of the conduct.<sup>219</sup> Ultimately, the *Trinko* Court's cursory treatment of the

214. See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 161 (2d Cir. 2005) (noting that few courts have found an implied repeal using this “vague” factor), *rev'd*, 127 S. Ct. 2383 (2007); Folse, *supra* note 33, at 775–76 (discussing the problems caused by using such an “indeterminate” factor in the implied immunity analysis).

215. *Trinko*, 540 U.S. at 406.

216. See, e.g., *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 689 (1975) (“[T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. . . . Such different standards are likely to result.”); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963) (“If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide.”).

217. *Trinko*, 540 U.S. at 413.

218. *Id.* at 415.

219. See *Billing*, 426 F.3d at 162 (noting that conflicts arise between a regulatory scheme and the antitrust laws “when the agency has the discretion to permit the activity by accepting or endorsing it”) (citations and emphasis omitted).

irreconcilability factor is inconsistent with its previous decisions, and suggests a more ready acceptance of claims for implied immunity in future cases.

The final implied immunity factor at issue in *Trinko* appears in the Court's conclusion that the regulatory scheme established by the Telecommunications Act "was an effective steward of the antitrust function."<sup>220</sup> The Supreme Court's analysis of this issue indicates that it relied both on the FCC's duty to enforce some measure of competition and on the FCC's authority to approve or prohibit Verizon's conduct.<sup>221</sup> Cases such as *Pan American World Airways*<sup>222</sup> and *Federal Power Commission*<sup>223</sup> illustrate the significance of a regulatory agency's duty to enforce competition. Whereas in *Pan American World Airways*, implied antitrust immunity was appropriate because the regulatory agency had a broad duty to police anti-competitive conduct in the transportation industry,<sup>224</sup> the Court in *Federal Power Commission* denied immunity because the regulatory agency in that case was only required to *consider* competitive interests in exercising its authority.<sup>225</sup> In *Trinko*, the Telecommunications Act required the FCC to ensure that incumbent LECs offered "nondiscriminatory" access to their network elements.<sup>226</sup> While this duty appears more rigorous than the FCC's duty in *Federal Power Commission*, it is clearly not as broad as the Civil Aeronautics Board's duty in *Pan American World Airways*. Nevertheless, the Court in *Trinko* concluded without further analysis that the Telecommunications Act was "designed to deter and remedy anticompetitive harm,"<sup>227</sup> and in doing so, arguably lowered the standard for this factor in future implied immunity decisions.

When combined with the present state of confusion in the lower federal courts regarding implied antitrust immunity, the *Trinko* decision threatens to undermine the policies behind the Court's earlier implied immunity decisions; namely, that because of the antitrust laws' fundamental importance in our economy, courts should not infer immunities from the antitrust laws unless such a result is absolutely necessary. Not surprisingly, in the first three years after *Trinko* was decided, three more courts granted

220. *Trinko*, 540 U.S. at 413.

221. *See id.* at 412-13.

222. 371 U.S. 296 (1963).

223. 369 U.S. 482 (1962).

224. *See* 371 U.S. at 309-10.

225. *See* 369 U.S. at 486 (observing that while "[o]ther administrative agencies are authorized to enforce" competition laws, "the Federal Power Commission is not included in the list").

226. 540 U.S. at 412-13.

227. *Id.* at 412.

claims for implied immunity,<sup>228</sup> and in two of these cases, the courts' analyses were noticeably similar to that in *Trinko*.

The first of these two cases, *Last Atlantis Capital v. Chicago Board Options Exchange*,<sup>229</sup> involved an antitrust challenge to conduct related to the trading of options. The plaintiffs, a group of brokers, claimed that several exchanges had agreed with one another to artificially control the price of options traded on their exchanges in violation of section 1 of the Sherman Act.<sup>230</sup> For two reasons, however, the court concluded that the defendants' conduct was in fact impliedly immune from the antitrust laws. First, it agreed with the defendants that the SEC's regulatory authority over options trading was "so pervasive that judicial action under the antitrust laws would interfere with the objectives of that regulation."<sup>231</sup> But more importantly, the court also decided that allowing an antitrust suit to proceed would "create[] the very real possibility of subjecting the defendants to conflicting standards of conduct."<sup>232</sup> As in *Trinko*, the court in *Last Atlantis Capital* not only failed to identify why conflicting judgments were a "real possibility," it also suggested that *consistent* judgments were in fact more likely to result. Specifically, the court acknowledged that "the defendants' alleged actions may violate *both* antitrust law and SEC regulations," and even cited to SEC rules and orders that allegedly prohibited the defendants' conduct.<sup>233</sup> In this way, the irreconcilability analysis in *Last Atlantis Capital* was just as inconsistent with the Supreme Court's implied immunity precedents as was the Supreme Court's own analysis in *Trinko*.

Similarly, in *JES Properties v. USA Equestrian*,<sup>234</sup> decided in 2006, the United States Court of Appeals for the Eleventh Circuit held that the United States Equestrian Federation (USEF) was impliedly immune from the antitrust laws because Congress had given it "monolithic control" over

228. *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006); *JES Properties, Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224, 1228 (11th Cir. 2006), *cert. denied*, 2007 WL 506043 (Feb. 20, 2007); *Last Atlantis Capital LLC v. Chi. Bd. Options Exch., Inc.*, No. 04-C-397, 2005 WL 3763262, at \*3 (N.D. Ill. Mar. 30, 2005). In addition to these cases, another federal court recently relied on the Supreme Court's reasoning in *Trinko* to dismiss an antitrust suit under a doctrine closely related to implied antitrust immunity. *See Tex. Commercial Energy v. TXU Energy, Inc.*, No. C-03-249, 2004 WL 1777597, at \*11-12 (S.D. Tex. June 24, 2004) (holding that, in light of *Trinko*, statute's antitrust "saving" clause did not bar a finding of antitrust immunity under the filed-rate doctrine).

229. 2005 WL 3763262, at \*1.

230. *Id.*

231. *See id.* at \*2.

232. *Id.* at \*3.

233. *See id.* at \*2-3 (emphasis added).

234. 458 F.3d 1224 (11th Cir. 2006).

equestrian sports.<sup>235</sup> The plaintiffs in *JES Properties* were promoters of equestrian competitions, and argued that a scheduling rule adopted and enforced by the USEF and its members violated section 1 of the Sherman Act.<sup>236</sup> The Eleventh Circuit disagreed. It held that because the USEF was the national governing body for equestrian sports and was exercising its “monolithic control” over the sport—in this case, by “minimiz[ing] conflicts in the scheduling of competitions,” as required under § 220524 of the Ted Stevens Olympic and Amateur Sports Act (ASA)<sup>237</sup>—its conduct was impliedly immune from antitrust scrutiny.<sup>238</sup> In other words, the court held that the USEF’s pervasive authority over equestrian activities required that it be exempt from antitrust liability. As in *Trinko*, however, the court in *JES Properties* never analogized the USEF’s authority under the ASA to any regulatory authority that the Supreme Court had previously identified as “pervasive.” Given the Supreme Court’s treatment of the pervasive regulation factor in *Trinko*, more courts are likely to proceed like the court in *JES Properties*, and conduct an equally quick analysis of this malleable factor.<sup>239</sup>

As these two decisions demonstrate, the Supreme Court’s opinion in *Trinko* has already had an impact on implied immunity analysis in the lower courts. Despite the fact that the Court in *Trinko* supposedly *denied* the defendant’s argument for implied immunity, two courts in the past three years have used the Supreme Court’s analysis to *grant* claims for implied immunity. The Court’s decision in *Trinko* is poised to have an even greater impact on implied immunity analysis in light of the Court’s more recent decision in *Credit Suisse Securities v. Billing*.

235. See *id.* at 1230–31 (concluding that the rule challenged by the plaintiffs was immune from antitrust scrutiny because it was “an exercise of the ‘monolithic control’ Congress conferred on the USEF”).

236. *Id.* at 1226–27.

237. 36 U.S.C. §§ 220501–220529 (2000).

238. See *JES Properties*, 458 F.3d at 1230–31.

239. Perhaps a more direct criticism of the Eleventh Circuit’s decision in *JES Properties* is that the United States Olympic Commission (USOC), and not the USEF, is the regulatory agency whose authority the court should have evaluated. Specifically, because the ASA “provides for ongoing review of the [national governing body] by the USOC in order to ensure compliance” with the ASA, *id.* at 1229 (quoting *Behagen v. Amateur Basketball Ass’n of the United States*, 884 F.2d 524, 528 (10th Cir. 1989)), the USOC is the regulatory agency charged with enforcing the ASA. As such, the USOC is the only agency whose authority should have been relevant to the implied immunity decision.

## B. *Credit Suisse Securities v. Billing*

### 1. Facts and Procedure

Securities underwriting plays an important role in the securities industry. In particular, underwriting firms help private companies conduct initial sales of stock to the public (called initial public offerings, or IPOs).<sup>240</sup> As part of the IPO process, underwriting firms agree to purchase an issuer's securities in the future at an agreed-upon price and resell them to the public at the same price. Because issuers also agree to give underwriting firms a price discount at the time of sale, underwriting firms earn commissions by successfully reselling the purchased securities at the agreed-upon price.<sup>241</sup>

The underwriting process creates two key incentives for underwriting firms. First, underwriting firms have a direct incentive to resell every security they have purchased from an issuer, since their commissions depend on these sales.<sup>242</sup> Second, underwriting firms have an incentive to create a strong aftermarket for an issuer's securities—i.e., to ensure that the price of an issuer's securities does not drop after they reach the open market. A large drop in price may hurt the underwriting firm's reputation in the competitive IPO market. In addition, because underwriting firms often sell some of the newly issued securities to their preferred customers, a large drop in price may encourage these customers to take their business away from the underwriting firm.<sup>243</sup>

In *Billing*, a group of buyers of newly issued securities sued the underwriting firms that marketed the securities.<sup>244</sup> The plaintiffs alleged that the underwriting firms had conspired to manipulate the price of securities sold in IPOs and their accompanying aftermarkets in violation of section 1 of the Sherman Act. Specifically, the plaintiffs claimed that their purchase of newly issued securities was conditioned upon one of three things: (1) a promise to place bids in the aftermarket for the same securities at prices above the IPO price; (2) a promise to purchase other, less appealing securities; or (3) an agreement to pay excessive commissions on trades of other securities.<sup>245</sup> The plaintiffs argued that the conditions imposed by the un-

240. *See Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2388 (2007).

