

The Implied Antitrust Immunity

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In 1963, Richard Posner, then Justice William Brennan’s motivated clerk, drafted for the Supreme Court the iconic United States v. Philadelphia National Bank (“PNB”) decision. Addressing a set of issues in antitrust and regulation, Posner introduced several important doctrinal innovations and clarifications. Among others, PNB emphasized the primacy of competition over regulation and framed the implied antitrust immunity as a clear antitrust presumption: “Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored.”

The logic of the implied antitrust immunity has not changed much since its early days in the 1890s: The doctrine’s primary rationale is the elimination of conflicts between administrative agencies and federal courts. Over time, however, the immunity’s narrative and nature have considerably transformed. Born in the late nineteenth century as an application of the presumption against implied repeals, in PNB, the doctrine turned into an independent antitrust presumption. During the past five decades, the doctrine has transformed into an evaluative framework whose underlying premises tilt its outcomes toward preclusion of antitrust law.

The implied immunity doctrine is exceptionally important because it gives antitrust courts the power to preclude the application of antitrust law and influence national competition policies without a meaningful consideration of tradeoffs. Indeed, the doctrine is frequently invoked in courts. Yet, the doctrine has always been murky and confusing. This Article studies and clarifies the operation and applications of the implied immunity, as well as its structure, premises, and flaws.

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“Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.”

*United States v. Philadelphia National Bank*¹

Introduction

An important question antitrust courts have always been grappling with, is whether a federal regulatory scheme regulating a business activity impliedly precludes the application of antitrust law.² The argument, first introduced shortly after the enactment of the Sherman Act,³ is that the mere existence of a special regulatory scheme impliedly precludes the application of antitrust law. The persistent use of the argument contributed to the rise of the “implied antitrust immunity” doctrine, which in the past was also known as the “implied repeal doctrine” and today is also known as the “implied preclusion doctrine.”⁴

¹ *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963) [hereinafter: “PNB”] (footnotes omitted).

² See, e.g., Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1207 (1969) (“A pervasive and overriding issue of domestic economic regulatory policy is when and to what extent we should rely on free competitive markets and antitrust, and when and to what extent we should resort instead to regulation.”)

³ See, e.g., *United States v. Trans-Missouri Freight Ass’n*, 53 F. 440, 442 (C.C.D. Kan. 1892) *aff’d*, 58 F. 58 (8th Cir. 1893) *rev’d*, 166 U.S. 290 (1897).

⁴ See generally Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of “Plain Repugnancy”*, 45 GONZ. L. REV. 437 (2009); Karen Petroski, *Rethorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487 (2004).

During its first seven decades, the implied immunity doctrine was largely an application of the presumption against implied repeals, which treats lawmaking as a rationalizable process and attempts to reconcile inconsistencies between statutes.⁵ In the early 1960s, with no meaningful changes in its framing, the antitrust immunity departed from canon of statutory construction replacing the deference to legislative choices with a commitment to competition policy. In *Philadelphia National Bank* (“PNB”), Justice William Brennan’s clerk, Richard Posner,⁶ gave new life to the immunity using the traditional wording of the presumption but stressing that the existence of “broad [regulatory] powers to enforce of the competitive standard” is the key criterion courts should consider when they evaluate “plain repugnancy.”⁷

During the five decades that have followed *PNB*, the implied immunity has considerably evolved, transforming from a presumption against implied repeals of antitrust law into a flexible evaluative framework whose underlying premises tilt its outcomes toward preclusion of antitrust law. Offering immunity from antitrust laws to regulated industries, the implied immunity is exceptionally important. Its interpretation influences the scope of antitrust law, giving courts the power to strike the balance between antitrust and other national economic policies. Notwithstanding, the doctrine, its transformation, and applications by courts are poorly understood.⁸ This Article seeks to clarify the functions of the implied immunity, its structure, premises, and flaws.

Under present law, antitrust courts may determine that a regulatory scheme impliedly precludes the application of antitrust law, where that scheme *permits* an activity challenged under antitrust law, only *possibly permits* challenged activity, and even *prohibits* the challenged activity. Further, courts may make such determinations even when the relevant regulatory statute contains a saving clause. Thus, as stated at the outset, antitrust courts may preclude the application of antitrust law whenever a federal regulatory scheme *addresses* an activity that is challenged under antitrust law.

To illustrate the doctrine’s practical complexity, consider commodity price manipulations facilitated through collusion. For example, in late 1979, the Hunt brothers’ attempt to corner the silver market culminated with Silver Thursday, the

⁵ See generally J. F. Burrows, *Inconsistent Statutes*, 3 OTAGO L. REV. 601, 607-15 (1976); Karen Petroski, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487 (2004).

⁶ As a clerk to Justice William Brennan, Richard Posner wrote the *PNB* opinion for the Court. In 2011, Judge Posner noted that Justice Brennan “wasn’t very interested in the details of legal analysis, so [the] law clerks wrote the opinions.” Interview with Richard Posner, Securities and Exchange Commission Historical Society Oral History Project 2 (Jan. 25 2011). [ADD: Q&A WITH JUDGE RICHARD POSNER, PNB CONFERENCE]

⁷ *PNB*, 374 U.S. at 350-55. See also *supra* note 1 and accompanying text.

⁸ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *IA ANTITRUST LAW* 338 (4th ed., 2013) (“The implied immunity cases resist definitive harmonization.”)

“first great market panic since October 1929.”⁹ Conspiracies to manipulate commodity prices were not unusual in the 1970s.¹⁰ The phenomenon, however, is not extinct. For example, during the 2000-2001 California energy crisis, several energy companies conspired to manipulate the prices of natural gas.¹¹ The Commodity Exchange Act (“CEA”) regulates trade in commodities, does not expressly preempt the application of antitrust laws,¹² and bans collusive and unilateral price manipulation. In the described cases and others, the defendants contended (1) that the availability of a specific remedy under the CEA precluded plaintiffs from maintaining a simultaneous claim under the Sherman Act and/or (2) that there was a fine line between activities permissible under the CEA and activities impermissible under the Sherman Act. In many cases, though not all, courts rejected these arguments and found that conspiracies to manipulate commodity prices were not impliedly immune from the application of antitrust law. This outcome is probably inconsistent with the present Supreme Court’s antitrust jurisprudence.

The Supreme Court considerably broadened the implied immunity in *Trinko* and *Credit Suisse*,¹³ relying on three premises: (1) a regulatory scheme that facilitates competition is “an effective steward of the antitrust function,”¹⁴ (2) when a regulatory scheme intends to deter and remedy anticompetitive harm, antitrust enforcement is likely to be cost-ineffective,¹⁵ and (3) the social costs of false negatives in antitrust are insignificant, whereas social costs of false positives are

⁹ See L. J. Davis, *Silver Thursday*, HARPER’S, May 1981, at 39, 39. See also *Strax v. Commodity Exch., Inc.*, 524 F. Supp. 936 (S.D.N.Y. 1981); *Goldschmidt v. Hunt*, 556 F. Supp. 123 (N.D. Tex. 1983); *He Has a Passion for Silver*, TIME, Apr. 4, 1980, at 12; JEFFREY C. WILLIAMS, MANIPULATION ON TRIAL: ECONOMIC ANALYSIS AND THE HUNT SILVER CASE (1995).

¹⁰ Two highly publicized conspiracies to manipulate prices are the schemes in the markets for potatoes and orange juice. For the scheme in the market for potatoes see *Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985). See also *Leist v. Simplot*, 638 F.2d 283, 286 (2d Cir. 1980) *aff’d sub nom.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). For the scheme in the market for orange juice see *Pollock v. Citrus Associates of New York Cotton Exch., Inc.*, 512 F. Supp. 711 (S.D.N.Y. 1981).

¹¹ *In re W. States Wholesale Natural Gas Antitrust Litig.*, 661 F. Supp. 2d 1172 (D. Nev. 2009) [hereinafter: “Wholesale Natural Gas”].

¹² Several courts have interpreted CEA’s exclusive jurisdiction section as a general saving clause. See *Wholesale Natural Gas*, 661 F. Supp. 2d 1177.

¹³ See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (Scalia, J.); *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) (Breyer, J.).

¹⁴ *Trinko*, 450 U.S. at 413.

¹⁵ *Trinko*, 450 U.S. at 412; *Credit Suisse*, 551 U.S. at 283. See also *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 458-59 (2009) (Breyer, J., concurring).

high.¹⁶ Applying these premises to the analysis of commodity price manipulation, the implied immunity should presumably apply to conspiracies the CEA addresses.