241. *Id.*

242. *See Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 139 (2d Cir. 2005), *rev'd*, 127 S. Ct. 2383 (2007).

243. *See id.*

244. *Billing*, 127 S. Ct. at 2387.

245. *Id.* at 2389.

derwriting firms artificially inflated the prices of the newly issued securities.<sup>246</sup>

The underwriting firms filed a motion to dismiss, and argued that their conduct was impliedly immune from the antitrust laws because of extensive federal regulation in the securities industry.<sup>247</sup> The District Court agreed, and dismissed the lawsuit.<sup>248</sup> The Court of Appeals for the Second Circuit reversed after concluding that the doctrine of implied antitrust immunity did not preclude application of the antitrust laws to the defendants' conduct. The Supreme Court then granted the defendants' petition for writ of certiorari.<sup>249</sup>

## 2. Justice Breyer's Majority Opinion

In *Billing*, the Supreme Court concluded that the federal securities laws entitled the underwriting defendants to implied antitrust immunity.<sup>250</sup> After describing the underwriting process and the defendants' alleged misconduct,<sup>251</sup> the Court began its implied immunity analysis by reviewing the principles established in its three previous decisions involving the securities industry: *Silver v. New York Stock Exchange*,<sup>252</sup> *Gordon v. New York Stock Exchange*,<sup>253</sup> and *United States v. National Association of Securities Dealers*.<sup>254</sup>

More specifically, the Court determined that the following four factors from these cases were critical to any implied immunity decision involving the securities industry: (1) whether the SEC has supervisory authority over the challenged conduct; (2) whether the SEC has actually exercised its authority; (3) whether an antitrust court's review of the challenged conduct would create a "risk" of conflicting "guidance, requirements, duties, privileges, or standards of conduct"; and (4) whether this possible conflict "affect[s] practices that lie squarely within an area of financial market activity that the securities law seeks to regulate."<sup>255</sup>

246. *Id.*

247. *Id.* For a list of the laws governing the securities industry, see *supra* note 16.

248. *Billing*, 127 S. Ct. at 2389. The District Court's opinion is reported at *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497 (S.D.N.Y. 2003).

249. *Billing* 127 S. Ct. at 2389.

250. *Id.* at 2387.

251. *See id.* at 2388–89.

252. 373 U.S. 341 (1963).

253. 422 U.S. 659 (1975).

254. 422 U.S. 694 (1975).

255. *Billing*, 127 S. Ct. at 2392.

The Court then applied these factors to the underwriting firms' claim for implied immunity. As to the first factor, the Court concluded that the SEC's supervisory authority over the defendants' conduct was embodied in its power to "forbid, permit, encourage, discourage, tolerate, limit and otherwise regulate virtually every aspect of the practices in which underwriters engage."<sup>256</sup> In addition, because the SEC had issued regulations identifying permissible and impermissible underwriter conduct and had actively enforced these regulations, the Court determined that the underwriting firms' claim for immunity also satisfied the second factor from its previous decisions.<sup>257</sup>

Before addressing the third factor—the risk of conflicting judgments—the Court first concluded that any conflicting judgments that might arise would involve conduct that "is central to the proper functioning of well-regulated capital markets."<sup>258</sup> Specifically, it observed that joint conduct by underwriting firms is "essential to the successful marketing of an IPO," and "lie[s] at the very heart of the securities marketing enterprise." Thus, it held that as long as the defendants could satisfy the third factor from the Court's previous securities-related decisions, their claim would satisfy the fourth factor as well.<sup>259</sup>

The third factor, however, presented a more difficult question. That is, because both the SEC and the antitrust laws sought to prohibit the defendants' conduct, the plaintiffs argued that there was no risk of conflicting judgments.<sup>260</sup> The Court acknowledged that conflicting judgments were unlikely to result.<sup>261</sup> Nevertheless, it held that defendants' claim still satisfied the third factor because, in the Court's opinion, application of the antitrust laws to the defendants' conduct would seriously conflict with "proper enforcement of the securities law."<sup>262</sup>

The Court based its analysis here on two separate conclusions. First, the Court determined that allowing antitrust suits such as the plaintiffs' to proceed would potentially cause "serious securities-related harm."<sup>263</sup> In the Court's opinion, it would be difficult for antitrust courts to determine

256. *Id.* at 2392–93 (citing various sections of 15 U.S.C.).

257. *Id.* at 2393.

258. *Id.* at 2392.

259. *See id.*

260. *Id.* at 2394.

261. *See id.* ("We accept the premises of respondents' argument—that the SEC has full regulatory authority over [joint underwriting activities], that it has actively exercised that authority, but that the SEC has *disapproved* (and for argument's sake, we assume that it will continue to disapprove) the conduct that the antitrust complaints attack.")

262. *Id.* at 2397.

263. *Id.* at 2394.

whether the SEC actually allowed or prohibited certain conduct. Moreover, even if a court could answer this question with confidence, the Supreme Court observed that only a securities expert such as the SEC could know whether its permission or prohibition was likely to be permanent.<sup>264</sup> And because the same “evidence tending to show unlawful antitrust activity” might also “tend[] to show lawful securities marketing activity,”<sup>265</sup> the Court felt that applying the antitrust laws to the conduct of underwriting firms would likely result in “unusually serious” antitrust mistakes.<sup>266</sup> According to the Court, these mistakes would harm the securities industry because they would deter conduct essential to its effective operation.<sup>267</sup>

Second, the Court determined that “any enforcement-related need for an antitrust lawsuit [was] unusually small.”<sup>268</sup> The Court found it significant here that the SEC actively enforced its own regulations, and that the securities laws also allowed individual investors to sue for damages for injuries caused by underwriting firms. In addition, the Court observed that the SEC’s duty to consider competition when issuing and enforcing regulations made it “less necessary to rely upon antitrust actions to address anti-competitive behavior” by underwriting firms.<sup>269</sup> In light of the risk of injury to the securities industry and the absence of any real need for antitrust lawsuits, the Court concluded that application of the antitrust laws to the defendants’ conduct would conflict with the proper enforcement of securities law.<sup>270</sup> Thus, it found that the defendants’ claim for implied immunity also satisfied the third factor from the Court’s previous implied immunity decisions.

Having found all four factors present in the defendants’ claim for implied immunity, the Court concluded that the securities laws were “clearly incompatible” with any application of the antitrust laws to the defendants’ conduct. It reversed the Second Circuit’s opinion, and held instead that the defendants’ conduct was impliedly immune from the antitrust laws.<sup>271</sup>

### 3. Justice Stevens’s Concurring Opinion

Justice Stevens agreed with the majority that the plaintiff’s lawsuit should be dismissed. He disagreed, however, with the reasons for the

264. *See id.*

265. *Id.* at 2395.

266. *Id.* at 2396.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 2397.

271. *Id.*



Court's judgment.<sup>272</sup> That is, instead of granting the defendants implied immunity from the antitrust laws, Justice Stevens argued that the Court should have dismissed the plaintiffs' suit for the sole reason that the defendants' conduct did not violate the antitrust laws.<sup>273</sup> Moreover, Justice Stevens criticized the majority for using the burdens of antitrust litigation and the risk of antitrust mistakes to justify its grant of implied immunity to the defendants. He emphasized that these two concerns should not "play any role in the analysis of the question of law presented in a case such as this."<sup>274</sup>

#### 4. Analysis

Although the Supreme Court in *Billing* attempted to limit its decision to the securities industry<sup>275</sup>—the first time it has ever suggested that the requirements for implied antitrust immunity are different depending on the industry—several aspects of the Court's decision actually threaten to expand the scope of conduct entitled to implied immunity.<sup>276</sup> First, similar to the *Trinko* decision, where the Court found that the FCC adequately performs the role of antitrust courts,<sup>277</sup> the Court in *Billing* concluded that antitrust suits are not necessary to prevent anticompetitive conduct in the securities industry because the SEC already does a good job of this.<sup>278</sup> According to the Court's implied immunity precedents, the fact that Congress has charged a regulatory agency with enforcing competition in its industry is evidence that tends to support a finding of implied immunity.<sup>279</sup> In *Billing*, however, the SEC was not charged with enforcing competition in the securities industry. Nor was its duty even as rigorous as the FCC's duty in *Trinko* to ensure that the conduct of regulated entities was not dis-

272. *Id.* at 2398 (Stevens, J., concurring).

273. *See id.* ("In my view, agreements among underwriters on how best to market IPOs, including agreements on price and other terms of sale to initial investors, should be treated as procompetitive joint ventures for purposes of antitrust analysis. In all but the rarest of cases, they cannot be conspiracies in restraint of trade within the meaning of § 1 of the Sherman Act . . .").

274. *Id.*

275. *See id.* at 2392 (majority opinion) ("This Court's prior decisions also make clear that, when a court decides whether *securities law* precludes antitrust law . . .") (emphasis added).

276. In addition, recent case law suggests that the Court's attempt to limit its decision to the securities industry has also been unsuccessful. Specifically, in a case involving alleged misconduct in the airline industry, the United States District Court for the District of Massachusetts cited *Billing* as having established a universal, four-factor test for implied antitrust immunity. *See Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n.*, No. 06-11246-RGS, 2008 WL 410125, at \*5 n.7 (D. Mass. Feb. 15, 2008).

277. *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 413 (2004).

278. 127 S. Ct. at 2396.

279. *See, e.g., Pan Am. World Airways v. United States*, 371 U.S. 296, 309–10 (1963) (discussing the significance of the CAB's duty to police competition in the transportation industry).

criminary.<sup>280</sup> Rather, the SEC's only duty in *Billing* was to "take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations."<sup>281</sup> The Court's previous decisions strongly imply that the duty to merely consider competitive interests does not constitute a grant of power to adjudicate antitrust issues, and therefore does not support a finding of implied immunity.<sup>282</sup> By relying on such a limited duty in *Billing*, the Court thus significantly lowered the implied immunity hurdle for future antitrust defendants.

Second, the Court in *Billing* created another vague factor in the implied immunity analysis by using the potential costs of antitrust mistakes to justify its decision to grant implied immunity to the defendants.<sup>283</sup> Whereas in *Trinko*, the Court had examined the costs of potential mistakes in its analysis of antitrust liability,<sup>284</sup> the Court in *Billing* used this factor to preclude courts from even reaching the liability decision. Specifically, the Court concluded that the likelihood of mistakes in cases where the securities laws and the antitrust laws overlap would deter regulated entities from engaging in conduct beneficial to the securities industry. In the Court's opinion, this potential for securities-related harm supported a finding of implied immunity.<sup>285</sup> The difficulty with this analysis is that it requires courts to determine both the potential costs of mistakes and the likelihood that courts will make these mistakes, and no clear formula exists for either determination. Moreover, although the Court in *Billing* acknowledged that the costs associated with antitrust mistakes "exist[] to some degree" in all antitrust suits,<sup>286</sup> at least one commentator has observed that these costs exist in "any complex litigation" due to our use of generalist courts.<sup>287</sup> This begs the question: Why should the costs of potential mistakes benefit defendants in implied immunity cases, but not in other complicated cases? As Justice Stevens correctly recognized in his concurring opinion, the costs of potential mistakes simply should not "play any role" in the implied immu-

280. See *Trinko*, 540 U.S. at 412–13.

281. 127 S. Ct. at 2396.

282. See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 351 (1963) (denying defendant's claim for implied immunity where regulatory agency had duty to merely consider the effect on competition in exercising its authority); *California v. Fed. Power Comm'n*, 369 U.S. 482, 485–86 (1962) (suggesting that a grant of implied immunity is improper unless the regulatory agency has the authority to enforce competition).

283. See 127 S. Ct. at 2396.

284. See 540 U.S. at 414–15.

285. See 127 S. Ct. at 2396.

286. *Id.* at 2396.

287. Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761, 791.

nity analysis.<sup>288</sup> The majority's opinion, however, ensures that they will. The Court's analysis ultimately encourages regulated entities to rely on another vague factor, and thus increases the likelihood that otherwise inadequate claims for implied immunity will succeed in future cases.

Finally, and perhaps most significantly in light of the Court's implied immunity precedents, the Court in *Billing* granted implied antitrust immunity to the defendants even though there was no likelihood of conflicting mandates issuing from the SEC and an antitrust court.<sup>289</sup> Prior to *Billing*, the Supreme Court had always required a likelihood of conflicting judgments in its implied immunity decisions; the "mere possibility" of conflicting judgments was not enough to warrant implied immunity from the antitrust laws.<sup>290</sup> The primary reason for this requirement, though never clearly articulated in the Court's decisions, was to protect regulated entities from being subjected to inconsistent standards of conduct. If conflicting judgments are unlikely to result, however, there is no need to prevent an antitrust court from evaluating the defendants' conduct. On the contrary, the defendant will be held to consistent standards of conduct, and the court's judgment will therefore also further the goals of the regulatory

288. *Billing*, 127 S. Ct. at 2398 (Stevens, J., concurring).

289. *See id.* at 2394 (majority opinion) (rejecting defendants' argument that "repugnance" or "incompatibility" requires a conflict).

290. *See, e.g.,* *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 406 (2004) (stating that implied immunity was attractive in light of the "real possibility" of conflicting judgments); *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 735 (1975) (granting implied immunity because of the "substantial danger" for conflicting judgments); *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 689 (1975) (granting implied immunity because conflicting judgments were "likely to result").

The Court in *Billing* cited its decision in *Gordon* as evidence that the implied immunity doctrine requires only a possibility of conflict. Specifically, it noted that the Court in *Gordon* found conflict where the SEC had power to permit the defendants' conduct even though, as a result of recently enacted legislation, "the SEC and that antitrust law[s] would both likely prohibit" the defendants' conduct in the future. *Billing*, 127 S. Ct. at 2390–91 (citing *Gordon*, 422 U.S. at 690–91). The *Billing* Court's reliance on *Gordon* here is misplaced. Whereas in *Billing*, the SEC had never approved of the defendants' conduct and was not likely to do so in the future, 127 S. Ct. at 2394, in *Gordon*, the SEC had actually permitted the defendants' conduct at the time they engaged in it, 422 U.S. at 672. Thus, the Court in *Gordon* did not need to decide, as Justice Breyer suggested in *Billing*, whether the SEC would likely approve of the defendants' conduct in the future. Rather, conflict was evident in *Gordon* because the SEC had already permitted the conduct and because the conduct also likely violated the antitrust laws. *See* 422 U.S. at 691 ("Interposition of the antitrust laws . . . in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress . . .") (emphasis added).

Moreover, though the Court in *Gordon* did rely on the new legislation in its implied immunity decision, it cited the legislation as evidence of Congress's intent to repeal the antitrust laws, and not as evidence of potential conflict. *See id.* at 690 ("[I]n the new legislation . . . Congress has indicated its continued approval of SEC review of the commission rate structure.") (emphasis added). As explained further in Section IV.B.1, *infra*, the implied immunity analysis is different depending on whether the regulatory agency has already approved or permitted the defendants' conduct. Because the facts in *Billing* and *Gordon* differ on this point, the two cases are not analogous on the issue of irreconcilability.

scheme. But if courts instead grant claims for implied immunity when there is no likelihood of conflicting judgments, it is possible that regulatory agencies, acting alone, will be unable to sufficiently deter conduct that violates the antitrust laws. In *Billing*, for example, although the SEC had always prohibited the defendants' conduct,<sup>291</sup> and although the same conduct also at least arguably violated the antitrust laws, reports of similar underwriter misconduct had appeared in materials published by the New York Stock Exchange and the NASD, and in complaints filed by the SEC.<sup>292</sup> This evidence suggests that the SEC's enforcement efforts were not entirely successful in deterring the prohibited conduct. In sum, the *Billing* Court's conclusion that the mere possibility of conflicting results supports an implied repeal of the antitrust laws opens the defense of implied immunity to a significantly larger group of regulated entities, including those whose conduct is prohibited by both the antitrust laws *and* the regulatory agency. This expansion of the implied immunity doctrine plainly contradicts the Court's implied immunity precedents, which directed courts to grant implied immunity "only if necessary to make the [regulatory statute] work, and even then *only to the minimum extent necessary*."<sup>293</sup>

In their petition for writ of certiorari, the underwriter defendants in *Billing* urged the Supreme Court to clarify its test for implied antitrust immunity.<sup>294</sup> Yet despite granting certiorari and agreeing to hear the first true implied immunity case since 1981, the Supreme Court instead limited its analysis to the securities industry. On its face, the Court's decision thus leaves regulated entities in other industries to deal with the same uncertainty they faced prior to *Trinko* and *Billing*. Although this fact alone might have justified adopting a uniform approach to the doctrine of implied antitrust immunity, the *Billing* decision does more than simply maintain the status quo for the majority of regulated entities. By modifying several factors in the implied immunity analysis, the Court's decision also threatens to expand the scope of conduct entitled to implied antitrust immunity. It is this latter aspect of *Billing* that makes necessary some clarification of the implied immunity doctrine.

291. 127 S. Ct. at 2394.

292. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 136 (2d Cir. 2005), *rev'd*, 127 S. Ct. 2383 (2007).

293. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) (emphasis added).

294. The petitioners' Question Presented asked the Court to clarify whether a regulated defendant seeking implied immunity needs to show only the "potential for conflict" with the regulatory statute, or both "a specific expression of congressional intent to immunize [their] conduct" and evidence that the regulatory agency "has power to compel the specific practices at issue." Petition for a Writ of Certiorari at I, *Credit Suisse First Boston Ltd. v. Billing*, 127 S. Ct. 2383 (2007) (No. 05-1157), 2006 WL 616006.

#### IV. CLARIFYING THE IMPLIED IMMUNITY DOCTRINE

Viewed together, the Supreme Court's decisions in *Trinko* and *Billing* appear to usher in a new era of implied antitrust immunity—one in which judicial uncertainty and departures from established precedents will lead to additional, and in some cases unnecessary, immunities from the antitrust laws. Such a result plainly undermines the importance of the antitrust laws. Given the Supreme Court's reluctance to articulate a clear test for implied antitrust immunity, it is no surprise that several commentators have previously recommended a uniform approach to the implied immunity analysis. As discussed below, however, none of the proposals identifies an appropriate method for analyzing claims for implied antitrust immunity. Rather, a workable framework for implied immunity analysis already exists in the Supreme Court's previous decisions. The remainder of this section explains the Court's framework in detail, and illustrates why antitrust courts are in fact well-suited to address the difficult issues affecting regulated industries.

##### A. *Proposed Modifications to the Implied Immunity Doctrine*

In response to confusion in the lower federal courts, several commentators have suggested new or modified approaches to the doctrine.<sup>295</sup> The first of these tests, hereinafter referred to as the "Strict Test," is a factor-based test similar to the factor-counting approaches outlined above.<sup>296</sup> The Strict Test purports to simplify the doctrine by offering the following five criteria—all taken from the Supreme Court's decisions—that, if met, should result in a finding of implied immunity: (1) the agency must have supervisory authority over the defendant's conduct, (2) the agency must have authority to grant the relief requested by the antitrust plaintiff, (3) the agency must consider competition in its determination of the public interest, (4) the agency must have expertise that will assist it in deciding the particular antitrust issues in dispute, and (5) the antitrust suit must involve important issues of regulatory policy.<sup>297</sup>

While the Strict Test is appealing due to its simplicity, it has been criticized for ignoring the reasoning behind the Supreme Court's decisions.<sup>298</sup> Indeed, such a formulaic approach to the implied immunity doctrine simply cannot be reconciled with the unpredictable, industry-specific

295. See *AT&T and the Antitrust Laws*, *supra* note 12; Folse, *supra* note 33; Balter & Day, *supra* note 23.

296. See *AT&T and the Antitrust Laws*, *supra* note 12, at 258.

297. *Id.*

298. *E.g.*, Balter & Day, *supra* note 23, at 448 n.7 (disagreeing with the Strict Test and citing other sources that have criticized this approach).

analysis required by the Court's implied immunity decisions. On a more practical note, to the extent that the Strict Test allows courts to grant claims for implied immunity when one or more of the five criteria are missing,<sup>299</sup> it does not simplify the implied immunity analysis. Since none of the five factors is dispositive, courts will be forced to conduct a more traditional balancing test, no doubt leading to the same confusion and inconsistency that the Strict Test claims to resolve.