The uncertainty regarding the immunity's scope, however, grows with the sophistication and complexity of the challenged business activity. In *Stock Options*, for example, five national stock exchanges entered into agreements regarding the listing and trading of equity options on multiple exchanges.¹⁷ Absent any immunity, such agreements are likely to be in violation of Section 1 of the Sherman Act. Both the DOJ and SEC submitted amicus curiae briefs arguing that a repeal by implication of antitrust law was not warranted. Nonetheless, the Second Circuit ruled that, in that context, the Securities and Exchange Act impliedly repealed the Sherman Act. The court observed that "the SEC ha[d] ample statutory authority, which it ha[d] repeatedly exercised, to regulate the listing and trading of equity options. It ha[d] at times encouraged multiple listing and at times disapproved of that practice."¹⁸ It, therefore, insisted that the preclusion of antitrust law was "necessary to preserve the authority of the SEC to regulate [the] conduct."¹⁹ The analyses of the district court and the Second Circuit mostly suggest that the SEC had very limited expertise in analyzing collusive practices and it does not focus on collusion.²⁰

My goal in this Article is to clarify the logic of the implied antitrust immunity and highlight some of its flaws.

I. Regulatory Reforms and Transforming Immunities

The implied immunity began its life as an application of a general legal presumption, and its framing was firm and narrow: "It is a cardinal principle of construction that repeals by implication are not favored."²¹ The modern framework is profoundly more complex. As Justice Breyer described in *Credit Suisse*:

Where regulatory statutes are silent in respect to antitrust, . . . courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws

¹⁶ *Trinko*, 450 U.S. at 414; *Credit Suisse*, 551 U.S. at 282-83.

¹⁷ In re Stock Exchanges Options Trading Antitrust Litig., 317 F.3d 134 (2d Cir. 2003) [hereinafter: "Stock Options"].

¹⁸ *Id.* at 149.

¹⁹ *Id.* at 148.

²⁰ For the district court's decision see In re Stock Exchanges Options Trading Antitrust Litig., 1283, 2001 WL 128325 (S.D.N.Y. Feb. 15, 2001).

²¹ U.S. v. Borden Co., 308 U.S. 188, 198 (1939). *supra* also note 1 and accompanying text.

and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws.”²²

The most obvious change is that the modern framework no longer expressly states a preference, let alone a strong one, against such implied repeals. Instead, it requires judicial discretion and evaluation of circumstances. To fully understand this transformation, I will discuss four key phases in the life of the implied immunity doctrine: (1) The origin of the doctrine in the presumption against implied repeals, (2) the doctrine’s departure from the presumption against implied repeals to an independent antitrust presumption, (3) the transition from a presumption to an evaluative framework, and (4) the reorientation of the doctrine to a reasoning instrument used to narrow the scope of antitrust law.

A. *The Origins of the Doctrine*

When railroad companies started appearing in courts as antitrust defendants in the 1890s, they argued that because the Sherman Act was a general statute while the Interstate Commerce Act, which regulated railroads, was a special statute, a repeal by implication was warranted.²³ In *Trans-Missouri*,²⁴ the Supreme Court dismissed this claim using the canon of construction that “repeals by implication are not favored.”²⁵ A year later, in *Joint Traffic*,²⁶ the Court reaffirmed its decision. These two decisions established the traditional narrow scope of the implied antitrust immunity. The doctrine, therefore, emerged as a simple application of the presumption against implied repeals and functioned as such for several decades.

²² *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007).

²³ See, e.g., *United States v. Trans-Missouri Freight Ass’n*, 53 F. 440, 442 (C.C.D. Kan. 1892) *aff’d*, 58 F. 58 (8th Cir. 1893) *rev’d*, 166 U.S. 290 (1897); *United States v. Joint-Traffic Ass’n*, 171 U.S. 505 (1898); *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87, 105 (1913).

²⁴ *Trans-Missouri Freight Ass’n*, 166 U.S. 290.

²⁵ *Borden*, 308 U.S. at 198. See also *Morton v. Mancari*, 417 U.S. 548-49 (1974). In *re Henderson’s Tobacco*, 78 U.S. 652, 652 (1870) (“[A] repeal is not to be implied where the powers or directions under the later acts are such as may well subsist together with those under the earlier.”); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (“It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (“A court “must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose.”); *Gozlon-Peretz v. United States*, 498 U.S. 395, 406 (1991) (“A specific provision controls over one of more general application.”); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”); *Wood v. United States*, 41 U.S. 342, 363 (1842) (Story, J.):

[T]o establish, that subsequent laws cover some or even all of the cases provided for by [early act]; for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only pro tanto, to the extent of the repugnancy.

²⁶ *Joint-Traffic Ass’n*, 171 U.S. 505.

During the Great Depression, the confidence in competition diminished and use of the implied immunity was questioned. For example, upon the repeal of the National Industrial Recovery Act (“NIRA”) in 1935,²⁷ many industries developed elaborate cartels to maintain the spirit of price stabilization NIRA tried to promote.²⁸ Public officials were often aware of those cartels and even supported some of them.²⁹ In 1938, the federal government launched an attack against some of large cartels, including the Chicago milk cartel that coordinated the supply of milk to Chicago.³⁰ The government charged 14 firms and 43 individuals, including senior public officials, with violations of Section 1 of the Sherman Act.³¹ The trial and appellate courts primarily focused on the question whether federal regulation of the milk industry exempted the industry from antitrust scrutiny.³² The district court in *Broaden* dismissed the charges stating that, considering the perishable nature of milk and the regulation of its trade by the City, the collusion served the public.³³ It explained that

The Sherman Act has been in force nearly fifty years. During that time sweeping changes in the nation’s social and economic problems have

²⁷ In 1933, Congress enacted NIRA, Pub. L. No. 73-67, 48 Stat. 195 (1933), to address a “national emergency . . . of widespread unemployment and disorganization of industry, which burden[ed] interstate . . . commerce, affect[ed] the public welfare, and undermine[d] the standards of living of the American people.” NIRA, § 1. NIRA intended “to remove obstructions to the free flow of interstate . . . commerce . . . and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups.” *Id.* To stabilize prices, NIRA encouraged industries to develop codes that they could legally enforce under the statute. NIRA also included an explicit exemption from antitrust laws for any action complying with its provisions. NIRA, § 5. See also President Roosevelt’s statement on signing the National Industrial Recovery Act, June 16, 1933, 2 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 251, 253 (1938) (“We are relaxing some of the safeguards of the anti-trust laws. . . . [W]e are putting in place of old principles of unchecked competition some new Government controls.”) The Supreme Court struck down NIRA in *A.L.A. Schechter Poultry Corporation v. U.S.*, 295 U.S. 495 (1935).

²⁸ See Barbara Alexander, *The Impact of the National Industrial Recovery Act on Cartel Formation and Maintenance Costs*, 76 REV. ECON. STAT. 245 (1994); Matthew B. Krepps, *Another Look at the Impact of the National Industrial Recovery Act on Cartel Formation and Maintenance Costs*, 79 REV. ECON. STAT. 151 (1997). The phenomenon appeared in other episodes of temporary antitrust immunities. See Rene Y. Kamita, *Analyzing the Effects of Temporary Antitrust Immunity: The Aloha-Hawaiian Immunity Agreement*, 53 J. L. & ECON. 239 (2010).

²⁹ See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 (1940) (“Though employees of the government may have known of [the cartel’s programs] and winked at them or tacitly approved them, no immunity would have thereby been obtained.”); *List of Accused in Milk Indictments*, CHICAGO DAILY TRIB., Nov. 16, 1938, at 6.

³⁰ *U.S. v. Borden Co.*, 28 F.Supp. 177, 180 (N.D. Ill. 1939).

³¹ See *List of Accused in Milk Indictments*, CHICAGO DAILY TRIB., Nov. 16, 1938, at 6.

³² See, e.g., *Supreme Court Orders Chicago Milk Case Trial*, CHICAGO DAILY TRIB., Dec. 5, 1939, at 7; *No Agricultural Exemption*, N.Y. TIMES, Dec. 6, 1939, at 23; *Far-Reaching Decision*, ATLANTA CONST., Dec. 6, 1939, at 10.

³³ *Borden*, 28 F.Supp. 177, 179 (N.D. Ill. 1939).

been wrought. . . . The Sherman Act embodies the philosophy of individualism and unrestrained competition. . . . The tendency of later legislation has embodied the philosophy of collectivism and control of harmful competition.³⁴

In light of those “incompatible philosophies,” the district court concluded that the federal Agricultural Marketing Agreement Act and Capper-Volstead Act, as well as Section 6 of the Clayton Act exempted the cartel from the Sherman Act. The Supreme Court, however, reversed stressing that “[i]t is a cardinal principle of construction that repeals by implication are not favored.”³⁵

B. *Doctrinal Independence*

In the late 1950s and early 1960s, courts and commentators began identifying competition as a “fundamental national economic policy” and antitrust law as a means to accomplish this policy.³⁶ The phrase first appeared in *PNB*: “Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy.”³⁷ One source of inspiration for this statement was *Northern Pacific Railway*, in which, a few years earlier, the Court declared that “[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”³⁸ This view reflected the Supreme Court’s antitrust jurisprudence until the era of the Rehnquist Court. The Court expressly “recognized that the antitrust laws represent[ed] a fundamental national economic policy and [was reluctant to] . . . 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.”³⁹

The *PNB* Court declared that the existence of “broad [regulatory] powers to enforce the competitive standard” is the primary consideration for the

³⁴ *Id.* at 183.