The second proposal for reforming the implied immunity doctrine, hereinafter referred to as the "Policy Test," suggests an entirely different approach.<sup>300</sup> Instead of relying on factors identified in the Supreme Court's cases, the Policy Test recommends that courts balance two key policies implicated by the implied immunity decision: avoiding unfairness to the regulated defendant, and preserving the autonomy of the regulatory agency.<sup>301</sup> Although it sets forth a logical decision tree for courts to follow in future implied immunity cases,<sup>302</sup> the Policy Test is not without flaws. First and foremost, it requires courts to abandon their search for congressional intent in deciding claims for implied immunity.<sup>303</sup> However, because the implied immunity decision requires courts to interpret conflicting commands issued by Congress,<sup>304</sup> the doctrine of implied antitrust immunity cannot possibly be divorced from congressional intent. In addition, this proposal's justifications for ignoring legislative intent, similar to those expressed over the years by Justice Scalia,<sup>305</sup> are not endorsed by a majority of the Supreme Court.<sup>306</sup>

As a more general criticism, the Policy Test is based on the incorrect assumption that the Supreme Court's implied immunity decisions are irreconcilable, and that some type of reform is therefore necessary.<sup>307</sup> As discussed later in this section, the Court's implied immunity decisions are not

299. Although this possibility is not discussed in the proposal, the language used to introduce the test suggests that an antitrust defendant need not satisfy all five factors in order to receive implied immunity: "Any claim of immunity which can meet all of these criteria should *certainly* succeed." *AT&T and the Antitrust Laws*, *supra* note 12, at 258 (emphasis added). It would appear that claims which do not meet all five criteria will not "certainly" succeed, but may succeed. *See id.*

300. *See* Folse, *supra* note 33.

301. *Id.* at 786.

302. *See id.* at 791–94.

303. *See id.* at 756, 761–62.

304. *Id.* at 760.

305. *Compare id.* at 761–62 (discussing the problems of relying on legislative history) with *Zedner v. United States*, 126 S. Ct. 1976, 1990–91 (2006) (Scalia, J., concurring in part and concurring in the judgment) and *Blanchard v. Bergeron*, 489 U.S. 87, 98–100 (1989) (Scalia, J., concurring in part and concurring in the judgment).

306. *See* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 149 (2001) (citing *Wis. Pub. Intervenor v. Mortieri*, 501 U.S. 597, 610 n.4 (1991)).

307. *See* Folse, *supra* note 33, at 756.

irreconcilable; the Court has merely failed to articulate the framework it has used in its analysis. Thus, while the Policy Test is not entirely without merit, such a complete overhaul of the doctrine is simply unnecessary.

The final proposal for reforming the implied immunity doctrine, hereinafter referred to as the “Implied Repeal Test,” does not suffer from the same problems as the first two because it seeks to identify a framework for implied immunity analysis based on the Supreme Court’s earlier decisions.<sup>308</sup> Specifically, the Implied Repeal Test suggests that the Supreme Court has actually used the same framework for analysis in its implied antitrust immunity decisions that it has always used in general cases of implied statutory repeal.<sup>309</sup> Thus, the authors of this proposal argue that implied repeal of the antitrust laws is improper unless the defendant shows either (1) an irreconcilability between the antitrust laws and the particular regulatory statute, or (2) affirmative evidence of congressional intent to repeal the antitrust laws.<sup>310</sup>

Though the Implied Repeal Test starts down the correct path by reading the Court’s decisions under the general framework for implied statutory repeal, it remains too attached to this doctrine when the Court’s decisions clearly head in a different direction. For example, the authors of this proposal point to the Supreme Court’s decision in *NASD* as an example of an implied immunity decision based solely on affirmative evidence of congressional intent to repeal.<sup>311</sup> Yet they ignore the fact that the Supreme Court in *NASD* also explicitly found that it could not reconcile the operation of the regulatory statute with the antitrust laws.<sup>312</sup> Moreover, the authors fail to explain how the Supreme Court’s reasoning in cases such as *Radio Corp.* fits within the traditional framework for implied statutory repeal. In *Radio Corp.*,<sup>313</sup> the Supreme Court denied a claim for implied immunity despite the fact that there was a real possibility of conflicting

308. See Balter & Day, *supra* note 23, at 450.

309. See *id.* at 451–52.

310. *Id.* at 465.

311. *Id.* at 461–62.

312. As to the defendants’ vertical agreements to restrain trade, the Court in *NASD* concluded that there was “no way to reconcile the Commission’s power to authorize these restrictions with the competing mandate of the antitrust laws.” 422 U.S. 694, 722 (1975). As to the defendants’ horizontal agreements to restrain trade, the Court concluded that “maintenance of an antitrust action for activities so directly related to the SEC’s responsibilities poses a substantial danger that [defendants] would be subjected to duplicative and inconsistent standards.” *Id.* at 735. The authors of this proposal also try to pigeon-hole the Court’s decision in *Gordon* into the “congressional intent” category of implied statutory repeal. Balter & Day, *supra* note 23, at 461–62. This categorization is similarly mistaken, however, since the Court in *Gordon* also found that allowing an antitrust suit would likely “subject the [defendants] . . . to conflicting standards”—i.e., that the regulatory statute and the antitrust laws were irreconcilable. 422 U.S. 659, 689 (1975).

313. 358 U.S. 334 (1959).

results.<sup>314</sup> Under the doctrine of implied statutory repeal, such irreconcilability should have been enough to compel a finding of implied immunity;<sup>315</sup> there should have been no reason for the Court in *Radio Corp.* to also search—as it did—for evidence of congressional intent to repeal.<sup>316</sup>

Ultimately, none of the three suggested approaches to the implied immunity doctrine presents a satisfactory option. As shown below, the proper framework for implied immunity analysis is a slightly modified version of the test for general implied statutory repeal. In light of the antitrust laws' fundamental influence on economic policy, courts should evaluate claims for implied antitrust immunity under a stricter standard than general claims for implied statutory repeal. The Supreme Court's analysis reflects this concern, and any framework for the implied immunity doctrine should do the same.

### *B. Identifying a Uniform Approach to Implied Immunity Analysis*

Viewed in its entirety, the Supreme Court's implied immunity jurisprudence identifies a workable approach to implied antitrust immunity. Although the Court has engaged in analysis similar to that used for general implied statutory repeals, it has carved out a separate and more rigorous framework for the doctrine of implied antitrust immunity. Thus, while implied statutory repeal is required either where two laws are irreconcilable or where there is evidence of congressional intent to repeal the earlier statute, implied antitrust immunity is required only if the defendant can show both irreconcilability *and* affirmative evidence of congressional intent to repeal the antitrust laws.

#### 1. Irreconcilability

The starting point for the Supreme Court's implied immunity analysis is clearly the nature of the regulatory scheme. As then-Circuit Judge Anthony Kennedy correctly observed, "each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved."<sup>317</sup> In particular, whether a regulatory statute can be

314. See *id.* at 336–37. In *Radio Corp.*, the FCC had specifically approved the defendants' conduct pursuant to its authority under the Communications Act of 1934, but the government argued that the defendants' conduct nevertheless violated the antitrust laws. *Id.*

315. See Balter & Day, *supra* note 23, at 465 (discussing the two separate situations in which courts should grant claims for implied antitrust immunity).

316. See 358 U.S. at 340–46.

317. *Phonetele v. AT&T*, 664 F.2d 716, 727 (9th Cir. 1981).



reconciled with the antitrust laws is determined in large part by the extent of regulatory authority over the defendant's conduct.<sup>318</sup> As discussed below, the Court's implied immunity precedents identify two main categories of cases.

In the first type of case, the regulatory agency has no authority to require, approve, or permit the defendant's conduct.<sup>319</sup> For example, the agency may have authority to condemn rules promulgated by the defendant, yet lack authority to oversee the defendant's enforcement of these rules.<sup>320</sup> In these cases, there is no possibility of conflicting judgments issuing from the regulatory agency and an antitrust court because the regulatory agency cannot issue a mandate with regard to the defendant's conduct.<sup>321</sup> In order to establish irreconcilability between the antitrust laws and the regulatory statute, the regulated entity must therefore show that judicial review will necessarily conflict with the *goals* of the regulatory scheme.<sup>322</sup>

The Supreme Court demonstrated such an analysis in *Silver*. After identifying the main goals of the Securities and Exchange Act—to protect investors and ensure fair dealing on exchanges<sup>323</sup>—the Court concluded that the SEC's inability to address the conduct of an individual exchange left open the possibility that an exchange would act in a manner inconsistent with these goals. Because it was possible that an antitrust court would enjoin such conduct, and therefore further the same goals, the Court held that the regulatory statute was not incompatible with the antitrust laws.<sup>324</sup> In general, a finding of implied immunity is unlikely in these cases because it is almost impossible to show irreconcilability.

318. Parties on either side of a claim for implied immunity usually disagree on this issue, and argue for their interpretation of the particular regulatory statute. *See, e.g.,* *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 168 (2d Cir. 2005) (declining to “resolve the bounds of SEC authority” because the parties could not agree, and because the SEC itself was noncommittal), *rev'd*, 127 S. Ct. 2383 (2007). To properly define the scope of an agency's authority, a court must not only engage in statutory interpretation, it must also thoroughly examine the operation of the particular regulatory regime. *See, e.g.,* *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 704–19 (1975) (determining the scope of the SEC's regulatory authority under the Investment Company Act).

319. *See Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963).

320. *Id.*

321. *See id.* at 358. The Court's decision in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), offers another example of this type of case. Although the regulatory agency in *Pennsylvania Railroad Co.* had authority to approve or modify the rates established by the defendant railroad companies, the Court refused to infer antitrust immunity because the agency had no authority to modify or prohibit the *way in which* the defendants set their rates—i.e., it had no authority over the defendants' conduct, just the resulting rates. *See id.* at 455–57, 462.

322. *See Silver*, 373 U.S. at 359.

323. *Id.* at 352.

324. *See id.* at 358–59.