³⁵ *Borden*, 308 U.S. 188.

³⁶ Most prominently, perhaps, in their 1959 treatise, Carl Kaysen and Donald Turner described regulation as an “exception to competitive policy.” See CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 189-214 (1959).

³⁷ *PNB*, 374 U.S. at 372.

³⁸ *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4 (1958).

³⁹ *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966) (Warren, C.J.). The last direct recognition of the Court is from May 1986. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986). For prior references see, e.g., *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 313 (1973); *Gulf States Utilities Co. v. Fed. Power Comm’n*, 411 U.S. 747, 759 (1973); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 755 (1977); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399 (1978); *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 387 (1981) [hereinafter: “*Nat’l Gerimedical Hosp.*”].

determination whether to preclude the operation of antitrust law.⁴⁰ *PNB*, therefore, created an antitrust presumption independent. It expressly replaced the general presumption with a commitment to competition policy. Even before *PNB*, the Court has already announced that “[i]mmunity from the antitrust laws is not lightly implied” and clarified that “[o]ur function is to see that the policy entrusted to the courts is not frustrated by an administrative agency.”⁴¹ Yet, the Court still resorted to the statutory interpretation presumption against implied repeals as the underlying rationale for the doctrine.⁴² The departure of the *PNB* Court from the general canon of statutory interpretation may be the most misunderstood characteristic in the life of the implied immunity.

PNB extended the scope of antitrust law to commercial banks.⁴³ Responding to a merger wave in the banking industry in the 1950s, Congress enacted the Bank Merger Act of 1960.⁴⁴ For historical reasons related to the interpretation of the Commerce Clause, antitrust could not have applied to banks until the mid 1940s.⁴⁵ The Bank Merger Act gave the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the FDIC authority to scrutinize bank mergers.⁴⁶ In *PNB*, the DOJ sought to block a merger between “the second and third largest of the 42 commercial banks with head offices in the Philadelphia metropolitan area.”⁴⁷ *PNB* determined that “the banking agencies maintain[ed] a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition.”⁴⁸ The decision, therefore, focused on competition as the primary consideration for the purpose of examining “plain repugnancy between the antitrust and regulatory provisions.”⁴⁹

⁴⁰ *PNB*, 374 U.S. at 351-55.

⁴¹ *California v. Fed. Power Comm’n*, 369 U.S. 482, 490 (1962).

⁴² *Id.*; *Pan Am. World Airways, Inc. v. U.S.*, 371 U.S. 296, 491-92 (1963) (Brennan, J., dissenting).

⁴³ See Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective*, 41 ANTITRUST BULL 255 (1996). See also Eileen Shanahan, *Clayton Act Held Bank-Merger Bar*, N.Y. TIMES, June 18, 1963, at 49 (“The decision was the first in which the court has ever ruled on the applicability of antitrust laws to commercial banks.”)

⁴⁴ Pub.L. No. 86-463, 74 Stat. 129 (1960).

⁴⁵ See Adolf A. Berle, Jr., *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589 (1949).

⁴⁶ 12 U.S.C. § 1828(b)(2).

⁴⁷ *PNB*, 374 U.S. at 330.

⁴⁸ *Id.* at 352.

⁴⁹ *Id.* at 350-51.

In *Silver*, decided only a month before *PNB*, the Court declared that antitrust laws might apply to stock exchanges.⁵⁰ *Silver* involved a concerted action of the New York Exchange, as a self-regulatory entity run by its members. In June 1958, NYSE granted Harold J. Silver a temporal approval to install direct communication lines to ten NYSE members. In February 1959, without any explanation, NYSE ordered the member firms to discontinue communication with Silver's firm and withdrew its stock ticker service. The Court observed that "removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of Section 1 of the Sherman Act."⁵¹ Writing for the Court, Justice Arthur Goldberg emphasized that antitrust laws and securities laws have different goals and different perspectives of competitive harm: "[T]he antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable."⁵² He, therefore, determined that while NYSE actions subject to direct SEC oversight might be excluded from antitrust scrutiny, the antitrust laws applied to actions that the SEC did not directly regulate. Further, Justice Goldberg set "the guiding principle to reconciliation of the two statutory schemes": "Repeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary."⁵³ Put simply, *Silver* emphasized the potential incompatibility between antitrust and specific regulatory schemes that might arise due to the different perspectives of competition.

C. *The Transition to an Evaluative Framework*

1. The Context: Historical Developments

When Congress passed the Sherman Act in 1890, the only other federal regulatory statute was the Interstate Commerce Act, which largely intended to standardize the supply of services provided by common carriers ("nondiscrimination"). Since the enactment of the Sherman Act, many regulatory frameworks have formed, evolved, and been dismantled.⁵⁴ Confidence in

⁵⁰ *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 383-88 (3d ed., 2003). See also *Stock Exchange Is Ruled Subject to Antitrust Law*, N.Y. TIMES, May, 1963, at 1 ("It appears certain that the . . . decision will have major repercussions in the financial community. It could lead . . . to the award of substantial damages against [a stock] exchange if it acts improperly.")

⁵¹ *Silver*, 373 U.S. at 347.

⁵² *Id.* at 359.

⁵³ *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

⁵⁴ See generally Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

regulation was replaced with disillusion and aversion, which in turn dissipated over time as well.⁵⁵ Since the mid 1970s, economic regulation in the United States has substantially contracted and transformed.⁵⁶ It no longer focuses on prices, entry, and service quality, but on the facilitation of healthy competition. In the opposite direction, since the mid 1960s, the United States has been experiencing a continuing expansion of “social regulation” aiming at externalities, consumer protection, workplace safety, and civil rights.⁵⁷

Today’s regulatory system embodies several paradigms, philosophies, and goals that are not always consistent with each other. Some regulatory frameworks intend to facilitate competition in network industries, such as telecommunications, transportation, energy, and finance.⁵⁸ Other frameworks aim at externalities, consumer protection, workplace safety, and civil rights. Some contemporary regulatory framework are detailed and elaborate, while other merely facilitate a regulated activity.⁵⁹

In practice, most regulatory schemes serve multiple goals. For example, the Telecommunication Act of 1996 declares that its purpose is “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property.”⁶⁰ Likewise, the Securities Act of 1933 requires the SEC, whenever it engages in rulemaking, to “consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”⁶¹ By contrast, antitrust has a single goal—the protection of competition—stated as “consumer welfare.”⁶²

⁵⁵ See generally BARAK ORBACH, REGULATION: WHY AND HOW THE STATE REGULATES (2012); Orbach, *A State of Inaction*, *supra* note 76.

⁵⁶ Kearney & Merrill, *supra* note 54.

⁵⁷ See EUGENE BARDACH & ROBERT A. KAGAN EDS., SOCIAL REGULATION: STRATEGIES FOR REGORM (1982); Rabin, *supra* note 54, at 1278-1315; Clifford Winston & Robert W. Crandall, *Explaining Regulatory Policy*, 1994 BROOKINGS PAPERS ECON. ACTIVITY: MICROECONOMICS 1 (1994).

⁵⁸ See generally Kearney & Merrill, *id.*

⁵⁹ See, e.g., *Churchill Downs Inc. v. Thoroughbred Horsemen’s Grp., LLC*, 605 F. Supp. 2d 870, 882 (W.D. Ky. 2009) (“[The Interstate Horseracing Act] created the rules under which racetracks could legally market and facilitate inter-state horse race wagering. . . . But the legislation neither creates nor envisions any other supervision or regulatory scheme. Its limited provisions do not seem to conflict either directly or indirectly with antitrust principles.”)

⁶⁰ 47 U.S.C. § 151.

⁶¹ 15 U.S.C. § 77b.

⁶² See Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013); Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, ANTITRUST L.J. (forthcoming).

The difference between multiple goals and a single goal has great significance for the implied antitrust immunity. Antitrust is very different from other regulatory schemes in its focus on particular types of harm to competition, primarily collusion, exclusion, and abuse of market power. By contrast, the preservation of competition may be one goal of other regulatory schemes, but not the only one. The tension is nuanced but meaningful.⁶³

2. The Relaxation of the Implied Immunity Standard

The Supreme Court kept following the approach delineated in *Silver* and *PNB* until 1975, when it issued, on the same day, a pair of decisions related to alleged price fixing violations in securities markets—*Gordon* and *National Association of Securities Dealers (“NASD”)*.⁶⁴ The cases highlighted the challenges courts face in analyzing complex business environments. *Gordon* involved the stock exchanges’ practice of setting fixed commission rates by agreement among their members. The practice formed in the early nineteenth century. The Securities Exchange Act of 1934 authorized the SEC to regulate commission rates. After 25 years of “minimal” action, the SEC conducted a “deep and serious study” for another 15 years and phased out the practice.⁶⁵ The Court concluded that “[t]o permit operation of the antitrust laws with respect to commission rates . . . would unduly interfere, in our view, with the operation of the Securities Exchange Act.”⁶⁶

NASD, in turn, concerned agreements to restrict the sales and distribution of mutual fund shares in secondary markets. The defendants argued for implied immunity on the basis that the Investment Company Act regulated the challenged activities. They pointed out that the SEC was aware of the practice “for more than three decades” and “[at] no point did it intimate that those agreements were not legitimate.”⁶⁷ The Court ruled that there could be “no reconciliation of [the SEC’s] authority . . . to permit [the challenged] restrictive agreements with the Sherman Act’s declaration that they are illegal per se.”⁶⁸

Both *Gordon* and *NASD* underscored the striking contrast between antitrust and securities regulation. In antitrust, collusion is “the supreme evil,” which may be facilitated through negotiation among competitors.⁶⁹ By contrast, securities

⁶³ See, e.g., *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 689 (1975) (“[T]he sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry.”)

⁶⁴ *Gordon*, 422 U.S. 659; *United States v. Nat’l Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975) [Hereinafter: “*NASD*”].

⁶⁵ *Gordon*, 422 U.S. at 690.

⁶⁶ *Id.* at 685-86.

⁶⁷ *NASD*, 422 U.S. at 727-28.

⁶⁸ *Id.* at 729.

⁶⁹ *Trinko*, 540 U.S. at 408

regulation rests on “SEC supervision of industry self-regulation.”⁷⁰ Economic analysis shows that self-regulated industries are inherently conflicted, as the incentives to serve their members at the expense of the public are high.⁷¹ Industry characteristics, however, often require self-regulation. In his seminal book, *The Transformation of Wall Street*, Joel Seligman observed that “SEC supervision of industry self-regulation generally has been effective in its major applications only when the Commission has been willing to threaten or actually used its regulatory authority to create incentives for industrial self-regulation.”⁷² Both *Gordon* and *NASD* describe contexts in which the SEC was reluctant to use its regulatory powers for decades. Nonetheless, in both instances the Court determined that, under *Silver*’s “guiding principle,” it was necessary to impliedly repeal the antitrust laws to make the regulatory scheme work.⁷³ To reach this conclusion, the *Gordon* and *NASD* Courts utilized complex analyses to show plain repugnancy between antitrust and the regulatory statutes. This reasoning broadened the implied immunity as it departed from the firm preference against the immunity. Yet, neither case offered lowered courts meaningful guidance as to how to evaluate “plain repugnancy.”

D. *The Reorientation of the Implied Immunity*

1. The Rise of the Inaction Preference

The original formulation of the implied immunity intended to serve an assertive antitrust policy. This preference changed with the rise of the critique of government regulation in the 1960s and 1970s.⁷⁴ Today’s Supreme Court is very different from the Court that presided in the 1960s. As Herbert Hovenkamp pointed out: “[W]hile the Court is more skeptical about agency regulation than it was in the 1970s, its skepticism about the use of antitrust litigation is even greater.”⁷⁵ Specifically, today’s Court perceives antitrust as an impediment to the entrepreneurial spirit and a burden on businesses, rather than as a reliable means to

⁷⁰ SELIGMAN, *supra* note 50, at 439.

⁷¹ See, e.g., Peter M. DeMarzo et al., *Self-Regulation and Government Oversight*, 72 REV. ECON. STUD. 687 (2005); Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program*, 43 ACAD. MGMT J. 698 (2000); Stephen Craig Pirrong, *The Self-Regulation of Commodity Exchanges: The Case of Market Manipulation*, 38 J. L & ECON. 141 (1995). See also *Silver*, 373 U.S. at 360 (noting that certain “anticompetitive acts of exchanges . . . conflict with their duty to keep their operations and those of their members honest and viable.”)

⁷² SELIGMAN, *supra* note 50, at 439-40.

⁷³ *Gordon*, 422 U.S. at 691; *NASD*, 422 U.S. at 734.

⁷⁴ See generally Barak Orbach, *A State of Inaction: Dysregulation and Income Inequality*, 16 THEORETICAL INQ. L. (forthcoming, 2015).

⁷⁵ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *IA ANTITRUST LAW* 355 (4th ed., 2013).

promote competition and liberty.⁷⁶ Within this trend, more than any other Court since the Great Depression, the Roberts Court has been hostile toward government regulation and has been expanding corporate rights at the expense of individual rights through repeals of campaign financing restrictions and barriers to lawsuits against firms.⁷⁷ With the exception of moral and climate change regulations,⁷⁸ the Court's hostility toward regulation and antitrust has been undermining the effectiveness of public policies and raising the costs of private enforcement.⁷⁹ The Roberts Court has been consistently increasing the influence of wealth and interest groups on U.S. politics by narrowing the constitutionality of limits on campaign financing,⁸⁰ and trimming the scope of private enforcement by erecting procedural hurdles to bar plaintiffs from moving forward on substantive issues.⁸¹ Any

⁷⁶ See generally Barak Orbach, *A State of Inaction: Dysregulation and Income Inequality*, 16 THEORETICAL INQ. L. (forthcoming, 2015).

⁷⁷ See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN L. REV. 1431 (2013) (“[T]he Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were. . . . [F]ive of the ten Justices who, over the span of our study (the 1946 through 2011 Terms), have been the most favorable to business are currently serving, with two of them ranking at the very top among the thirty-six Justices in our study.”) See also Erwin Chemerinsky, Justice for Big Business, N.Y. TIMES, July 2, 2013, at A25 (“[T]he Roberts court . . . obviously believes, and sometimes expressly says, that there is a need to protect big business from litigation. But in discrimination, product liability and arbitration, it has left injured employees, consumers and small businesses without recourse.”); Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY, Winter 2012, at 46.

⁷⁸ For moral regulation see, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (examining the FCC’s indecency policy); *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012) (same). For climate change regulation see, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527 (2011); *EPA v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584 (2014).

⁷⁹ See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (striking down a state law restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors); *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) [hereinafter: “*NFIB*”] (criticizing the federal government’s use of the Commerce Clause).

⁸⁰ See, e.g., *Fed. Election Comm’n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007); See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011); *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014).

⁸¹ See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Credit Suisse*, 551 U.S.; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011); *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013); *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013); *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). For the trend before the appointment of Chief Justice Roberts see Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571 (2004).

meaningful analysis of distortions in the U.S. regulatory system must factor such legal developments.⁸²

In the context of the implied antitrust immunity, the Supreme Court has used three premises to reinforce the described trend: (1) a regulatory scheme that facilitates competition is “an effective steward of the antitrust function,”⁸³ (2) when a regulatory scheme intends to deter and remedy anticompetitive harm, antitrust enforcement is likely to be cost-ineffective,⁸⁴ and (3) the social costs of false negatives in antitrust are insignificant, where as costs of false positives are high.⁸⁵ These premises—individually and combined—grossly oversimplify the meaning of “competitive harm” under different legal regimes.

2. The Common Misuse of Deregulation

Deregulation illustrates the misunderstood complexity of the relationship between antitrust and other regulatory areas. Technically, “deregulation” refers to the repeal or relaxation of regulatory policies,⁸⁶ but the U.S. deregulation movement constituted a complex transformation of the regulatory system “from hostility to competition to the maximum promotion of competition.”⁸⁷ It consisted of multiple reforms that introduced new regulatory regimes governed by a new paradigm. Paul Joskow explained this point:

The word *deregulation* . . . is a simplistic characterization of a much more complex process that involves the relaxation of government controls over prices and entry, the restructuring of industry to facilitate competition in some industry segments and better regulation in others, stricter but more effective environmental regulation, and efforts to improve the performance of product quality and safety and workplace safety regulations to increase the net benefits to society.⁸⁸

For most people, however, “deregulation” means a reform intending to reduce government regulation.⁸⁹ For example, in a well-cited literature review of

⁸² See Orbach, *A State of Inaction*, *supra* note 76.

⁸³ *Trinko*, 450 U.S. at 413.

⁸⁴ *Trinko*, 450 U.S. at 412; *Credit Suisse*, 551 U.S. at 283. See also *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 458-59 (2009) (Breyer, J., concurring).

⁸⁵ *Trinko*, 450 U.S. at 414; *Credit Suisse*, 551 U.S. at 282-83.

⁸⁶ See, e.g., OECD, *THE OECD REPORT ON REGULATORY REFORM 6* (1997) (“Deregulation is a subset of regulatory reform and refers to complete or partial elimination of regulation in a sector to improve economic performance.”)

⁸⁷ Kearney & Merrill, *supra* note 54, at 1408.

⁸⁸ PAUL L. JOSKOW, *DEREGULATION: WHERE DO WE GO FROM HERE?* 1 (2009).