The second category of cases covers a much broader spectrum of federal regulation. It includes situations where a regulatory agency is authorized to require, approve,<sup>325</sup> or permit<sup>326</sup> the defendant's conduct. To show irreconcilability between one of these regulatory statutes and the antitrust laws, a defendant must show that applying the antitrust laws to his conduct will create a "real possibility" of conflicting judgments issuing from the regulatory agency and an antitrust court.<sup>327</sup>

This test ensures that regulated entities are treated fairly by antitrust courts. The potential for unfair treatment exists when a regulatory statute overlaps with the antitrust laws because the overlap forces regulated entities to look for approval from two different authorities—the regulatory agency and an antitrust court. If the two statutes are likely to produce conflicting judgments with regard to the defendant's conduct, the defendant will likely be subjected to inconsistent standards of conduct.<sup>328</sup> Similarly, when an antitrust court condemns conduct previously required, approved, or permitted by a regulatory agency, it undermines the defendant's reliance on the agency's endorsement of its conduct. And although one defendant's reliance surely does not outweigh the importance of the antitrust laws, a single conflicting judgment has the potential to affect the conduct of every regulated entity in the industry. Therefore, because it would be unfair to hold regulated entities to inconsistent standards of conduct, and because the law generally protects reasonable reliance interests,<sup>329</sup> the Supreme Court's test dictates that a regulatory statute and the antitrust laws are irreconcilable if they are likely to produce conflicting judgments.

325. See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350 (1963); *California v. Fed. Power Comm'n*, 369 U.S. 482, 488 (1962); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 337 (1959).

326. See *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 728 (1975); *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 666–67 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373 (1973). To clarify, an agency does not have the power to permit conduct unless it also has the power to prohibit the same conduct. Agencies with this type of authority generally have the power to establish guidelines for the defendant's conduct, and to impose penalties for any violations. Thus, an agency permits conduct by expressly authorizing it in a rule, or by making an affirmative decision *not* to prohibit it. See *Gordon*, 422 U.S. at 680 (discussing SEC's power to permit or prohibit fixed commissions); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 311–12 (1963) (discussing CAB's power to prohibit unlawful combinations).

327. The Supreme Court has articulated its test for irreconcilability in several different ways. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 406 (2004) (discussing the "real possibility" of conflicting judgments); *NASD*, 422 U.S. at 735 (finding a "substantial danger" of conflicting judgments); *Gordon*, 422 U.S. at 689 (observing that conflicting judgments were "likely to result"). However, it has remained consistent in requiring more than a mere possibility of conflicting judgments. As discussed in Section III, *supra*, the Supreme Court's suggestion in *Billing* that the mere possibility of conflicting judgments is enough to show irreconcilability is inconsistent with the Court's previous decisions, and expands the scope of conduct entitled to implied antitrust immunity.

328. See *Folse*, *supra* note 33, at 787–88.

329. See, e.g., RESTATEMENT (SECOND) OF TORTS § 537 (1977).

The difficulty for courts facing this second type of case lies in determining whether the regulatory agency and an antitrust court are in fact likely to issue conflicting judgments. Because most antitrust suits allege conduct that at least arguably violates the antitrust laws, the key question here is whether the regulatory agency is likely to require, approve, or permit the defendant's conduct. If the regulatory agency has *already* required, approved, or expressly permitted the defendant's conduct, then the statutes are obviously irreconcilable.<sup>330</sup> In *California v. Federal Power Commission*,<sup>331</sup> for example, the statute at issue authorized the Federal Power Commission to approve mergers, and the agency exercised its authority in approving the defendants' merger.<sup>332</sup> The Court considered the effect of this approval, and acknowledged that an "unscrambling" would be necessary if an antitrust court eventually found the same merger to be illegal.<sup>333</sup> Although the Court in *Federal Power Commission* ultimately concluded that the defendants' merger was not entitled to implied antitrust immunity, it did so only after finding no congressional intent to repeal the antitrust laws. In other words, it denied the defendants' claim for implied immunity only after reaching the "congressional intent" prong of the implied immunity analysis.<sup>334</sup>

The irreconcilability decision is more complicated when the regulatory agency has not yet required or approved the defendant's conduct,<sup>335</sup> or when permission is merely inferred from the agency's decision not to prohibit the conduct.<sup>336</sup> When the agency has the authority to require or approve the defendant's conduct, but has not done so, the court must determine whether the agency is likely to require or approve similar conduct in the future. In *Pan America World Airways*, for example, the Supreme Court found that although the Civil Aeronautics Board had not been

330. See AREEDA & HOVENKAMP, *supra* note 157, at 35 ("[C]onduct that is specifically compelled by the agency acting within its jurisdiction is generally immune.") (emphasis omitted).

331. 369 U.S. 482 (1962).

332. *Id.* at 483–84.

333. *Id.* at 488.

334. See *id.* at 485–86, 489; see also *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) (declining to imply immunity where agency had approved the defendants' conduct because there was no evidence of congressional intent to repeal the antitrust laws).

335. See, e.g., *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2394 (2007) (noting that the SEC had always *disapproved* of the defendants' conduct); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 305, 310 (1963) (noting that although the CAB had power to approve the defendants' conduct, it had not done so because the defendants had acted prior to the enactment of the regulatory statute).

336. See, e.g., *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 727–28 (1975) (discussing the SEC's "acceptance" of the defendants' conduct "for more than three decades"); *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 668–82 (1975) (discussing the SEC's review of the defendants' systems of fixed commissions, and its repeated decisions not to prohibit the conduct).

in existence to approve the defendants' allocation of transportation routes, it was likely to approve similar allocations in the future since this activity was a "precise ingredient[]" of its regulatory authority.<sup>337</sup> Thus, the Court found that applying the antitrust laws to the defendants' conduct would create a real possibility of conflicting judgments issuing from the Civil Aeronautics Board and an antitrust court—i.e., that the two statutes were irreconcilable.<sup>338</sup>

For similar reasons, when a regulatory agency with power to prohibit the defendant's conduct chooses not to do so, thereby implicitly permitting the conduct, the court must examine the agency's *previous* exercise of its authority.<sup>339</sup> That is, unless the agency has been diligent in monitoring the conduct in question and has demonstrated a willingness to exercise its authority when necessary, its permission says little about whether the agency actually endorses the conduct. In turn, if the agency has not endorsed the conduct, there is no potential for a conflicting judgment issuing from an antitrust court, and thus no irreconcilability. In *Gordon*, for example, the Court reviewed almost forty years of activity by the SEC.<sup>340</sup> Only after determining that the agency had "engaged in thorough review" of the defendant's system of fixed commission and had actually abolished the system on at least one occasion<sup>341</sup> did the Court conclude that the Securities Exchange Act and the antitrust laws were irreconcilable.<sup>342</sup>

337. 371 U.S. at 305, 310.

338. *See id.* at 310.

339. *See Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 727–28 (1975); *Gordon*, 422 U.S. at 668–82.

340. *See Gordon*, 422 U.S. at 668–82.

341. *Id.* at 682.

342. *See id.* at 689 (stating that judicial review of the defendant's conduct would likely subject the defendants to "conflicting standards"); *Pan Am. World Airways*, 371 U.S. at 310 (noting that the antitrust and regulatory regimes "might collide").

The Court's decision in *NASD* initially appears contradictory to this framework. In *NASD*, the Court granted implied antitrust immunity for two separate types of conduct—vertical and horizontal agreements to fix prices. 422 U.S. at 697, 700. Although the Court acknowledged the potential conflicts that might arise with respect to the vertical agreements, *id.* at 728–30, it concluded that the SEC had no specific authority to require, approve, or permit the horizontal agreements, *id.* at 730. Thus, by implication, there could be no potential conflict between the antitrust laws and the regulatory statute. Nevertheless, the Court granted the defendants' claim for implied antitrust immunity as to the horizontal agreements based on the pervasive regulatory scheme created by the Investment Company Act and the Maloney Act. *Id.*

The Court's analysis here was slightly misleading. If the SEC actually had no authority to require, approve, or permit the horizontal agreements, the Court in *NASD* should have simply considered, as it did in *Silver*, whether judicial review of the dealers' conduct would have been "incompatible with the fulfillment of the aims" of the two regulatory statutes. *Silver v. New York Stock Exch.*, 373 U.S. 341, 357–59 (1963). The Court in *NASD* did eventually answer this question in the affirmative. *See* 422 U.S. at 734. Importantly, however, it also concluded that the statutory schemes were in fact irreconcilable. That is, it found that the dealers' horizontal agreements produced restrictions that closely resembled those produced by the dealers' vertical agreements. *Id.* at 733. And because the SEC had authority to approve the vertical agreements, the Court held that "maintenance of an antitrust action for

As the Supreme Court's decisions illustrate, irreconcilability is a prerequisite to any finding of implied immunity. Only after the defendant has satisfied this element should a court move on to consider evidence of congressional intent. Such a two-pronged approach is consistent not only with the Supreme Court's previous decisions, but also with the policies implicated by the implied immunity decision. To be sure, if conflicting judgments are unlikely to result, there should be no problem with an antitrust court evaluating the defendant's conduct, since the decision will further the goals of the regulatory statute, and will neither undermine the agency's regulatory autonomy nor disturb any reliance by the regulated defendant.<sup>343</sup>

## 2. Congressional Intent to Repeal

If a regulatory statute and the antitrust laws are irreconcilable, the Supreme Court's implied immunity decisions suggest that a defendant must also show evidence of Congress's intent to repeal the antitrust laws in order to succeed on a claim for implied immunity.<sup>344</sup> The Court's test for implied immunity is more rigorous in this regard than its test for general implied statutory repeal since, under the latter test, irreconcilability alone is enough to warrant an implied repeal. Although the Court has never articulated its reasons for applying a stricter test to claims for implied immunity, a stricter test is justified by the "overarching and fundamental" influence of the statute that antitrust defendants seek to repeal.<sup>345</sup>

Ultimately, the importance of congressional intent in the Court's implied immunity decisions cannot be overstated. As evidenced by Justice Blackmun's concluding paragraph in *Gordon*, a case in which the antitrust

activities so directly related to the SEC's responsibilities pose[d] a substantial danger that appellees would be subjected to duplicative and inconsistent standards." *Id.* at 735. In addition, the Court held that the SEC actually had "ample authority to eliminate" the dealers' activities through its powers of rule amendment. *Id.* at 734. Therefore, despite the Court's assertion that immunity was required simply because of the SEC's pervasive regulatory authority, the Court also justified its conclusion on the grounds that the two statutory schemes were irreconcilable. The *NASD* decision thus fits squarely within the Court's previously established framework for implied immunity analysis.

343. See *Folse*, *supra* note 33, at 786 (discussing the policies implicated by the implied immunity decision). When the defendant cannot show irreconcilability, the Supreme Court's test for implied immunity dictates that immunity is improper *even if there is evidence of congressional intent to repeal the antitrust laws*. Obviously, however, this rule does not include cases where the statute itself *expressly* exempts activity from antitrust scrutiny. The evidence of congressional "intent" in these cases is more than enough to justify an exemption from the antitrust laws.

344. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-75 (1973) (denying defendant's claim for implied immunity for conduct permitted by regulatory agency because there was no evidence of congressional intent to repeal the antitrust laws).

345. See *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 399 (1978). The Supreme Court has expressed its reluctance to repeal the antitrust laws by characterizing its approach as creating a "presumption against repeal by implication." *Id.*

laws and the regulatory statute were obviously irreconcilable,<sup>346</sup> the Supreme Court has always structured its implied immunity analysis around congressional intent:

In sum, the statutory provision authorizing regulation, §19(b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act *was intended by the Congress* to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as *per se* violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act *as intended by Congress* and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work *as it was intended*; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.<sup>347</sup>

Thus, under the Supreme Court's framework for implied immunity analysis, the antitrust laws are not "inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants."<sup>348</sup> Nor are they inapplicable simply because the agency's jurisdiction creates a real possibility of conflicting results.<sup>349</sup> Rather, the Court's test also requires proof that antitrust immunity is "necessary to protect the achievement of the aims of the [regulatory statute]"—i.e., that Congress intended to repeal the antitrust laws when it enacted the regulatory statute.<sup>350</sup>

The Supreme Court's precedents identify four factors that may show congressional intent to repeal the antitrust laws: (1) whether the statutory scheme requires the regulatory agency to enforce competition; (2) whether the particular regulatory scheme is pervasive; (3) whether Congress has expressly authorized the agency to require, approve, or permit conduct that would otherwise constitute a *per se* violation of the antitrust laws; and (4)

346. Under the regulatory statute at issue in *Gordon*, Congress had expressly authorized the SEC to approve conduct—price-fixing—that the antitrust laws deemed *per se* illegal. See 422 U.S. at 682. As the Court observed, the SEC's regulatory authority was "likely to result" in conflicting judgments issuing from the SEC and antitrust courts with regard to the defendants' conduct. *Id.* at 689.

347. *Id.* at 691 (emphasis added).

348. *Id.* at 692 (Stewart, J., concurring); see also *Otter Tail Power Co.*, 410 U.S. at 372 ("Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.")

349. See, e.g., *California v. Fed. Power Comm'n*, 369 U.S. 482, 487–88 (1962) (holding that the likely need for an "unscrambling" of conflicting judgments was not enough to warrant implied immunity for conduct approved by the regulatory agency).

350. *Gordon*, 422 U.S. at 692 (Stewart, J., concurring) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 361 (1963)).

whether the statutory text and/or legislative history otherwise demonstrate an intent to repeal to the antitrust laws.

The first of these factors concerns whether Congress has required the regulatory agency to enforce competition.<sup>351</sup> The theory behind this factor is that judicial review of regulated conduct is not as important where Congress has entrusted the regulatory agency to perform, at least to some degree, the role of an antitrust court.<sup>352</sup> Evidence of this factor is usually found in the text of the regulatory statute.<sup>353</sup> In *Pan American World Airways*, for example, the Court found that Congress had intended to repeal the antitrust laws where it expressly required the Civil Aeronautics Board to police unfair competition in the transportation industry.<sup>354</sup> In contrast, where a regulatory agency is simply required to “consider” the effect on competition in exercising its authority, this does not constitute a grant of power to adjudicate antitrust issues.<sup>355</sup>

Despite these two clear examples, there is a gray area of uncertainty as to what exactly constitutes authority to “enforce competition.” As the Supreme Court suggested in *Trinko*, an agency’s duty to ensure that regulated entities act in a “nondiscriminatory” manner might be enough to satisfy this factor.<sup>356</sup> And in dictum, the Court in *Philadelphia National Bank* suggested that intent to repeal might exist where Congress has required an agency not only to consider the effect on competition as a substantial factor in its exercise of authority, but to provide for a hearing before making its decision and to allow for judicial review of its decision.<sup>357</sup> Ultimately, the issue courts must decide here is whether a regulatory agency is sufficiently performing the role of antitrust courts such that the goals of the antitrust laws are still protected.<sup>358</sup> Only then can it be said that Congress actually intended to repeal the antitrust laws with respect to the defendant’s activity.

351. See *Verizon Commc’ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 412–13 (2004); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 351–52 (1963); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358–59 (1963); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 302 (1963); *California v. Fed. Power Comm’n*, 369 U.S. 482, 486 (1962); *United States v. Borden*, 308 U.S. 188, 205–06 (1939).

352. *Trinko*, 540 U.S. at 412.

353. E.g., *Silver*, 373 U.S. at 358 (declining to grant implied immunity in part because “[t]here is nothing built into the regulatory scheme which performs the antitrust function”).

354. 371 U.S. at 309–10 (quoting the Federal Aviation Act § 411, 72 Stat. 731 (1958)).

355. See *Fed. Power Comm’n*, 369 U.S. at 485–86; *Phila. Nat’l Bank*, 374 U.S. at 351.

356. See 540 U.S. 412–13.

357. See *Phila. Nat’l Bank*, 374 U.S. at 351.

358. See *Trinko*, 540 U.S. at 412.

The second factor relevant to congressional intent concerns the pervasiveness of the regulatory scheme.<sup>359</sup> This factor is simply an extension of the idea that when Congress enacts federal regulation in a particular industry, it has decided that unrestrained competition in the industry does not vindicate the public interest, and that artificial restraints of some kind are appropriate.<sup>360</sup> Thus, where federal regulation in an industry is pervasive, courts should assume that Congress has “forsworn the paradigm of competition” for those activities subject to agency oversight.<sup>361</sup>

Though the precise elements of this second factor are more difficult to define, several general principles can be established. First, the broader the reach of federal regulation, the more likely it is that the regulatory scheme is pervasive.<sup>362</sup> To determine whether Congress intended a particular regulatory scheme to apply broadly to participants in an industry, the Supreme Court has given great weight to legislative history. In *Pan American World Airways*, for example, the Court found that Congress had created a pervasive regulatory scheme under the Civil Aeronautics Act in part because language in a report from the House of Representatives indicated that the Civil Aeronautics Board “was to have broad jurisdiction over air carriers.”<sup>363</sup>

A second principle directs that when commercial relationships in an industry are governed more by business judgment than by regulatory coercion, a court is *less* likely to find the regulatory scheme to be pervasive.<sup>364</sup> This principle also depends on legislative history. In *Otter Tail*, for example, the Supreme Court concluded that Congress had not created a pervasive regulatory scheme under the Federal Power Act where reports from both the House and Senate evidenced Congress’s intent to preserve the voluntary nature of the defendant’s activities.<sup>365</sup>

The third principle from the Court’s decisions is that when Congress enacts a statute to govern the conduct of common carriers, courts are more

359. See *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 688 (1975) (recognizing that the Court has always treated “the pervasiveness of the regulatory scheme as a *factor* in determining whether there is an implied repeal”) (emphasis added).

360. *AT&T and the Antitrust Laws*, *supra* note 12, at 257.

361. *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 82 (2d Cir. 1981).

362. See, e.g., *Phila. Nat’l Bank*, 374 U.S. at 352; *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 304 (1963).

363. 371 U.S. at 304; see also *Phila. Nat’l Bank*, 374 U.S. at 352 (reviewing committee reports from both the House of Representatives and the Senate before concluding that Congress did not intend the Bank Merger Act to affect the application of antitrust laws to banking acquisitions).

364. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

365. *Id.*; see also *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351 (1959) (“In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion) . . . . No pervasive regulatory scheme was involved.”).



likely to find the regulatory scheme to be pervasive.<sup>366</sup> This principle turns on the fact that intense competition among carriers may threaten the financial status of individual carriers and lead to unsafe travel conditions.<sup>367</sup> As a result, the public interest requires that competition among carriers be extremely limited.<sup>368</sup> Because Congress has limited competition among carriers by regulating their rates, federal agencies are in a better position than courts to deal with potentially anticompetitive conduct and to ensure that Congress's detailed rate structure is not thrown off balance.<sup>369</sup>

The final principle related to pervasive regulation comes into play when the Supreme Court has not previously addressed the effect of federal regulation in a particular industry. In these situations, the Court will compare the new industry to others it has previously considered.<sup>370</sup> For example, in *Philadelphia National Bank*, the Court compared the nature of federal regulation in the banking industry to Congress's regulation of public utilities. It found that the Bank Merger Act was "in most respects less complete than public utility regulation," and therefore concluded that Congress had not intended to repeal the antitrust laws with respect to the defendants' proposed bank merger.<sup>371</sup>

These four principles notwithstanding, the existence of a pervasive regulatory scheme does not, without more, exempt a regulated entity's voluntary conduct from antitrust scrutiny.<sup>372</sup> Instead, a pervasive regulatory scheme is simply evidence of congressional intent to repeal the antitrust laws.<sup>373</sup> A defendant's conduct is not impliedly immune under this test unless, as discussed above, judicial review would also create a substan-

366. See, e.g., *Pan American World Airways*, 371 U.S. at 300–01; *Phila. Nat'l Bank*, 374 U.S. at 352 (noting that common carriers are subject to much more regulation).

367. *Pan American World Airways*, 371 U.S. at 301 (quoting S. REP. NO. 1661, at 2 (1938)).

368. See *id.*

369. See *Phila. Nat'l Bank*, 374 U.S. at 352 (suggesting that antitrust enforcement would be "disruptive" of the regulatory structure imposed on common carriers); see also *Otter Tail*, 410 U.S. at 374 (finding no intent to repeal the antitrust laws where "common carrier" provisions were eliminated from regulatory statute before its enactment).

370. See *Phila. Nat'l Bank*, 374 U.S. at 352.

371. *Id.*; see also *Radio Corp. of Am.*, 358 U.S. at 348–49 (comparing regulation of radio broadcasters to regulation of telephone and telegraph companies).

372. See *Pan American World Airways*, 371 U.S. at 304–05 ("There are various indications in the legislative history that the Civil Aeronautics Board was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned. . . . [Y]et we hesitate here, as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws . . ."). The Court's suggestion to the contrary in *Gordon* was only dictum. See 422 U.S. 659, 688–89 (1975).