⁸⁹ See Cass R. Sunstein, *Deregulation and the Courts*, 5 J. POL’Y ANALYSIS & MGM’T 517, 518 (1986) (explaining that the term “deregulation” is “misleading,” defining it as “decisions that relax or rescind existing regulatory requirements . . . to distinguish deregulation from traditional regulatory action . . . and pure inaction”)

deregulation, Clifford Winston interpreted “economic deregulation” as “the state withdrawal of its legal powers to direct the economic conduct (pricing, entry, and exit) of nongovernmental bodies.”⁹⁰ Similarly, in his 2007 memoir, Alan Greenspan summarized the theory underlying deregulation: “markets and prices, not central planners, [are] the best allocators of society’s resources.”⁹¹

Understood as a repeal of regulation to rely on market institutions, deregulation supposedly commands a greater reliance on antitrust enforcement and narrow interpretation of the implied immunity doctrine. For example, in its 2007 report, the bipartisan Antitrust Modernization Commission wrote: “[O]nce deregulation has been completed and the public relies solely on competition and market forces, the antitrust laws should apply fully to deter or challenge anticompetitive conduct.”⁹² The Commission also recommended that “[w]hen the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible.”⁹³ “In particular,” the Commission added, “antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.”⁹⁴ Under this view, antitrust should apply to the maximum possible extent both in regulated and deregulated markets. The Commission, however, called for caution in situations of “partial deregulation”—where segments of a deregulated industry continue to require some form of regulation.⁹⁵ It cited Alfred Kahn’s 1990 observation:

Where competition is not feasible throughout an industry or market, . . . entry of unregulated competition can introduce distortions so severe as to make the mixed system the worst of both possible worlds. The preferable remedy is not to suppress the competition, but to make the residual regulation as consistent as possible with it.⁹⁶

The Commission’s concept of regulation was rather outdated (already for 2007), essentially focusing exclusively on economic regulation and perceiving it as measures that control prices, costs, and entry. Consistently with this simplistic view, the Commission’s recommendation endorsed the *PNB* standard: “Courts should continue to apply current legal standards . . . [granting] implied immunities

⁹⁰ Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263, 1263 n. 1 (1993).

⁹¹ ALAN GREENSPAN, *THE AGE OF TURBULENCE* 72 (2007).

⁹² ANTITRUST MODERNIZATION COMM’N, *REPORT AND RECOMMENDATIONS* 358 (2007).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. REG. 325, 329 (1990).

only when there is a clear repugnancy between the antitrust law and the regulatory scheme.”⁹⁷

The Great Recession started a few months after the Commission released its report and recommendation.⁹⁸ Perspectives of regulation have dramatically changed after the market crash of 2008. The Commission’s analysis of the application of antitrust law in regulated and deregulated industries should be understood in its historical context. Equally important, as explained in the subsequent section, the Supreme Court did not endorse the Commission’s recommendations. Today, the Commission’s analysis and recommendation offer an insight into the common understanding of the immunity and the law in 2007.

3. *Trinko* and *Credit Suisse*

Pretty much until *Trinko* and *Credit Suisse*,⁹⁹ lower courts grappled with the *Gordon-NASD* opinions while considering potential conflicts between antitrust and regulatory statutes, or simply used the *PNB* presumption. *Trinko* and *Credit Suisse* both clarified and revised the implied immunity.¹⁰⁰ They did so in five separate dimensions. First, the *Trinko* and *Credit Suisse* Courts retired the presumption that repeals by implication are strongly disfavored. Under present law, *Silver’s* guiding principle is no longer binding. Second, the *Trinko* and *Credit Suisse* Courts were willing to grant implied immunity even when the regulatory statute contained a saving clause. Third, the *Trinko* and *Credit Suisse* Courts declared that, when a regulatory scheme intends to deter and remedy anticompetitive harm, antitrust enforcement is likely to be cost ineffective. Fourth, the *Trinko* and *Credit Suisse* Courts amplified concerns regarding false positives in antitrust, downplaying the significance of false negatives. And, finally, *Credit Suisse* presented a four-factor framework for the analysis of the implied immunity.

In *Trinko*, the Court considered “whether a complaint alleging breach of the incumbent’s duty under the [Telecommunications] 1996 Act to share its network with competitors states a claim under Section 2 of the Sherman Act.”¹⁰¹ Writing for the Court, Justice Scalia explained that “a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity.”¹⁰² He noted, however, that Congress precluded such interpretation with

⁹⁷ ANTITRUST MODERNIZATION COMM’N, *supra* note 92, at 340.

⁹⁸ See generally NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, THE FINANCIAL CRISIS: INQUIRY REPORT (final report, Jan. 2011).

⁹⁹ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

¹⁰⁰ See generally Howard A. Shelanski, *The Case for Rebalancing: Antitrust and Regulation*, 109 MICH L. REV. 683 (2011).

¹⁰¹ *Trinko*, 540 U.S. at 401.

¹⁰² *Id.* at 406.

an “antitrust-specific saving clause.”¹⁰³ Nonetheless, Justice Scalia argued that “[where] the existence of a regulatory structure designed to deter and remedy anticompetitive harm[,] . . . the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.”¹⁰⁴ He emphasized that “[a]gainst the slight benefits of antitrust intervention . . ., we must weigh a realistic assessment of its costs.”¹⁰⁵ Further, without any analysis, Justice Scalia declared that “the regime [set by the Telecommunications Act] was an effective steward of the antitrust function.”¹⁰⁶ *Trinko*, therefore, is somewhat ambiguous. It acknowledges that the Telecommunication Act’s saving clause precludes immunity but, at the same time, offers reasoning for softening this statutory restriction on immunity.¹⁰⁷ Further, the *Trinko* Court made an effort to rationalize repeals by implication, discarding the preference against such repeals.

The 2007 report of the Antitrust Modernization Commission discussed *Trinko* in the context of saving clauses.¹⁰⁸ The Commission recommended that *Trinko* “is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman act; it does not displace the role of the antitrust in regulated industries.”¹⁰⁹ It further recommended that “[c]ourts should interpret savings clauses to give deference to the antitrust laws.”¹¹⁰

The Commission’s recommendations clearly did not influence the Supreme Court. In *Credit Suisse*, the Court examined whether there was a ‘plain repugnancy’ between antitrust claims related to alleged collusive practices of underwriters and the federal securities law.¹¹¹ The Securities Act of 1933 and the Securities Exchange Act of 1934 include a general saving clause stating that the rights and remedies they provide “shall be in addition to any and all other rights and remedies that may exist at law or in equity.”¹¹² Writing for the Court, Justice Breyer maintained that, in

¹⁰³ *Id.* Section 601(b)(1) of the 1996 Act provides that “nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.” 47 U.S.C. § 152, note.

¹⁰⁴ *Id.* at 412.

¹⁰⁵ *Id.* at 414.

¹⁰⁶ *Id.* at 413.

¹⁰⁷ See, e.g., *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1134 n16 (9th Cir. 2004) (interpreting *Trinko* to say that “the regulatory scheme created by the 1996 Act does not shield regulated entities from antitrust scrutiny altogether under the doctrine of implied immunity.”)

¹⁰⁸ ANTITRUST MODERNIZATION COMM’N, *supra* note 92, at 339-40.

¹⁰⁹ *Id.* at 340.

¹¹⁰ *Id.* at 339.

¹¹¹ *Credit Suisse*, 551 U.S. at 267.

¹¹² 15 U.S.C. § 77p(a); § 78bb(a).

securities markets, “antitrust courts are likely to make unusually serious mistakes.”¹¹³ He acknowledged that “[t]his kind of problem exists to some degree in respect to other antitrust lawsuits,” but insisted that the characteristics of securities markets “make mistakes unusually likely.”¹¹⁴ Justice Breyer, therefore, concluded that, in the that particular context, “the securities laws [were] clearly incompatible with the application of the antitrust laws.”¹¹⁵ Further, he expressed the view that regulation diminishes the likelihood of antitrust harm.¹¹⁶ In the context of securities markets, he argued that, because “the SEC is . . . required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations,” it is “somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior.”¹¹⁷ Quite importantly, Justice Breyer identified in *Gordon* and *NASD* four factors critical for “finding sufficient incompatibility to warrant an implication of preclusion”¹¹⁸: “(1) the existence of regulatory authority under [the relevant statute] to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; . . . (3) a resulting risk that the [relevant law] and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct [; and] . . . (4) . . . the possible conflict affected practices that lie squarely within an area . . . that the [relevant statute] seeks to regulate.”¹¹⁹

Trinko and *Credit Suisse* suffer from several obvious deficiencies, yet their redeeming qualities should not be overlooked. First, in practice, the conflict between antitrust and another regulatory regime may be confusing. The *PNB* presumption of the implied immunity does not recognize the uncertainties that such conflicts may raise. By retiring the presumption that repeals by implication of the antitrust laws are strongly disfavored, *Trinko* and *Credit Suisse* require courts to consider the complexity of potential conflicts between antitrust and other regulatory schemes. Second, the *Credit Suisse* four-factor framework offers helpful

¹¹³ *Credit Suisse*, 551 U.S. at 282.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 285.

¹¹⁶ *Id.* at 283 (“[A]ny enforcement-related need for an antitrust lawsuit is unusually small.”) See also *Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) (“[R]egulation significantly diminishes the likelihood of major antitrust harm.”) In his academic writing, Justice Breyer argued that regulated and partially regulated industries tend raise problems that traditional antitrust policy cannot resolve. See STEPHEN BREYER, *REGULATION AND ITS REFORM* 159-61 (1982); Stephen Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005 (1987). See also *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 459 (2009) (Breyer, J., concurring) (“When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.”)

¹¹⁷ *Credit Suisse*, 551 U.S. at 283.

¹¹⁸ *Id.* at 275.

¹¹⁹ *Id.* at 275-76.

guidance to courts in the analysis of the immunity, while preserving substantial flexibility in the choices of balance between antitrust and regulation.

The flaws in *Trinko* and *Credit Suisse* can be summarized briefly. First, the decisions are quite vague about the circumvention of saving clauses. Superficially, the idea of granting implied immunity in cases where the regulatory statute contains a saving clause might appear radical. However, as a practical matter, such immunity may be necessary when the regulatory scheme permits, encourages, or compels an activity, which is allegedly illegal under antitrust laws.¹²⁰ *Trinko* and *Credit Suisse* do not adequately explain the rationales for preclusion of antitrust when saving clauses exist and do not offer any guidance.

Second, the Court's obsession with false positives rests on ideological beliefs and outdated theories that lack empirical support.¹²¹ As illustrated, the Court's premises are oblivious to a large set of anticompetitive activities that regulatory schemes do not handle well.

Third, the premises regarding the capacity of economic regulation to substitute antitrust are wrong and misleading. Antitrust's concept of competition is quite different from the competition that other regulatory regimes may attempt to facilitate. Specifically, antitrust could be particularly effective in addressing anticompetitive harms resulting from collusions and exclusionary practices, whereas specific regulatory regimes tend to be effective in facilitating viable competition. Perhaps most importantly, the practical issue is not a theoretical comparison between the goals of antitrust and those of a specific regulatory scheme. Rather, there are two critical questions a court must consider: (1) Is a business activity, allegedly illegal under the antitrust laws, permitted, encouraged, or compelled by another set of laws? (2) Is the relevant regulatory agency operates to reduce antitrust harm, as opposed to other forms harm to competition? *Trinko* and *Credit Suisse* somewhat addressed the first question, but ignored the other.

Finally, it is important to recognize that the Court handed down *Trinko* and *Credit Suisse* before the market crash of 2008. The financial crisis influenced the dominant understanding of regulation, including judges' understanding.¹²² One

¹²⁰ See, e.g., *Wholesale Natural Gas*, 661 F. Supp. 2d at 1178:

Although the [regulatory statute] does not expressly preempt antitrust laws, the savings clause does not expressly preserve all antitrust actions. Because the [statute], and the [agency] acting thereunder, in some instances permit or even encourage conduct that otherwise would constitute illegal restraints of trade, the Court must determine whether, and in what respects, the [statute] implicitly precludes the antitrust laws' application.

¹²¹ See generally Jonathan Ba. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27 (2003); Jonathan B. Baker, *Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, ANTITRUST L.J. (forthcoming, 2014); Orbach, *A State of Inaction*, *supra* note 76.

¹²² See, e.g., RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009); RICHARD A. POSNER, *THE CRISIS OF CAPITALIST SOCIETY* (2010).

would hope that, in considering the balance between antitrust and regulation in the aftermath of the Great Recession, the Supreme Court would at least consider the changes in the regulatory landscape.

II. Operationalizing the Implied Immunity

In *Credit Suisse*, the Supreme Court distilled four “critical” factors whose presence establishes “sufficient incompatibility to warrant an implication of preclusion”:¹²³ (1) the challenged activities lie “squarely within the heartland” of a regulatory scheme, (2) a regulatory authority to supervise the challenged activities exists, (3) the regulatory agency exercises its authority, and (4) the parallel exercise of antitrust and regulatory authorities creates a risk of a “serious conflict” between the regimes.¹²⁴ This Section clarifies the *Credit Suisse* factors and explains how courts typically apply them. As explained, the first three factors serve as preconditions for the application of the immunity, whereas the fourth factor defines the substantive scope of the immunity. The *Credit Suisse* framework offers a modern interpretation for the phrase “plain repugnancy.”

Several lower courts have questioned the applicability of the *Credit Suisse* framework to contexts outside of securities laws.¹²⁵ The doubts reflect misunderstanding of the law.

A. *The Heartland of a Regulatory Scheme*

Questions of implied immunity may arise only when the challenged market activities lie squarely within the “heartland” of the relevant regulatory scheme. For example, the Securities Exchange Act of 1934 addresses underwriting agreements pertaining to initial public offerings (IPOs),¹²⁶ and the Commodity Exchange Act offers remedies for manipulation of energy prices.¹²⁷ Private agreements related to these issues will lie in the “heartland.”

¹²³ *Id.* at 275.

¹²⁴ *Id.* at 275-76, 285. *Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC*, 588 F.3d 128 (2d Cir. 2009) [hereinafter: “Short Sale”] (applying and explaining the *Credit Suisse* framework).

¹²⁵ *See, e.g., Energy Mktg. Servs., Inc. v. Columbia Gas Transmission Grp., LLC*, 639 F.Supp.2d 643, 650–51 (D.W.Va.2009) (noting that the defendant “failed to cite any case applying the *Credit Suisse* framework outside of the securities context.”); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, C 07-05634 CRB, 2011 WL 1753738 (N.D. Cal. May 9, 2011) (noting that the application of the *Credit Suisse* framework outside of the securities context is “indisputably rare.”)

¹²⁶ *Credit Suisse*, 551 U.S. 264.

¹²⁷ *Wholesale Natural Gas*, 661 F. Supp. 2d 1172.

By contrast, the Interstate Horseracing Act concerns off-track betting and does not regulate industry agreements that may violate antitrust laws.¹²⁸ Similarly, the Ted Stevens Amateur Sports Act (the “Sports Act”) requires national governing bodies to “keep amateur athletes informed of policy matters and reasonably reflect the views of the athletes in its policy decisions,”¹²⁹ and “provide and coordinate technical information on physical training, equipment design, coaching, and performance analysis.”¹³⁰ These requirements are profoundly different from the promotion of specific products, making false statements about competing products, and altering images of athletes to remove logos of certain brands.¹³¹ The latter are “an entirely separate set of activities” from those the Sports Act regulates and are not in the “heartland.”¹³² Courts often distinguish between activities that federal regulation directly addresses—requires, permits, compels, or bans—and activities that federal regulators *may* address. The former are in the “heartland” of the regulation. The latter are not.

Many decisions—mostly but not only early ones—suggest that the scope of the regulation serves as proxy of intent to preclude antitrust.¹³³ This intuition, however, is flawed. The “pervasiveness” of the regulatory scheme does not mean that it actually addresses the challenged activities or that any conflict exists.¹³⁴

¹²⁸ See *Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406 (6th Cir. 1994); *Churchill Downs Inc. v. Thoroughbred Horsemen's Grp., LLC*, 605 F. Supp. 2d 870, 875 (W.D. Ky. 2009).

¹²⁹ 36 U.S.C. § 220524(3).

¹³⁰ *Id.* § 220524(8).

¹³¹ *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1127 (C.D. Cal. 2009).

¹³² *Id.*

¹³³ See, e.g., *PNB*, 374 U.S. at 351 (suggesting that a regulation ought to be “all pervasive” to establish implied immunity); *Borden Co.*, 308 U.S. at 199 (“The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner”); *United States v. RCA*, 358 U.S. 334, 350 (1959) (emphasizing the significance the absence of “pervasive regulatory scheme.”); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) (same); *California v. Fed. Power Comm'n*, 369 U.S. 482 (1962) (lack of pervasiveness precludes immunity); *Gordon*, 422 U.S. at 688 (noting that “in some prior cases we have been concerned with the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws.”); *Stock Options*, 317 F.3d at 147 (arguing that, based on *Silver*, *Gordon*, and *NASD*, “the implied repeal doctrine [is] operating . . . when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition.”); *Trinko*, 540 U.S. at 406 (“[A] detailed regulatory scheme . . . ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity.”)

¹³⁴ See, e.g., *Northeastern Telephone Co. v. AT&T*, 651 F.2d 76, 82 (2d Cir.1981) “[The defendants’ assertion] that they are entitled to immunity on the vague ground of pervasive regulation, is . . . without merit. The pervasiveness of a regulatory scheme is not susceptible of precise quantification.”; *Nat’l Gerimedical Hosp.*, 452 U.S. at 389:

Stated differently, the pervasiveness of a regulatory scheme does not indicate that a particular regulatory activity is in the “heartland.”

B. Authority to Regulate.

When considering implied immunity, an antitrust court must determine whether regulatory powers to oversee the challenged activities exist. For example, the *Credit Suisse* Court found that “the law grants the SEC authority to supervise all of the activities here in question. Indeed, the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which [the defendants] engage.”¹³⁵

The logic underlying this factor is self-explanatory. Yet, as already discussed, its implementation in self-regulated industries is far from obvious. For example, in *Silver*,¹³⁶ the Supreme Court examined whether a collective action of a stock exchange and its members to exclude a member was an activity that the SEC regulated. The Court determined that “[a]lthough the [Securities Exchange] Act [gave] to the [SEC] the power to request exchanges to make changes in [exchanges’] rules, . . . and impliedly, therefore, to disapprove any rules adopted by an exchange, . . . it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules.”¹³⁷ Similarly, *Georgia v. Pennsylvania Railroad Co.* involved a private ratemaking system of regulated railroad companies.¹³⁸ The defendant railroads argued for implied immunity because the Interstate Commerce Commission had authority to oversee railroad rates and remove discriminatory and unreasonable rates. Focusing on the price-fixing activity, the Court dismissed the argument stating that “the Commission [had] no supervisory authority over the combination.”¹³⁹

Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. . . . Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge.

Courts sometimes use the primary jurisdiction doctrine to defer to administrative expertise where the courts believed not to have the needed expertise. See, e.g., *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952) (“[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.”).

¹³⁵ *Credit Suisse*, 551 U.S. 276.

¹³⁶ *Silver*, 373 U.S. 341 (1963).

¹³⁷ *Id.* at 357.

¹³⁸ 324 U.S. 439 (1945).

¹³⁹ *Id.* at 460.

C. Active Regulation

A statutory authority is not sufficient for the purpose of the implied immunity. Rather, the relevant agency must actively exercise its authority. Thus, the implied immunity could not apply when the regulatory agency fails to exercise discretion, whether by serving as a rubber stamp or by not exercising its powers.¹⁴⁰ Application of this factor could be rather confusing. Courts are often reluctant to identify government inaction as a failure and, therefore, may be willing to grant immunity even when the agency was clearly inactive.¹⁴¹ For example, in *National Gerimedical*, the Court ruled that “the claim of implied antitrust immunity . . . is weaker” when the challenged activity “was neither compelled nor approved by any governmental regulatory body.”¹⁴²

More broadly, since *Gordon* and *NASD*, the Supreme Court appears to premise that, if the SEC had the power to regulate an activity in securities markets, it exercised it.¹⁴³ The factual accounts of the Court itself, as well as studies of securities regulation, contradict this belief.¹⁴⁴ Thus, for example, in *NASD*, the Court concluded that “[t]he Commission’s acceptance of fund-initiated restrictions for more than three decades hardly represent[ed] abdication of its regulatory responsibilities.”¹⁴⁵ This inaction, the Court ruled, “manifest[ed] an informed administrative judgment that the contractual restrictions . . . were appropriate means for combating the problems of the industry.”¹⁴⁶ *Trinko* and *Credit Suisse’s* focus on false positives reinforces this tendency to disregard inaction.

Finally, active regulation may be confused with “pervasiveness” because of the reach of the regulation.¹⁴⁷ But again, the relevant test is active regulation

¹⁴⁰ See, e.g., *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801 (2d Cir. 2002):

[I]mplied immunity exists where allowing parallel proceedings on antitrust and [a regulatory agency] tracks would subject defendants to conflicting mandates. The source of the conflict may, but need not, involve affirmative [government] action. Conflict also can exist where the [an agency] has jurisdiction over the challenged activity and deliberately has chosen not to regulate it.

¹⁴¹ For government inaction see Orbach, *A State of Inaction*, *supra* note 76.

¹⁴² *Nat’l Gerimedical*, 452 U.S. at 389-90.

¹⁴³ See, e.g., *Gordon*, 422 U.S. at 659-60 (“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.”)

¹⁴⁴ SELIGMAN, *supra* note 50, at 439-568. See also Adam C. Pritchard, *Self-Regulation and Securities Markets*, 26(1) REGULATION 32 (2003).

¹⁴⁵ *Id.* at 728.

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* notes 133-134 and accompanying text.

addressing the challenged business activities, while pervasiveness is not a relevant factor.

D. A Risk of Serious Conflict

1. What Is Conflict?

The first three factors of the *Credit Suisse* framework are the preconditions for plain repugnancy. The fourth factor is the substantive one. It requires a risk of meaningful conflict between the antitrust law and the other regulatory scheme.

What is the meaning of conflict under the implied immunity doctrine? The traditional meaning is *actual conflict*—a situation where an activity prohibited under antitrust law is permitted under a federal regulatory scheme. *Silver, Gordon*, and *NASD* extended the implied immunity to *potential* conflicts—situations in which antitrust laws conflict with future regulatory policies.¹⁴⁸ In these cases, the Court considered anticipated policies. In *Friedman*, the Second Circuit interpreted the “potential conflict” to be circumstances “where allowing an antitrust lawsuit to proceed would conflict with Congress’s implicit determination that the [regulatory agency] should regulate the alleged anti-competitive conduct. In other words, “implied immunity exists where allowing parallel proceedings on antitrust and [regulatory agency] tracks would subject defendants to conflicting mandates.”¹⁴⁹ This interpretation is consistent with the spirit of *Trinko* and *Credit Suisse*: When a regulatory scheme intends to deter and remedy anticompetitive harm, antitrust enforcement is likely to be cost ineffective. Indeed, it was offered at the outset as a logical interpretation of *Trinko* and *Credit Suisse*.¹⁵⁰

The *Credit Suisse* Court, however, went one step further. Under certain circumstances, such as those it examined, the Court explained that “only a fine, complex, detailed line separates activity that [regulatory agency] permits or encourages (for which . . . [there is] immunity) from activity that the [agency] must (and inevitably will) forbid (and . . . [thus] should be open to antitrust attack).”¹⁵¹

¹⁴⁸ See *supra* Section II.B-C. See also *Credit Suisse*, 551 U.S. at 273 (“The upshot [of *Silver*] is that, in light of potential future conflict, the Court found that the securities law precluded antitrust liability even in respect to a practice that both antitrust law and securities law might forbid.”); *Strobl*, 768 F.2d at 27 (Both *Silver* and *Gordon* discussed *potential* conflicts between the antitrust laws and a regulatory scheme.); *Stock Options*, 317 F.3d at 149 (“The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit.”); *Friedman*, 313 F.3d at 799 (“Importantly, the ‘plain repugnancy,’ or conflict, between antitrust and securities laws extends to potential as well as actual conflicts.”); *Short Sale*, 588 F.3d at 138.

¹⁴⁹ *Friedman*, 313 F.3d at 800-801.

¹⁵⁰ See *supra* note 13 and accompanying text.

¹⁵¹ *Credit Suisse*, 551 U.S. at 279.

Under such circumstances, the Court added, only the agency could distinguish “with confidence” between the permissible and impermissible.¹⁵²

To restate the Court’s fine-line argument: Certain business activities are lawful because the relevant regulatory scheme impliedly precludes the application of antitrust laws. Since the relevant regulatory agency defines boundaries of such lawful activities, the agency itself should interpret them and enforce violations related to acts outside these boundaries.¹⁵³ Antitrust courts do not have the adequate expertise to interpret the existing policies. They “are likely to make unusually serious mistakes.”¹⁵⁴

Thus, under present law a serious risk of conflict between antitrust and the relevant regulatory scheme may include: (1) actual conflict between antitrust and the relevant regulatory scheme, (2) a conflict between antitrust and the intended regulatory powers of the relevant regulatory agency, and (3) business activities at and slightly beyond the permissible boundaries of the relevant regulatory scheme that are ordinarily prohibited under antitrust law.

As this Article explains and illustrates, these concepts of conflict, used for the fourth factor in the *Credit Suisse* framework, rest on three highly simplistic premises: (1) a regulatory scheme that facilitates competition is “an effective steward of the antitrust function,” (2) when a regulatory scheme intends to deter and remedy anticompetitive harm, antitrust enforcement is likely to be cost-ineffective, and (3) the social costs of false negatives in antitrust are insignificant, where as costs of false positives are high. These premises may reflect the Supreme Court’s explicit skepticism of antitrust, some misunderstanding of modern antitrust and regulation, or something else.

2. The Fine Line Between Permissible and Impermissible Conduct

The fine-line argument deserves some additional examination. In essence, the argument is an application of the Supreme Court’s concerns regarding false positive errors.¹⁵⁵ When such concerns direct the analysis, courts give a broad

¹⁵² *Id.* at 280-81.

¹⁵³ The Court borrowed some of the arguments Herbert Hovenkamp made in a 2003 article. See Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607 (2003).

¹⁵⁴ *Credit Suisse*, 551 U.S. at 282.

¹⁵⁵ See, e.g., *Short Sale*, 588 F.3d at 136 (“To ascertain the risk [of conflict] . . . , the Supreme Court considered whether allowing antitrust liability for the conduct alleged to have the anticompetitive effect would inhibit permissible (and even beneficial) market behavior.”); *Baltimore v. Citigroup, Inc.*, 08 CV. 7746 (BSJ), 2010 WL 430771 (S.D.N.Y. Jan. 26, 2010), *aff’d on other grounds*, 709 F.3d 129 (2d Cir. 2013) (“[I]t is unreasonable to expect broker-dealers . . . to determine the fine line between permissible communications under securities law and impermissible communications under antitrust law.”); *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 406 (S.D.N.Y. 2010) (analyzing the fine line between permissible and impermissible conduct as a relevant factor).

interpretation to the implied immunity fearing of fine lines that separate permissible and impermissible activities.

“Legal fine lines,” however, often exist more because sophisticated professionals push the boundaries, than due to confusion the regulatory system imposes on the business community.¹⁵⁶ Under many circumstances, legal fine lines are one facet of opportunism,¹⁵⁷ which Oliver Williamson famously defined as “self-interest seeking with guile.”¹⁵⁸ Stated differently, traditional economic analysis shows that legal fine lines accommodate undesirable conduct that escapes precise legal definitions.¹⁵⁹ The financial industry, which has produced many implied immunity cases, is a prime example for this point.¹⁶⁰ At least until the eve of the Great Recession, the wage premium in the financial sector in the United States corresponded to the tightness of financial regulation.¹⁶¹ Empirically, the financial sector exploits legal fine lines. Legal fine lines, therefore, may be a source of confusion but also a source of economic externalities. The Supreme Court’s false positives thesis rests on the belief that antitrust courts cannot distinguish between confusion and exploitation of opportunities. Or, worse, the Supreme Court is oblivious to the exploitation of legal fine lines.

To illustrate the analysis of legal fine lines, consider the *Western States Wholesale Natural Gas Antitrust Litigation*.¹⁶² A private lawsuit was bought against energy companies for alleged manipulation of natural gas prices during the 2000-2001 California energy crisis. Relying on *Credit Suisse*, the defendants maintained that applying antitrust law to manipulation of natural gas prices would be incompatible with the regulatory regime (the Commodity Exchange Act), because “evidence of unlawful activity would overlap with evidence of lawful activity,” and because it would require “complex legal line drawing which should be done by an expert agency and not by non-expert judges and juries.”¹⁶³ Specifically, the

¹⁵⁶ See generally Orbach, *A State of Inaction*, *supra* note 76.

¹⁵⁷ See, e.g., William J. Baumol, *Entrepreneurship: Productive, Unproductive, and Destructive*, 98 J. POL. ECON. 893, 897 (1990) (describing rent-seeking procedures, such as the “discovery of a previously unused legal gambit that is effective in diverting rents to those who are first in exploiting it.”)

¹⁵⁸ OLIVER E. WILLIAMSON, *MARKET AND HIERARCHIES* 26 (1975).

¹⁵⁹ Henry Smith defined “opportunism” as “behavior that is undesirable but that cannot be cost-effectively captured—defined, detected, and deterred—by explicit ex ante rulemaking.” Henry E. Smith, *An Economic Analysis of Law Versus Equity* (unpublished manuscript, 2010).

¹⁶⁰ See, e.g., Lauren Cohen et al., *Decoding Inside Information*, 67 J. FIN 1009 (2012) (identifying large volume of insider trading transactions).

¹⁶¹ See Thomas Philippon & Ariell Reshef, *Wages and Human Capital in the U.S. Finance Industry: 1909–2006*, 127 Q. J. ECON. 1551 (2012).

¹⁶² *Wholesale Natural Gas*, 661 F. Supp. 2d 1172

¹⁶³ *Id.* at 1175.

defendants argued that “there [was] a fine line between a false price report made with an intent to manipulate the market as opposed to merely negligent or ‘sense of the market’ reporting without the intent to manipulate, which . . . would not violate the [regulatory statute].”¹⁶⁴ The court was not persuaded and, paraphrasing *Credit Suisse*, ruled that “[a]ntitrust courts are not likely to make ‘unusually serious mistakes’ regarding intent, knowledge, purpose, or agreement.”¹⁶⁵ Further, the court held that that no special expertise was required to determine whether reports “were made as part of a conspiracy to manipulate prices,”¹⁶⁶ and emphasized that “[i]ntent and the existence and scope of a conspiracy are matters which judges and juries resolve every day.”¹⁶⁷ The court, therefore, determined that “given the allegations of intentional price manipulation,” antitrust laws and the Commodity Exchange Act were reconcilable.¹⁶⁸

In sum, *Trinko* and *Credit Suisse* identified a “complex legal line” between permissible and impermissible activities as a justification for the use of the implied immunity, even where the regulatory statute contains a saving clause. In context, when the facts are properly evaluated, the line *Trinko* and *Credit Suisse* depict is often an area of opportunism. This is one instance where the preclusion of antitrust could effectively accommodate opportunism.

3. Evaluation of Legal Fine Lines

Under present antitrust jurisprudence of the U.S. Supreme Court, a serious risk of error exists whenever courts adjudicate an antitrust matter. This thesis effectively suggests that “nonexpert judges” and “nonexpert jurors” cannot distinguish between confusion and exploitation of opportunities in the form of collusion and exclusion. As illustrated, at least some lower courts are likely to be critical of this theory.

The fine line argument may not be sustainable, as the Supreme Court has not consistently followed its spirit. For example, in *Actavis*, while the Court did not consider the implied immunity doctrine, it exhibited great confidence in the capacity of antitrust courts. *Actavis* concerned the question whether reverse payment patent settlements are “immune from antitrust attack so long as [their anticompetitive effects fall within the scope of the exclusionary potential of the patent.”¹⁶⁹ Underlying this question was the old proposition that “a patent conveys the right to cripple competition.”¹⁷⁰ Writing for the Court, Justice Breyer rejected

¹⁶⁴ *Id.* at 1179.

¹⁶⁵ *Id.* at 1180.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1180.

¹⁶⁸ *Id.* at 1183.

¹⁶⁹ *FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2227 (2013).

¹⁷⁰ *Id.* at 2230.

the argument, holding that reverse payment settlement agreements should be evaluated under the rule of reason. Expressing confidence in antitrust courts, Justice Breyer left “to the lower courts the structuring of the present rule-of-reason antitrust litigation.”¹⁷¹

IV. Conclusion

The implied antitrust immunity comes into play where a federal regulatory scheme *addresses* an activity that is presumably illegal under antitrust law. Under present law, antitrust courts may determine that a regulatory scheme impliedly precludes the application of antitrust law, where that scheme *permits* an activity challenged under antitrust law, only *possibly permits* challenged activity, and even when it *prohibits* the challenged activity. Further, courts may make such determinations even when the relevant regulatory statute contains a saving clause.

The general logic of the implied immunity has not changed much since its early days: The doctrine’s primary rationale is the elimination of conflicts between administrative agencies and federal courts.¹⁷² Over time, however, the immunity’s narrative and nature have considerably transformed. Born as an application of the presumption against implied repeals, in *PNB*, the doctrine turned into an independent antitrust presumption. During the past five decades, the doctrine has transformed into an evaluative framework whose underlying premises tilt its outcomes toward preclusion of antitrust law.

The normative implications of this Article are troubling, in my mind. Reality seems to matter very little to the premises that shape antitrust analysis. Every policy, including the implied immunity doctrine, should be sensitive to tradeoffs. Yet, some of the key developments of the implied immunity during the past decade have relied on three premises that largely ignore tradeoffs: (1) a regulatory scheme that facilitates competition is “an effective steward of the antitrust function,” (2) when a regulatory scheme intends to deter and remedy anticompetitive harm, antitrust enforcement is likely to be cost-ineffective, and (3) the social costs of false negatives in antitrust are insignificant, where as costs of false positives are high. The Court should retire these premises.

The implied immunity doctrine is exceptionally important because it gives antitrust courts the power influence national competition policy without a

¹⁷¹ *Id.* at 2238.

¹⁷² See, e.g., *NASD*, 422 U.S. at 734 (“[W]e have implied immunity . . . to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.”); *Trinko*, 540 U.S. at 406 (arguing that a statute is “a good candidate for implication of antitrust immunity, [if the immunity would] avoid the real possibility of judgments conflicting with the agency’s regulatory scheme.”); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801 (2d Cir. 2002) (“[I]mplied immunity exists where allowing parallel proceedings on antitrust and [regulatory] tracks would subject defendants to conflicting mandates.”)

meaningful consideration of tradeoffs. Nonetheless, the doctrine is poorly understood and often misused. Under *Credit Suisse*, when a firm is pushing the boundaries and is acting in an area whose legality under the relevant regulatory scheme is unclear, supposedly it should not concern itself with antitrust law. This is an invitation for collusions and exclusionary practices.