373. See *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 733 (1975) ("As the Court previously has recognized, the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act . . .") (citation omitted).

tial danger of conflicting mandates issuing from the regulatory agency and an antitrust court.<sup>374</sup>

The third factor relevant to a showing of congressional intent to repeal is whether Congress has expressly authorized the regulatory agency to approve, require, or permit conduct that would normally constitute a *per se* violation of the antitrust laws.<sup>375</sup> In *NASD*, for example, the Court held that Congress had intended to repeal the antitrust laws where it expressly authorized the SEC to permit the defendants' vertical price-fixing agreements.<sup>376</sup> Despite the fact that such agreements would normally constitute a *per se* violation of the Sherman Act, Congress had determined "that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry,"<sup>377</sup> and had thus evidenced an intent to repeal the antitrust laws.<sup>378</sup> Similar to the pervasive regulation factor, however, the finding that Congress has expressly authorized an agency to approve, require, or prohibit *per se* illegal conduct is not a prerequisite to immunity.<sup>379</sup> It is simply one of several factors for courts to consider.<sup>380</sup>

The final factor relevant to congressional intent is a catch-all category that includes both statutory text and legislative history.<sup>381</sup> As with the other factors that may show congressional intent, courts must determine whether Congress's grant of authority to the regulatory agency was "intended to prevent enforcement of the antitrust laws in federal courts,"<sup>382</sup> or whether the "essential thrust" of the regulatory law was instead to maintain "competition to the maximum extent possible."<sup>383</sup> In *Gordon*, for example, the Supreme Court suggested that statutory text might evidence congressional intent to repeal if any part of the text would be "render[ed] nugatory" by

374. *See id.* (noting that implied immunity is appropriate where Congress has enacted pervasive regulation only for those "activities approved by the SEC").

375. *See id.* at 729; *Gordon*, 422 U.S. at 681–82.

376. 422 U.S. at 729.

377. *Id.*

378. *See id.* at 729–30; *see also Gordon*, 422 U.S. at 681–82, 691 (holding that SEC's statutory authority to review and modify defendants' rules with regard to fixing of commission rates, conduct that would otherwise constitute a *per se* violation of the antitrust laws, showed evidence of congressional intent to repeal the antitrust laws).

379. *See AREEDA & HOVENKAMP, supra* note 157, at 36–37 (noting that although immunity is less likely if the agency does not have pervasive authority, the "appropriate" conclusion ultimately will "depend upon the particular statute involved, the relative competence of court and agency, the comprehensiveness of agency responsibilities, and the degree to which the court is satisfied that the particular agency is sensitive to competitive policies").

380. *Id.* at 37.

381. *See, e.g., United States v. Radio Corp. of Am.*, 358 U.S. 334, 339–46 (1959); *United States v. Borden*, 308 U.S. 188, 205–06 (1939).

382. *Radio Corp.*, 358 U.S. at 346.

383. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373–74 (1973).

application of the antitrust laws.<sup>384</sup> Likewise, in *Radio Corp.*, the Supreme Court demonstrated the significance of legislative history as evidence of congressional intent when it denied a claim for implied immunity after finding Senator Dill's statement in the congressional record: "[T]he bill does not attempt to make the [regulatory agency] the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court."<sup>385</sup> By implication, legislative history might also evidence congressional intent to repeal if it shows that an antitrust "saving" clause was removed from a bill before its enactment.<sup>386</sup>

Thus, the Supreme Court's implied immunity decisions make clear that a regulated entity whose conduct is subject to agency supervision is not impliedly immune from antitrust scrutiny unless there is (1) a real danger of conflicting judgments issuing from the agency and an antitrust courts, and (2) affirmative evidence that Congress intended to repeal the antitrust laws with respect to the entity's conduct. However, because courts' search for congressional intent may lead to inconsistent interpretations of statutory language and legislative history, it is important to point out several general rules from the Supreme Court's decisions regarding this second prong of the implied immunity analysis.

First, an antitrust defendant need not satisfy each of the four factors discussed above to compel a finding of implied immunity. In *Pan American World Airways*, for example, the Court granted the defendants' claim for implied immunity, but relied only on the first two factors relevant to congressional intent;<sup>387</sup> it did not discuss the third factor—whether Congress had authorized the regulatory agency to approve, require, or prohibit *per se* illegal conduct.<sup>388</sup>

Second, the Supreme Court's decisions do not clearly indicate whether each factor, on its own, is sufficient to meet the required showing of congressional intent. Such a conclusion is arguably supported for the second and third factors, respectively. In *NASD*, for example, the Court granted the defendants' claim for implied immunity with regard to the horizontal agreements, but relied only on the pervasiveness of the regulatory scheme—the second of the four factors—as evidence of congressional

384. See *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 691 (1975).

385. 358 U.S. at 343 (quoting 67 CONG. REC. 12507 (1926) (statement of Sen. Dill)).

386. Compare *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 406 (2004) (holding that presence of antitrust "savings" clause precludes a finding of implied immunity) with *Otter Tail*, 410 U.S. at 374 (finding no intent to repeal where provision that would have counseled in favor of pervasive regulation was removed from statute before its enactment).

387. See *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 300–02 (1963).

388. See also *Gordon*, 422 U.S. at 682, 691 (relying solely on SEC's permission to authorize *per se* illegal conduct as evidence of congressional intent).

intent to repeal the antitrust laws.<sup>389</sup> Similarly, in *Gordon*, the Court granted the defendant's claim for implied immunity, but did not address whether the regulatory statute had created a pervasive regulatory scheme,<sup>390</sup> or whether SEC was required to enforce competition in the securities industry. The Court instead relied solely on the fact that Congress had authorized the SEC to prohibit the defendant's *per se* illegal price-fixing, suggesting that the second factor relevant to congressional intent can also stand on its own.<sup>391</sup> To date, however, none of the Court's decisions have indicated whether either the first or fourth factor, standing alone, can satisfy the second prong of the Court's implied immunity analysis.

Finally, due to the number of industries subject to federal regulation<sup>392</sup> and the variety of ways in which Congress drafts regulatory legislation, the weight attributed to each of the above factors need not be the same in every case. In general, establishing bright-line rules with regard to particular factors seems inconsistent with the industry-specific analysis required by the Court's previous implied immunity decisions. The correct approach to the search for congressional intent must take into account the nature of the particular industry and focus on the overall strength of all the evidence showing an intent to repeal the antitrust laws.

### C. *Defending the Uniform Approach to Implied Immunity Analysis*

As indicated above, the Supreme Court's framework for implied immunity analysis is more rigorous than its test for general implied statutory repeal, because it requires defendants to show *both* irreconcilability and congressional intent to repeal. Defendants seeking an implied repeal of the antitrust laws therefore face a greater burden than defendants seeking an implied repeal of other federal statutes. As discussed below, this additional burden is justified by the structure of the federal court system, the policies behind the antitrust laws, and the interaction of firms in federally regulated industries.

The primary argument in favor of expanded immunity in regulated industries—i.e., in favor of a lesser burden for regulated defendants seeking implied immunity—is that regulatory agencies are congressionally-created experts for a particular industry, and are therefore in a better position than antitrust courts to address industry-specific issues and to shape industry

389. *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 730, 733 (1975).

390. 422 U.S. at 689.

391. *See id.* at 682, 685.

392. *See* Rubin, *supra* note 10, at 13–14 (compiling list of regulatory statutes that potentially overlap with the antitrust laws).

policy.<sup>393</sup> The Supreme Court made this argument in *Billing*. Specifically, in determining that the defendants' underwriting activity was subject to antitrust scrutiny, the Court noted that "[i]t will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence" whether an underwriter's conduct violates the SEC's rules and regulations, and even more, whether those rules "set forth a virtually permanent line" that is "unlikely to change."<sup>394</sup> According to the Court in *Billing*, implied antitrust immunity prevents "different nonexpert judges and different nonexpert juries" from destroying the detailed regulatory regime established by Congress.<sup>395</sup> Yet this argument overlooks the fact that federal courts can and do review the decisions of regulatory agencies.<sup>396</sup> Though courts generally defer to the agency's determination in these cases,<sup>397</sup> the need to evaluate industry-specific decisions requires courts to become intimately familiar with the operation of a particular industry.<sup>398</sup> To suggest that courts are incapable of performing the analysis in antitrust cases involving regulated industries would presumably disqualify them in some of these cases as well. Moreover, it would create a serious line-drawing problem in that courts would somehow need to determine when a particular industry-related issue is too specialized or too difficult for them to handle.

Another argument for expanded immunity, one closely related to the previous argument, is that regulatory agencies possess far greater resources to evaluate industry-specific issues than do federal courts. But federal courts are not necessarily worse off when it comes to available resources. To ensure that industry issues are properly considered, for example, a federal court may appoint a special master<sup>399</sup> or assign the case to a magistrate judge for preliminary factual findings.<sup>400</sup> In addition, parties whose inter-

393. See also *AT&T and the Antitrust Laws*, *supra* note 12, at 279.

394. *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2394 (2007).

395. See *id.* at 2395; see also *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 689–90 (1975) ("Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.").

396. See, e.g., *Orkin v. Sec. & Exch. Comm'n*, 31 F.3d 1056, 1058 (11th Cir. 1994) (affirming SEC's decision to approve sanctions imposed by the National Association of Securities Dealers).

397. See, e.g., *C.E. Carlson, Inc. v. Sec. & Exch. Comm'n*, 859 F.2d 1429, 1433 (10th Cir. 1988) (reviewing SEC's factual findings merely to determine if its interpretation of the evidence was "rational").

398. See *Orkin*, 31 F.3d at 1063–66 (analyzing regulated defendant's alleged misconduct within the context of the securities industry).

399. FED. R. CIV. P. 53.

400. 28 U.S.C. §§ 631–639 (2000); FED. R. CIV. P. 72–73.

ests are affected by the litigation may join in through intervention,<sup>401</sup> and parties who have additional information that may assist the court in deciding the issues may participate as *amicus curiae*.<sup>402</sup> Representatives for the regulatory agencies whose authority is in dispute often participate in implied immunity cases under this latter procedure.<sup>403</sup> An antitrust court can therefore assume a role not unlike that of a congressional committee, and solicit testimony from various sources in order to reach a more informed decision.

The fact remains that there is a greater potential for harm both to the competitive process and to the regulated industry when courts mistakenly *grant* claims for implied immunity than when courts mistakenly deny these claims. A court that grants a claim for implied immunity exempts the defendant's conduct from any and all antitrust liability. Exemptions therefore encourage regulated entities in the same industry—the defendant and others similarly situated—to stretch the limits of their immunity, while at the same time discouraging antitrust plaintiffs from filing lawsuits to challenge similar conduct. As in *Billing*, this means that conduct prohibited by the regulatory agency, but not sufficiently deterred, will continue to cause harm to the industry. If the defendant's conduct also violates the antitrust laws, a court that grants implied immunity will also have enabled the anti-competitive effects likely to result from the conduct. In addition, although artificial restraints on competition may be necessary to a certain extent in regulated industries,<sup>404</sup> some amount of competition is almost always in the public interest.<sup>405</sup> Improvident exemptions, however, will make it much more difficult to foster competitive environments, especially in industries that were previously monopolistic or oligopolistic,<sup>406</sup> and regulated industries are likely to suffer as a result.

On the other hand, when a court mistakenly denies a claim for implied antitrust immunity, there is much less potential for harm to the regulated industry and to the competitive process. The concern here is that the threat of antitrust liability will affect the conduct of regulated entities, and consequently, the operation of the regulated industry. Once the implied immunity hurdle is cleared, antitrust courts could theoretically focus too much on

401. FED. R. CIV. P. 24.

402. FED. R. APP. P. 29; SUP. CT. R. 37.

403. See, e.g., Brief for Securities Industry and Financial Markets Ass'n et al. as Amici Curiae Supporting Petitioners, *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2006) (No. 05-1157), 2007 WL 160779.

404. *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1312 (7th Cir. 1985).

405. See Shuman, *supra* note 5, at 4–7.

406. Folse, *supra* note 33, at 755–56.

maintaining competition in the particular industry and ignore the fact that artificial restraints on competition may actually be in the public interest. In the face of such antitrust enforcement and the damages that would flow from a finding of liability, the fear is that regulated defendants will refrain from engaging in conduct beneficial to the industry. This concern is unwarranted for two reasons.

First, under the Court's uniform approach to implied antitrust immunity, not all types of regulated conduct will even face the threat of antitrust prosecution. To be sure, regulated entities need not worry much about the antitrust laws when they engage in activities required, approved, or expressly permitted by the regulatory agency, or in activities that the agency is likely to require, approve, or expressly permit in the future. Because the Supreme Court's test directs that the regulatory statute and the antitrust laws are irreconcilable as to these activities, as long as the defendant can show evidence of congressional intent to repeal the antitrust laws, his conduct will be immune from antitrust scrutiny.

It follows that regulated entities need only worry about antitrust suits when they engage in two types of conduct. The first type is conduct that the regulatory agency has not required, approved, or expressly permitted, and is not likely to require, approve, or expressly permit in the future. Because the regulatory agency has not endorsed the conduct in any way, there can be no irreconcilability, and thus no implied immunity for the defendant. The defendants' conduct in *Billing* is a good example of this type of activity. In that case, the SEC had always prohibited the defendants' conduct, and the Court assumed the SEC would continue to prohibit the same conduct in the future.<sup>407</sup> As was true in *Billing*, however, conduct falling into this category is probably not necessary to the effective operation of the industry. Thus, while the threat of antitrust suits will certainly deter some of this conduct, deterrence is not necessarily a bad thing. In *Billing*, for example, the threat of antitrust enforcement might have actually helped the regulatory agency prevent the prohibited conduct.

Admittedly, however, when a regulated defendant engages in conduct that a regulatory agency has the power to prohibit, but has chosen not to prohibit, the threat of antitrust liability does have the potential deter conduct that is in the best interests of the regulated industry. That is, because the implied immunity analysis is more difficult when the defendant has engaged conduct implicitly permitted by the regulatory agency,<sup>408</sup> some courts will inevitably deny legitimate claims for implied antitrust immu-

407. *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2394 (2007).

408. See discussion accompanying footnotes 339–42.

nity. As demonstrated below, however, the likelihood that these courts' decisions on the subsequent issue of liability will deter *too much* conduct beneficial to the regulated industry is greatly reduced by the flexibility of the antitrust laws.

Specifically, the second reason that the threat of antitrust lawsuits will not deter too much beneficial conduct is that courts are required to consider "the peculiarities" of the regulatory scheme in their analysis of antitrust liability.<sup>409</sup> Thus, when a court denies a claim for implied immunity, it is not a foregone conclusion that the defendant has violated the antitrust laws. As the Supreme Court's decision in *Silver* illustrates, courts usually evaluate antitrust claims brought under section 1 of the Sherman Act using a rule of reason analysis.<sup>410</sup> The rule of reason approach requires courts to determine whether the defendant's restraint of trade is reasonable in light of all the circumstances,<sup>411</sup> including the presence of federal regulation. Thus, when a defendant's conduct falls "within the scope and purposes of" a regulatory statute, the conduct "may be regarded as justified"—i.e., free from antitrust liability.<sup>412</sup> The Supreme Court's decision in *Trinko* demonstrated a similar analysis, but did so for an antitrust claim brought under section 2 of the Sherman Act, for which traditional rule of reason analysis does not apply. Specifically, the Court in *Trinko* undertook a complete analysis of the defendant's conduct within the specific regulatory context—including its likely effect on competition—and concluded that although the defendant was not entitled to implied immunity, its conduct was nevertheless justified in light of the regulatory scheme.<sup>413</sup>

The Court's approach to the antitrust claim in *Trinko* "lowers the stakes" of the implied immunity analysis.<sup>414</sup> As a result of this decision, regulated defendants have less to fear from antitrust prosecutions, and thus no reason to stop engaging in conduct that benefits the industry. That is, even if a court mistakenly denies the defendant's claim for implied immunity, the court will evaluate the defendant's conduct within the context of the regulatory scheme regardless of whether the conduct is challenged under section 1 or section 2 of the Sherman Act. And because a court is

409. AREEDA & HOVENKAMP, *supra* note 157, at 12.

410. See *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 361–66 (1963).

411. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

412. *Silver*, 373 U.S. at 361; see also *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 166 (2d Cir. 2005) (noting that "certain behavior classically deemed anticompetitive might not violate the antitrust laws" in the regulatory context due to the nature of a particular regulatory scheme), *rev'd*, 127 S. Ct. 2383 (2007).

413. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 411–16 (2004).

414. *Billing*, 426 F.3d at 166.



unlikely to impose antitrust liability if the defendant's conduct is in the best interests of the industry,<sup>415</sup> mistaken denials of claims for implied immunity are unlikely to cause serious harm to the regulated industry. Moreover, although there is a risk that judicial mistakes on the issue of antitrust liability will deter some pro-competitive conduct, the problems associated with judicial mistakes are in no way unique to implied immunity cases.<sup>416</sup> As such, they should not factor into the implied immunity decision.<sup>417</sup>

In sum, the arguments against a stricter standard for implied antitrust immunity are not convincing. The only remaining question is whether the Court's specific framework for implied immunity analysis is justified. Under the Court's test, implied immunity is improper unless a defendant can show (1) that the antitrust laws and the particular regulatory statute are irreconcilable, and (2) that Congress intended to repeal the antitrust laws with respect to the challenged conduct. This test is identical to the Court's test for implied statutory repeal except that, under the latter test, implied repeal is granted if the defendant can show either irreconcilability *or* congressional intent to repeal. Due to the similarity between claims for implied antitrust immunity and claims for implied statutory repeal—both seek a judgment that Congress impliedly repealed an earlier statute in its enactment of a later one—it makes sense that the two tests should share the same basic framework.

In addition, the sole difference between the two doctrines can be explained by the importance of the statute that antitrust defendants seek to repeal:

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. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.<sup>418</sup>

The Supreme Court has always expressed a similar regard for the antitrust laws,<sup>419</sup> and has thus been reluctant to grant claims for implied repeal

415. See AREEDA & HOVENKAMP, *supra* note 157, at 7 (“[T]he antitrust laws are flexible enough to take into account the peculiarities of a regulated industry.”).

416. See Bush, *supra* note 287, at 791.

417. See Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383, 2398 (2007) (Stevens, J., concurring) (arguing that the potential costs of antitrust mistakes should not “play any role in the analysis of” claims for implied antitrust immunity).

418. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

419. See, e.g., Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty . . . .”); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933) (describing the Sherman Act as “a charter of freedom”).

of the antitrust laws in all but the most exceptional cases.<sup>420</sup> Only when the Court cannot possibly justify enforcing the antitrust laws has a defendant been entitled to implied immunity. As one might expect, the Court's zealous approach to antitrust enforcement is reflected in its framework for implied immunity analysis. That is, by requiring regulated defendants to show *both* irreconcilability and congressional intent to repeal in order to succeed on a claim for implied antitrust immunity, the Court's test erects an antitrust barrier that only the most deserving defendants can overcome.

As it stands now, however, the Supreme Court has ruled on thirteen substantive claims for implied antitrust immunity, but has yet to clearly articulate a uniform framework for its analysis. Until it does so, the lower courts will continue to apply the doctrine in an inconsistent and unpredictable manner, and the harms associated with improvident exemptions from the antitrust laws will continue to accrue.

#### CONCLUSION

Since the Supreme Court's earlier decisions establishing the doctrine of implied antitrust immunity, the lower federal courts have struggled to consistently apply the doctrine. Their efforts have resulted in a number of tests, and have made application of the doctrine unpredictable. The Supreme Court's two latest decisions in this area—*Verizon v. Trinko* and *Credit Suisse Securities v. Billing*—have contributed to a recent increase in the number of successful claims for implied immunity, and appear to have created a new era of implied immunity analysis in which regulated defendants are more likely to receive immunity from the antitrust laws. This trend must be reversed. Specifically, the Supreme Court should articulate and re-adopt the same approach to implied immunity analysis it used prior to *Trinko*. Under the Court's test, implied immunity is inappropriate unless a defendant can show both an irreconcilability between the antitrust laws and the particular regulatory statute governing his activity, and evidence of congressional intent to repeal the antitrust laws. Ultimately, the antitrust laws are flexible enough to address the peculiarities of regulated industries, and their influence on economic policy in this country requires that courts be particularly careful before exempting conduct from their reach.

420. See *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966) ("We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) (antitrust immunity is to be implied "only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary").