The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy"

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I. INTRODUCTION

This article presents a critique of the United States Supreme Court's revision of the implied repeal doctrine in *Credit Suisse Securities (USA) LLC v. Billing*,[1] taking a

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1. 551 U.S. 264 (2007).

historical perspective to demonstrate the sound rationale for the more traditional approach to this canon of statutory interpretation. Almost imperceptibly, and without explanation or admitting that it has done so, the Supreme Court has greatly expanded the range of circumstances in which courts may partially repeal statutory enactments.[2] As traditionally applied over hundreds of years, implied partial repeals were strongly disfavored, reflecting judicial deference to the legislature and the democratic system under which laws are enacted and repealed by elected and accountable officials. In its most recent articulation of the doctrine, the Supreme Court has ventured far from this traditional course, taking upon itself essentially a function of evaluating the wisdom of legislative enactments in their particular applications, and partially repealing statutes on that basis.[3] In this article, I will argue that the Court's revision of the implied repeal doctrine ignores the long and steady history of the doctrine, that the Court's new approach is bad law and bad policy, and that the Court should move to restore the traditional doctrine fully and clearly.

Aside from occasional bursts of activity, American rules of statutory interpretation have received remarkably little in the way of scholarly treatment. As Judge Posner observed a quarter century ago, "No one has ever done for legislation what Holmes did for the common law."[4] Around the same time as Judge Posner's observation, a few scholars turned their attention to the subject, prompting one of them to proclaim that statutory interpretation had been, like Cinderella, moved from a once scorned post in the kitchen into the ballroom.[5] However, whatever scholarly work has been done has been spotty and has produced little in the way of theoretical consensus on or off the court. A recent study of Supreme Court interpretations of statutes demonstrates that there is no single coherent analytical approach that could explain the results.[6] Recently, as the United States Supreme Court has visibly altered its approach to statutory interpretation, a few have joined in debating whether the canons serve as honest, value-neutral interpretive guides,[7] or instead masquerade as

2. *See id.* at 275-76.

3. *See id.* at 271-85.

4. Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800 (1983).

5. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994).

6. NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 5A:7 at 452 (6th ed. 2002).

7. *See generally, e.g.*, Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561 (1992); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579 (1992); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). An interesting empirical analysis of the application of canons of legislative interpretation concludes that these doctrines tend to be invoked to support ideological outcomes rather than as value-neutral interpretive norms. *See generally* James J. Brudney & Corey

post-hoc justifications for value-driven intrusions by the judiciary into policy formulation matters that should properly be left to legislatures.[8] Meanwhile, Professor Eskridge has advocated a dynamic approach to statutory interpretation that acknowledges democratic limits on the court's province but at the same time urges that courts should not stultify American law by applying rules of construction that purport to freeze the law in time and thus ignore the forward movement of history.[9] Despite the dearth of attention paid to them and the lack of any consensus about their validity or proper foundations, the canons continue to guide courts in their interpretation of statutes.

One of the oldest canons of statutory interpretation is the implied repeal doctrine, whose earliest articulation is found in Lord Coke's 1614 decision in *Dr. Foster's Case*.[10] In its traditional formulation, implied repeal has been understood to be a very narrow doctrine that reconciles older and newer enactments by minimally paring back older law where there is no plausible understanding of the laws that can avoid the inconsistency.[11] Courts apply this doctrine rarely because it is limited to reconciling laws that are so "plainly repugnant" to one another that they are incapable of coexisting.[12] Even when faced with plainly incompatible enactments, the doctrine allows for only the most modest displacement of the earlier law.[13] This narrow formulation of implied repeal has had a long and steady history—until now.

In *Credit Suisse*, the Court lurched past the traditional narrow confines of the doctrine and recast it in terms that will most likely give rise to more frequent displacements of legislative enactments.[14] *Credit Suisse* acknowledges no departure from precedent.[15] However, the Court has, in fact, greatly expanded the implied repeal doctrine. As it is currently employed by the Court, the new doctrine bears little

Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

8. Posner, *supra* note 4, at 805-22.

9. ESKRIDGE, *supra* note 5, at 13-14, 48-53.

10. (1614) 77 Eng. Rep. 1222, 1232 (K.B.).

11. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 123-24 (New York, John S. Voorhies 1857).

12. *Id.* at 124-27.

13. *See* Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963) (discussing the implied repeal doctrine in the context of the Securities Exchange Act).

14. The Court in Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264 (2007), found support and precedent for its analysis in expansive readings of several earlier implied repeal decisions, including a trilogy of cases that involved securities regulation and antitrust law. *See Silver*, 373 U.S. 341; Gordon v. N.Y. Stock Exch., 422 U.S. 659 (1975); United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975). As discussed in Section II below, *Credit Suisse* represents an important departure from these and other precedents.

15. *See Credit Suisse*, 551 U.S. 264, 271-85.

resemblance to precedent, obscures a previously simple rule, and exhibits a profound disregard for the sound policy underpinnings of this particular canon of legislative interpretation. By expanding, and even rewording, the "plain repugnancy" standard and introducing a vague factor-based approach, the Court invites the judiciary to find legislative inconsistencies in new and creative ways, placing the courts in an enlarged role of refashioning legislative enactments to resolve these "inconsistencies."[16] Moreover, the Court has dismantled the traditional implied repeal rule without explaining why it believes the traditional doctrine should be abandoned. Indeed, one of the Court's vaguely expressed rationales for displacing antitrust rules in *Credit Suisse*—an assertion that antitrust courts are particularly error-prone—is offered without empirical or theoretical support.[17] Viewed more broadly beyond the antitrust law context in *Credit Suisse*, the restated implied repeal doctrine lacks an analytical justification for its departure from precedent.

The Court's reformulation of the implied repeal doctrine is bad law, bad policy, and should be undone. In *Credit Suisse*, the Court divested private plaintiffs of antitrust remedies for conduct that securities regulators had already concluded were both anticompetitive and subversive of public confidence in capital markets.[18] Unequivocally, the antitrust case challenged conduct that was illegal under securities regulatory law.[19] Although securities regulation and antitrust rules prohibited the conduct in question for overlapping reasons, the revised implied repeal doctrine employed by the Court allowed it to find these congruent laws to be "plainly inconsistent" with one another.[20] Taking direction from the Supreme Court's new implied repeal doctrine, courts are encouraged—or at least no longer discouraged—to find inconsistencies between laws they do not like and laws they prefer and, then, narrow or repeal the disfavored statutes accordingly. Indeed, Justice Stevens's concurrence suggests that this is essentially what the Court did in *Credit Suisse* when it disparaged the private antitrust enforcement process as error prone and found it displaced by securities regulation the Court applied with undisguised reverence.[21]

While the canons of statutory construction have been disparaged in general as "a homely collection of rules, principles, and presumptions,"[22] this particular canon in its traditional formulation served a useful purpose. Repealing laws on the basis of policy preferences is a legislative function, not a proper judicial one. The traditional implied repeal rule minimized judicial incursions into the legislative sphere and, at the same time, provided a clear, predictable, and administrable rule. These

16. *See id.* at 275.
17. *See id.* at 281-83.
18. *Id.* at 269-70, 278-79.
19. *Id.* at 278-79.
20. *See id.* at 279-85.
21. *Id.* at 287 (Stevens, J., concurring).
22. ESKRIDGE, *supra* note 5, at 275.

advantages of the traditional approach have been articulated in case law and scholarly authorities going back over many centuries. Indeed, the traditional implied repeal rule is as old as the judicial function of legislative review—the power of the courts to interpret and apply laws and to strike them down when they are deemed to have conflicted with constitutional requirements or other statutes. Legislative review is among the most important functions of the judiciary, but one that ought to be kept distinct from the legislative function. When a court finds new and old laws to be inconsistent, and then refashions the older one to resolve the problem, it engages in a bit of legislative handiwork. Limiting the involvement of the judiciary in the legislative realm is good policy. The traditional doctrine served well to prevent courts from finding inconsistencies unnecessarily and also minimized judicial rewriting of the earlier enactment where inconsistency was unavoidable.

This article examines the historical roots and continuous application of the traditional implied repeal doctrine and advocates its restoration. Considering judicial and scholarly treatment of the doctrine over several centuries, this article develops an answer to the ultimate question: Why have such a doctrine at all? The answer is that there are sound policy underpinnings of the traditional doctrine that help to explain what the doctrine should and should not do. The article then traces the Supreme Court's path toward its ultimate restatement of the implied repeal rule in *Credit Suisse*. The article concludes by advocating that the time-honored articulation of the doctrine should be restored, consistent with the very reasons for its existence as evidenced by its historic function.

II. THE *CREDIT SUISSE* CASE AND THE EXPANSION OF "PLAIN REPUGNANCY"

The *Wall Street Journal* ran a lead story on December 6, 2000, exposing alleged securities underwriting abuses.[23] The story reported that investment banks had agreed with large institutional investors to a "laddering" scheme in which the investors committed to purchase additional shares at higher prices in the immediate aftermarket following the initial offering or "IPO."[24] The *Wall Street Journal* article described the laddering agreements as providing "rocket fuel that sometimes boosts IPO prices into orbit on the first trading day."[25] As reported, the tying or laddering practices had allowed underwriters to reduce risks of post-IPO stock drops, which are associated with making firm commitment offerings, along with a number of less direct risks, such as reputational harm, to the investment banks among large institutional investors.[26] The Securities and Exchange Commission (SEC) had

23. Susan Pulliam & Randall Smith, *Trade-Offs: Seeking IPO Shares, Investors Offer to Buy More in After-Market*, WALL ST. J., Dec. 6, 2000, at A1.

24. *Id.*

25. *Id.*

26. *See generally* Stephen Choi & Adam C. Pritchard, *Should Issuers be on the Hook for*

already become concerned with the practice of tying IPO shares to post-IPO purchases at inflated prices. On August 25, 2002, the SEC staff issued a bulletin warning that such tying arrangements "are a particularly egregious form" of prohibited transactions that "undermine the integrity of the market."[27] As reported in the *Wall Street Journal*, SEC Chairman Arthur Levitz condemned laddering and tying as corrosive to public confidence in securities markets because of the perception that IPO outcomes were being "rigged."[28]

The ensuing scandal provoked regulatory[29] and private class action litigation under securities laws[30] and antitrust laws.[31] Following an SEC investigation into the practices, fines were levied against Credit Suisse First Boston ($100 million), Robertson Stephens ($28 million), and J.P. Morgan ($25 million).[32] By the time the antitrust litigation that led to the *Credit Suisse* decision was filed, there was no doubt that the conduct alleged in those cases violated securities regulatory law. The antitrust claims involved allegations of anticompetitive practices by ten leading investment banks in connection with underwriting syndicate practices.[33] In consolidated class action cases assigned to Judge Pauley of the United States District Court for the Southern District of New York, two putative classes of plaintiffs alleged antitrust injuries suffered as a result of purchasing IPO shares of technology-related securities at artificially inflated prices during the "dot-com boom" of the late 1990s.[34] One group alleged violations of § 1 of the Sherman Act[35] and analogous state antitrust statutes; the other actions alleged commercial bribery under § 2(c) of the

Laddering? An Empirical Analysis of the IPO Market Manipulation Litigation 2-3, (Univ. of Mich. Law Sch., Working Paper No. 9, 2004), *available at* http://law.bepress.com/umichlwps/olin/art9 (providing an analysis under securities law of the tying and laddering conduct that provoked the scandal).

27. SEC Staff Legal Bulletin No. 10 (Aug. 25, 2000), *available at* http://www.sec.gov/interps/legal/slbmr10.htm.

28. Pulliam & Smith, *supra* note 24, at A1.

29. SEC v. Credit Suisse First Boston Corp., Litigation Release No. 17327, 2002 SEC LEXIS 147 (Jan. 22, 2002); SEC v. Robertson Stephens, Inc., Litigation Release No. 17923, 2003 SEC LEXIS 29 (Jan. 9, 2003); SEC v. J.P. Morgan Sec. Inc., Litigation Release No. 18385, 2003 SEC LEXIS 2334 (Oct. 1, 2003).

30. *In re* Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281, 294 (S.D.N.Y. 2003).

31. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497, 499 (S.D.N.Y. 2003), *rev'd* Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 172 (2d Cir. 2005), *rev'd* 551 U.S. 264, 285 (2007).

32. SEC v. Credit Suisse First Boston Corp., Litigation Release No. 17327, 2002 SEC LEXIS 147 (Jan. 22, 2002); SEC v. Robertson Stephens, Inc., Litigation Release No. 17923, 2003 SEC LEXIS 29 (Jan. 9, 2003); SEC v. J.P. Morgan Sec. Inc., Litigation Release No. 18385, 2003 SEC LEXIS 2334 (Oct. 1, 2003).

33. *IPO Antitrust Litig*., 287 F. Supp. 2d at 499.

34. *Id.*

35. 15 U.S.C. § 1 (2006).

Robinson-Patman Act.[36] The Sherman Act and state law claims alleged that the investment bank defendants had colluded to impose a variety of higher prices and other economic burdens on investors in highly sought after initial public offerings.[37] One challenged practice allegedly involved a conspiracy to impose upon IPO purchasers laddering commitments to bid on additional shares of the same security at higher prices in the immediate aftermarket.[38] It was further alleged that the investment banks conspired to impose costs on IPO customers in addition to the stated offering price for the IPO, including inflated commissions on other securities.[39] The antitrust complaints also alleged "tying" conspiracies among the investment banks that had required plaintiffs to purchase other less desirable securities as a condition of participating in highly desired IPOs.[40] The Robinson-Patman Act claims tracked the Sherman Act complaint and added allegations that certain institutional investors had made unlawful payments and other prohibited undertakings to the investment bank defendants in exchange for favorable allocations of IPOs.[41]

Defendants moved to dismiss the complaints on a number of grounds, one being that the regulatory scheme governing IPOs impliedly immunized the conduct of syndicated underwriting from the application of antitrust laws.[42] The district court granted the motion on two separate grounds. First, the court held that "the SEC explicitly permits much of the conduct alleged in the Sherman Act Complaint."[43] In this connection, the district court recited a number of allegations from the consolidated amended complaint alleging that the defendants had "combined and conspired" through the syndicate process and discarded these allegations as "a general indictment of the syndicate system" of IPO underwriting authorized by securities law and generally accepted in the industry.[44] To the extent that the complaint alleged antitrust violations based on conduct that is explicitly permitted by securities law, the court ruled that the antitrust laws were impliedly repealed by the inconsistent provisions of the securities regulatory scheme.[45] However, the court acknowledged that the core allegations of laddering and tying conduct violated both

36. 15 U.S.C. § 13(c) (2006).

37. *IPO Antitrust Litig.*, 287 F. Supp. 2d at 499-500.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 500-01.

42. *Id.* at 501.

43. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497, 506 (S.D.N.Y. 2003), *rev'd* Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 172 (2nd Cir. 2005), *rev'd* 551 U.S. 264, 285 (2007).

44. *IPO Antitrust Litig.*, 287 F. Supp. 2d at 508. The district court also disparaged the antitrust claims as an "indiscriminate assault on the syndicate system and various 'road show' practices." *Id.* at 509.

45. *Id.* at 510.

legal regimes and found the application of antitrust rules to that conduct did not immediately and directly constitute a "plain repugnancy" between the two sets of rules.[46] As to the antitrust allegations of conduct that also violated securities law, the court observed:

> While this conduct, under certain circumstances, could be deemed violative of the securities laws, such a finding would not be fatal to a conferral of implied immunity. This is because the SEC has broad power to regulate the conduct at issue in this case, and therefore potential conflicts exist even between activities that are, at the current time, prohibited under both the securities and antitrust regulatory regimes.[47]

On the basis of broad power of the SEC to regulate, the district court concluded that the regulatory scheme was in unavoidable conflict with antitrust laws, which were therefore impliedly repealed by Congress as to the conduct in question.

A. *The Supreme Court's Analysis in Credit Suisse: Tortured Precedents, Dicta, and the Invention of a Factor-Based Test for Implied Repeals*

In delivering the Court's opinion in *Credit Suisse*, Justice Breyer described the complaint as alleging unlawful agreements among underwriters of popular new securities issues requiring buyers "to buy additional shares of that security later at escalating prices (a practice called 'laddering'), . . . to pay unusually high commissions on subsequent purchases from the underwriters, or . . . to purchase from the underwriters other less desirable securities (a practice called 'tying')."[48] The only issue presented in *Credit Suisse* was "whether there is 'plain repugnancy' between these antitrust claims and the federal securities law."[49] In what may or may not have been a significant aside, the Court slightly altered the vocabulary to describe the test for implied repeal as "clearly incompatible" rather than the traditional "plain repugnancy."[50] To address this issue, Justice Breyer turned to the three prior

46. *Id.*

47. *Id.*

48. Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264, 267 (2007).

49. *Id.*

50. *See id.* at 275. Justice Breyer must have had some reason for altering the language of implied repeal. The "repugnancy" terminology dates back at least to the doctrine's earliest application by Chief Justice Story in Harford v. United States, 12 U.S. 109, 109-10 (1814). "Repugnancy" derives from the Latin "pugnare" which means "to fight." Thus repugnancy connotes more than mere inconsistency and suggests battling elements that are at war. "Incompatible" seems a bit softer. Altering the language of implied repeal thus fit with the Court's expanding view of the proper settings for finding implied repeals. However, the Court merely noted that it was making this linguistic shift, but did not attempt any explanation for it.

decisions of the Court that had addressed the relation between securities and antitrust laws: *Silver v. New York Stock Exchange*,[51] *United States v. National Ass'n of Securities Dealers*,[52] and *Gordon v. New York Stock Exchange*.[53] From these cases, Justice Breyer derived a factor-based test for determining whether securities regulatory law impliedly repealed antitrust law and extended the doctrine to apply in cases of merely potential conflict.[54] As will be discussed below, such a flexible and policy-laden approach marks a radical departure from the traditional implied repeal doctrine, which strictly limited the displacement of statutory enactments.

An examination of the three cases from which the Court derived this new factor analysis demonstrates how the Court extracted illusory precedential support for its view that an earlier statute can be impliedly repealed by consistent or even nonexistent regulation under a newer one. The Court's analytical framework that allowed it to find "plain repugnancy" between congruent securities laws and antitrust laws relied on tortured readings of these three implied repeal decisions. These cases were unremarkable in their articulation of the traditional implied repeal rule, and each was indeed faithful to the time-honored conception of implied repeal. Yet the *Credit Suisse* Court justified a radically new implied repeal doctrine by drawing implausible, and even illogical, principles from its precedents and dicta contained therein.

1. *Silver v. New York Stock Exchange*

The core principle extracted from *Silver* was that "the existence of regulatory authority under the securities law to supervise the activities in question" and "evidence that the responsible regulatory entities exercise that authority"[55] are critical *factors* in determining whether to displace antitrust law with securities regulation under implied repeal standards. However, nothing in *Silver* even minimally suggested any sort of *factor* analysis of implied repeal questions. To the contrary, *Silver* continued the bright-line traditional implied repeal rule. As *Credit Suisse* itself acknowledges, *Silver's* articulation of the implied repeal standard was that "where possible, courts should reconcile the operation of both . . . statutory schemes rather than holding one completely ousted" and that "repeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."[56] This standard was not applied in *Credit Suisse*. The court made no effort to reconcile antitrust laws with SEC regulations, but instead undertook a creative effort to find inconsistency between the

51. 373 U.S. 341 (1963).
52. 422 U.S. 694 (1975).
53. 422 U.S. 659 (1975).
54. *See* Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264 (2007).
55. *Id.* at 275.
56. *Id.* at 271 (internal brackets and citation omitted).

two. Furthermore, it was entirely unnecessary to displace antitrust rules in order to make SEC regulation work: the two regimes prohibited the same conduct for overlapping reasons. There was no explanation given as to how imposing additional antitrust sanctions on top of the SEC's fines would interfere with securities regulation or the markets they govern.

Silver involved an antitrust challenge to a New York Stock Exchange ("NYSE") order enforcing an internal rule prohibiting direct communications with non-member firms.[57] The anticompetitive nature and effect of the conduct was not seriously questioned under then-prevailing group boycott rules.[58] Thus, the sole issue before the Supreme Court was "whether the Securities Exchange Act has created a duty of exchange self-regulation so pervasive as to constitute an implied repeal of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases."[59] The Supreme Court held that the Securities Exchange Act of 1934 (the "Exchange Act") did not impliedly repeal the antitrust laws.[60] *Silver* did not articulate a factor-based approach, but instead proceeded from the observation that "the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or co-extensiveness of coverage with the agency's regulatory power."[61] Because the SEC lacked authority to review the conduct of the Exchange challenged under antitrust rules, there was no actual conflict between the application of antitrust rules and the SEC's exercise of regulatory power—the two did not overlap.[62] The Court further determined that, given the SEC's lack of authority over internal NYSE rules, "there was a need for applicability of the antitrust laws, for if those laws were deemed inapplicable the challenged conduct would be unreviewable."[63] The *Silver* Court speculated in dictum that "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented."[64] The *Silver* Court clarified in a footnote that it was not deciding the issue raised in this dictum, but merely pointing out that where conduct could be reviewed by both a regulator as well as an antitrust court, a different

57. Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963).

58. *Id.* at 347 ("The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market.").

59. *Id.*

60. *Silver*, 373 U.S. 341.

61. *Id.* at 358.

62. *Id.*

63. *In re* Stock Exch. Options Trading Antitrust Litig., 317 F.3d 134, 145 (2d Cir. 2003) (discussing *Silver*, 373 U.S. at 358-59).

64. *Silver*, 373 U.S. at 360.

issue than the one in *Silver* would present itself.[65] Contrary to the reading given this dictum in *Credit Suisse,* the *Silver* Court—even in dictum—did not purport to decide what the outcome of such a case would be, but merely indicated that it would be a different case.[66] *Silver* did nothing to alter or amplify the implied repeal doctrine, and instead represents an unremarkable determination that the Sherman Act was not displaced in spite of extensive industry regulation.

Credit Suisse ignored the holding in *Silver* and, instead, engaged in an illogical expansion of the dictum and speculation in that case to invent a factor analysis that *Silver* simply does not support. *Credit Suisse* takes *Silver* to have concluded that the overlap of regulatory and antitrust authority constitutes a factor favoring implied repeal.[67] In actuality, *Silver* did not need to reach that issue and instead upheld only the opposing proposition: that where the two *do not overlap* antitrust *must not give way* to regulatory enactments.[68] *Silver* tells us nothing about what happens when two regimes *do* overlap (except to say that that issue was not presented), and it is a logical fallacy to draw from that proposition the one the Court invented in *Credit Suisse*.[69] *Silver* merely upheld the Sherman Act against an argument for implied repeal because there was no overlap between regulation and antitrust.[70] It is particularly mysterious how one could derive such a factor-based approach when *Silver* had recited as "the guiding principle to reconciliation of the two statutory schemes" that "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary," and that "it is a cardinal principle of construction that repeals by implication are not favored."[71] So there was nothing in *Silver* that supports converting a regulatory overlap with antitrust into a factor in favor of displacing antitrust. In this respect, *Credit Suisse* reinvented *Silver*.

2. *Gordon v. New York Stock Exchange*

The Court even more impressively reinvented *Gordon.* The Court distilled *Gordon*'s analysis of the implied repeal issue into perhaps the most striking part of its newly-fashioned implied repeal analysis: that the *mere possibility* of conflict between

65. *Id.* at 358 n.12 ("Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today.").

66. *Id.* at 360, 358 n.12.

67. *See* Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264, 271-72, 277 (2007).

68. *Silver*, 373 U.S. at 357.

69. Put in terms of symbolic logic: "If not-P → not-Q" does not imply "If P → Q." Thus, "if no overlap, then no implied repeal" does not imply "if overlap, then implied repeal." The fallacy is perhaps better understood in prose: "If it is not precipitating, then it is not snowing" does not imply "If it is precipitating, then it must be snowing."

70. *Silver*, 373 U.S. at 357.

71. *Id.* at 357.

regulation and antitrust may be a sufficient reason to overthrow antitrust rules even where both laws currently prohibit the same conduct and where there is no evidence to suggest that the regulations are anything but stable.

In *Gordon,* the Supreme Court applied the traditional implied repeal doctrine, but in a unique context in which the regulator had been given recent express authority to override a Congressional prohibition on certain pricing conduct.[72] A putative class action challenged a system of fixed commission rates at the New York Stock Exchange and the American Stock Exchange (the "Exchanges"), alleging price fixing violations under the Sherman Act and seeking \$1.5 billion in damages on behalf of the class plaintiffs plus \$10 million in attorneys fees and costs.[73] Specifically, it was alleged that the Exchanges had unlawfully fixed commission rates on transactions involving less than \$500,000, i.e., non-institutional orders.[74] The Exchanges moved for summary judgment on the ground that the challenged actions were subject to supervision by the SEC under § 19(b) of the Securities Exchange Act of 1934 and, on that basis, claimed to be impliedly immunized from the antitrust laws.[75] The Court began its analysis by noting that commission fees had been continuously set by agreement, such as the one challenged in *Gordon* itself, without exception since the first exchange was formed under the Buttonwood Tree Agreement of 1792.[76] The fixed commission rates were not a secret and had been a subject of the hearings conducted by Congress in the course of passing the Exchange Act.[77] Section 19(b) provided explicitly for the SEC to monitor commission rates and to fix them.[78] Also, Congress had recently enacted legislation that made statutory the SEC's own ban on fixed commissions, but expressly left it to the SEC to determine, under specified

72. 422 U.S. 659 (1975).

73. *Id.* at 661 & n.3.

74. *Id.* at 661.

75. *Id.*

76. *Id.* at 663.

77. *See generally id*. at 664-67.

78. Section 19 (b) provided in part:

> The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as … (9) the fixing of reasonable rates of commission, interest, listing, and other charges.

Id at 666-67 (emphasis omitted) (quoting Securities Exchange Act of 1934, 48 Stat. 898).

circumstances, whether to allow reintroduction of fixed commissions.[79] The Court next observed that the SEC had discharged its delegated duty of oversight regarding fixed commission rates, having conducted extensive studies of the rates and, at times, having intervened and "thoroughly exercised its supervisory powers."[80] The Court reviewed the long and active history of both SEC activity and Congressional consideration of the fixed commission structures employed by the Exchanges, and found, unremarkably:

> 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.[81]

In his concurring opinion, Justice Stewart pointed out that Congress was aware of the commission practices when it enacted § 19(d) and had chosen to delegate oversight to the SEC rather than to simply freeze the prohibition of the practices by statute.[82] Notwithstanding that delegation, the conduct would not have been immunized by the mere enactment extending regulatory authority to the SEC. Instead, the implied immunity was the unavoidable consequence of Congress's awareness of the commission practice coupled with its delegation to the SEC of specific power to determine whether to lift the Congressionally-enacted fixed commission ban.

Justice Stewart explained that the Supreme Court's application of the implied repeal rule in *Gordon* was a direct consequence of recent Congressional activity that reflected an unmistakable legislative intent to leave the conduct at issue outside the reach of rigid per se rules under the Sherman Act:

> Instead, in § 19 (b)(9) of the 1934 Act Congress specifically empowered the Commission to exercise direct supervisory authority over exchange rules respecting 'the fixing of reasonable rates of commission.' Congress thereby

79. *Gordon*, 422 U.S. at 690-91.
80. *Id.* at 668.
81. *Id.* at 691.
82. *Id.* at 693 (Stewart, J., concurring).

> unmistakably determined that, until such time as the Commission ruled to the contrary, exchange rules fixing minimum commission rates would further the policies of the 1934 Act. Accordingly, although the Act contains no express exemption from the antitrust laws for exchange rules establishing fixed commission rates, under *Silver* that particular instance of exchange self-regulation is immune from antitrust attack.[83]

In a separate concurrence, Justice Douglas emphasized that implied repeal turned not merely on the existence of regulatory power, but on its active exercise.[84] Noting that the Court's opinion exhaustively established the elaborate and extensive oversight of fixed commissions by the SEC, Justice Douglas offered the following clarification of the Court's approach:

> The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing those rates from antitrust challenges. The antitrust laws are designed to safeguard a strong public interest in free and open competition, and immunity from those laws should properly be implied only when some equivalent mechanism is functioning to protect that public interest. Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended.[85]

Congress had thus only recently given explicit authorization to the SEC to *permit* the very conduct that was under antitrust challenge as per se illegal, and the SEC had the entire issue under active consideration. If the per se prohibition against price fixing had been allowed to apply to the fixing of commissions in that case, as the *Gordon* Court observed, this result would "render nugatory the legislative provision for regulatory agency supervision of exchange commission rates."[86] An antitrust verdict condemning the conduct would have directly preempted the specific regulatory activity that Congress had just set in motion and that the SEC was actively pursuing. Thus *Gordon* presented an unusual, perhaps unique, situation in which the challenged practice had been openly engaged in for the entire history of the industry, the SEC and Congress had for several decades been actively wrestling with the propriety of that practice, and Congress had concluded that the regulator should monitor and manage the conduct. Congress had left the decision to the SEC rather than to antitrust courts, giving rise to an implied repeal under the traditional approach.

From *Gordon*, the Supreme Court in *Credit Suisse* drew a broad conclusion that the *possibility of conflict* between a regulatory scheme and antitrust represents a

83. *Id.*
84. *Id.* at 691-92 (Douglas, J., concurring).
85. *Id.*
86. *Id.* at 691 (majority opinion).

factor favoring the displacement of antitrust law.[87] Thus "plain repugnancy" was reduced to "potential inconsistency." As the Court put the matter, "The upshot is that, in light of *potential future conflict*, the Court [in *Gordon*] found that the securities law precluded antitrust liability even in respect to a practice that both antitrust law and securities law *might forbid*."[88]

The Court went even further, though, in expanding on *Gordon,* and advanced the notion that "clear repugnancy" is supported by that earlier case even where there is no apparent reason to expect conflicting standards in the future.[89] The logic for the application of implied repeal in *Gordon*—that regulatory oversight was actively and extensively evaluating the conduct—was entirely ignored in *Credit Suisse*. Only by ignoring *Gordon's* context was *Credit Suisse* able to draw the perplexing conclusion that *Gordon* stands for the proposition that *compatibility* between law and regulation is a factor that generally supports a finding of "clear repugnancy." *Credit Suisse* thus characterized *Gordon* as follows: "Despite the likely compatibility of the laws in the future, the Court nonetheless expressly found *conflict*."[90] By the time the *Credit Suisse* Court had finished analyzing *Gordon*, "clear repugnancy" had been almost entirely set aside as the standard. Possible-but-unlikely conflict apparently suffices to support repeal by implication, or is at least an important factor favoring an implied repeal according to the *Credit Suisse* Court. This is a quite different standard than had been maintained for the roughly 400 years following *Dr. Foster's Case*.

Nor was the expanded implied repeal standard in *Credit Suisse* a reasonable application of *Gordon*. *Gordon* did not articulate an abstract rule to the effect that any possibility of future regulatory conflict, however unlikely, is an important factor weighing in favor of a court displacing an important law of general application such as the Sherman Act. To read *Gordon* so broadly ignores what was really presented by the facts of that case. *Gordon* presented a most unusual circumstance in which the regulator was in the process of determining whether to prohibit or allow the challenged practice, and Congress had explicitly authorized that targeted review.[91] Implied repeal, being a doctrine of legislative intent, was applied in *Gordon* on the basis of a specific Congressional enactment, namely § 19 of the 1934 Act.[92] It was consistent with the historic aversion against implied repeals to nevertheless find one based on the obvious intent of § 19. In *Credit Suisse* no congressional enactment is even mentioned as creating an immediate potential for regulatory conflict with the Sherman Act. The Court in *Gordon* was not concerned with a remote possibility that the SEC might someday create standards of conduct inconsistent with antitrust

87. Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264, 275-76 (2007).

88. *Id.* at 273 (emphasis added).

89. *Id.* at 273, 275-76.

90. *Id.* at 273.

91. *Gordon*, 422 U.S. at 681-82.

92. *Id.* at 685.

standards; the Court was instead persuaded by the Congressional enactment of Section 19(b):

> [Section] 19 (b) gave the SEC direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission. Not only was the SEC authorized to disapprove rules and practices concerning commission sates, but the agency also was permitted to require alteration or supplementation of the rules and practices when necessary or appropriate for the protection of investors or to insure fair dealings in securities traded in upon such exchange.[93]

Construing § 19(b) and the Sherman Act together, the Court found that the later enactment must have been intended to supplant the earlier one.[94]

3. *United States v. National Ass'n of Securities Dealers*

Having already mischaracterized *Gordon* and *Silver*, *Credit Suisse* proceeded to construe *United States v. National Ass'n of Securities Dealers* as congruent with this expanding view of the implied repeal doctrine, or more precisely with the relaxed view of "plain repugnancy."[95] However, as with *Silver* and with *Gordon, NASD* represents an application of a much narrower implied repeal doctrine than the one invented in *Credit Suisse*. In *NASD*, decided on the same day as *Gordon*, the United States challenged several agreements among the National Association of Securities Dealers ("NASD"), certain mutual funds, mutual fund underwriters, and broker-dealers.[96] The agreements prohibited sales of mutual fund shares at prices in the secondary markets other than at the IPO prices and inter-dealer transactions in these securities.[97] The alleged effects were to restrain the growth of competitive brokerage markets for mutual fund shares as well as the growth of a secondary dealer market in these securities.[98] The easier issues presented in *NASD* concerned the application of § 22(d) of the Investment Company Act as applied to the vertical price-fixing allegations.[99] The defendants argued that the price maintenance mandate of § 22(d) covered broker dealers.[100] However, by its express terms the statute only applied to

93. *Id.* (internal quotation omitted).
94. *Id.* at 691.
95. *See Credit Suisse*, 551 U.S. at 273-76.
96. United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975).
97. *Id.* at 700-02.
98. *Id.* at 701-03.
99. *Id.* at 711-20.
100. *Id.* at. 719.

"brokers."[101] Thus this statute could not form the basis for any implication that Congress intended to free-up dealers from the strictures of antitrust laws.

More complex issues were raised with regard to § 22(f) of the Investment Company Act. The United States claimed that the agreements restricting transferability were unlawful by virtue of their tendency to dampen the growth of a competitive secondary market.[102] Competitive secondary sales of investment company securities had been one target of congressional concern in enacting the Investment Company Act.[103] So-called "boot-legging"[104] had made it more difficult for investment companies to issue new shares, and provisions in the Investment Company Act addressing restrictions on transferability were in large part directed against the boot-legging practice.[105] Section 22(f) authorized restrictions on transfers, absent SEC rules or regulations prohibiting the restriction, so long as they were disclosed.[106] The Court found that this provision authorized funds to impose restrictions of the sort challenged by the United States, subject to Commission disapproval.[107] The statute thus established a negative option regulatory framework applicable to the transfer restrictions: funds could notify the SEC of restrictions and then impose the restrictions unless the SEC intervened to disallow them. After observing that the SEC had been active in monitoring and regulating transfer restrictions, the Court concluded: "The SEC's election not to initiate restrictive rules or regulations is precisely the kind of administrative oversight of private practices that Congress contemplated when it enacted § 22 (f)."[108] The SEC itself argued in its amicus curiae filing that the application of antitrust law to these restrictions would seriously impair the SEC's ability to regulate under the Investment Company Act.[109]

101. Investment Company Act, 15 U.S.C. § 80a-22(d) (1971).

102. *NASD*, 422 U.S. at 731-32.

103. *Id.* at 709.

104. Boot-legging in this context involved acquisitions of mutual-fund shares by dealers, who then offered them to the market at prices just under the primary market prices for the same shares, triggering price wars and otherwise interfering with the primary distribution system. Congress determined to stop the practice, and to authorize the SEC to add to this effort, by imposing restrictions on transferability and negotiability on such securities. The purpose was the elimination of price competition with the issuer by dealer sales of the same securities. *Id.* at 724-25 ("Section 22(d), by eliminating price competition in dealer sales, inhibits the most disruptive factor in the pre-1940's mutual market and thus assures the maintenance of a viable sales system. Section 22(f) complements this protection by authorizing the funds and the SEC to deal more flexibly with other detrimental trading practices by imposing SEC-approved restrictions on transferability and negotiability.").

105. *Id.* at 722.

106. *Id.* at 726.

107. *Id.*

108. *Id.* at 728.

109. Brief for the SEC as Amicus Curiae at 27, United States v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694 (1975) (No. 73-1701).

The dual objectives of protecting investors by preventing boot-legging practices while limiting excessively anticompetitive restrictions required the SEC to be in a position to strike the balance and to effectively allow (and immunize) whatever competitive restraints it concluded were appropriate.[110] By unavoidable implication, this regime in part displaced competition with regulation whenever the SEC chose to permit anticompetitive restrictions to further the policy objectives of preventing bootlegged sales--free and open competition under antitrust rules would countenance bootlegging and prohibit the desired anti-bootlegging restraints on resale.[111] The application of antitrust law could also, in this setting, lead an actor to be at the same time permitted for policy reasons by the SEC while prohibited by the Sherman Act in connection with the same restrictive conduct.[112] That the SEC's policy determinations were reflected by statute in a negative option approval did not alter the fact that the conduct had been effectively overseen and allowed by the regulator.[113] Not surprisingly, the particularized power extended by Congress to the SEC to approve the sort of agreements that were the subject of the antitrust charges created what the Court found to be a plain repugnancy between the securities regulatory law and the Sherman Act: "There can be no reconciliation of its authority under § 22 (f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal per se."[114]

Thus, there was nothing extraordinary about the Court's application of the implied repeal doctrine in *NASD.* As in *Gordon, NASD* presented two congressional enactments that were considered partly at odds with one another.[115] In finding that Congress intended that the reach of the Sherman Act should be narrowed, the *NASD* decision was not premised on the mere potential of some future conflict, but on the intent behind § 22(f) of the Investment Company Act.[116] That statute charged the SEC with balancing the value of competition with the value of private restraints on competition in a specific and narrow range of conduct involving bootlegging.[117] *NASD* is consistent with a policy of aversion to implied repeals in general and required the Court to find that the regulatory function authorized by Congress could not work consistently with the full applicability of antitrust rules to the conduct in question.[118]

110. *NASD*, 422 U.S. at 732.
111. *See id.* at 729.
112. *See id.*
113. *See id.* at 726.
114. *Id.* at 729.
115. *Id.* at 729-30.
116. *Id.* at 721, 723-24.
117. *Id.* at 732-33.
118. *Id.* at 734-35.

B. *The New Implied Repeal Doctrine: The Credit Suisse Factors-Based Test*

Taking a novel and expansive view of the appropriateness of displacing statutes, Justice Breyer found within *Silver, NASD*, and *Gordon* four factors that are "critical" in the context of a potential for conflict between antitrust and securities regulations:

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority;. . . (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. . . [and] (4) [whether] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.[119]

The Court found the application of these factors to "considerably narrow" its task, almost preordaining the result that the Sherman Act was impliedly repealed—notwithstanding the fact that the securities regulation in question had already been applied by the regulator to condemn the conduct in question.[120] The selection of the particular factors enumerated in *Credit Suisse* essentially preordained the outcome because these factors (with the possible exception of the third) were unarguably present. There was, indeed, fulsome regulation of IPO activity in securities markets; the SEC had amply exercised that authority, by imposing substantial fines on the same defendants for the same conduct alleged in the antitrust case—there is always a possibility that the regulator could view matters differently from an antitrust court—and the IPO activity involved in the case was squarely within the wheelhouse of securities regulation.[121]

Of these factors, only the third factor gave the Court pause because finding a possibility of conflict was not exactly trivial where there had already been regulatory expressions of outrage as well as formal condemnation of the same conduct.[122] The Court's explanation of the potential for conflict is perplexing, both because it makes no sense on its face, and because it appears to deny that federal courts are competent to comprehend and apply federal securities laws:

> [T]o permit antitrust actions such as the present one still threatens serious securities-related harm. For one thing, an unusually serious legal line-drawing problem remains unabated. In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which

119. Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264, 275-76 (2007).
120. *Id.* at 276, 283.
121. *Id.* at 276-77.
122. *Id.* at 277.

> respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on respondents' theory, should be open to antitrust attack).[123]

In a baffling observation, the Court went on offer the incomprehensibility of securities regulations as an additional reason to displace antitrust law:

> It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of "laddering-like" conduct that it now seems to forbid?[124]

The *Credit Suisse* Court was legitimately concerned that the threat of antitrust litigation could, in some contexts, undermine the smooth operation of securities markets by imposing potential burdens on legitimate conduct.[125] However, the line between legitimate and illegitimate was considered to be too "fine" for antitrust plaintiffs, judges, and even regulated entities to discern with confidence.[126] The Court appears to justify the displacement of antitrust law on the inability of courts and regulated persons to comprehend the SEC's regulations and additionally on the potential that the SEC might someday permit what "it now seems to forbid" (an odd way to describe the state of SEC anti-laddering regulation in the wake of the multi-million dollar fines that the SEC had already imposed).[127] Despite the Supreme Court's feigned uncertainty about the matter, no plausible inconsistency existed between the applicable securities regulation and the applicable antitrust rule. Rather than applying the traditional implied repeal doctrine, which strives to avoid finding inconsistencies, the Supreme Court invented a factor-based approach that assured implied repeal in the case before it.[128]

The *Credit Suisse* factor-based test is unprecedented in the long history of implied repeal and unfaithful to the doctrine and the policies that have sustained it for four centuries. An examination of the history of the doctrine makes plain that the

123. *Id.* at 279.

124. *Id.* at 280 (citation omitted).

125. *Id.* at 283.

126. *Id.* at 282-83.

127. *Id.* at 280; Petition for a Writ of Certiorari App. D, at 137a-38a, Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264 (2007) (No. 05-1157) ("[U]nderwriter agreed to pay a total of $100 million to be enjoined from future violations . . . .").

128. *Credit Suisse*, 551 U.S. at 275-76.

Court has abandoned it in place of something new and more expansive, departing from sound policy.

III. THE TRADITIONAL IMPLIED REPEAL DOCTRINE: ITS HISTORIC ROOTS AND THE POLICIES BEHIND THE "PLAIN REPUGNANCY" STANDARD

The doctrine of implied repeal is one of general application that resolves inconsistencies between earlier and later enactments of a single legislature while at the same time maximally preserving both laws.[129] Where the newer law is inconsistent with the earlier one, the later enactment by implication supersedes the earlier one to the minimal extent necessary to eliminate the conflict.[130] The doctrine is a rule of statutory construction based upon legislative intent. The essential elements of the rule are that (1) implied repeals are disfavored, even "strongly" disfavored,[131] (2) the later statute repeals by implication the earlier one only where the two are irreconcilably inconsistent or "plainly repugnant" to one another such that the two cannot work together;[132] and (3) where implied repeal is necessary due to inconsistencies, the repeal of the earlier statute is limited to the narrowest extent needed to allow the remainder of the two statutes to function together.[133] As the Court put it in *United States v. Borden Co.*, "[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible."[134] Implied repeal does not automatically result from the mere existence of a newer statute on the same subject; such a construction of the doctrine would mean the legislature could never enact complementary, remedial, or cumulative laws in the same area.[135] In order to trigger

129. *E.g.*, Wood v. United States, 41 U.S. 342, 362-63 (1842).

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

131. Rodriguez v. United States, 480 U.S. 522, 524 (1987) (While repeal by implication is a disfavored method of statutory construction and will not be found absent a clear intent to repeal, such an intent may be inferred from an "irreconcilable conflict" between two provisions.); Samuels v. District of Columbia, 770 F.2d 184, 194 n.7 (D.C. Cir. 1985) ("[R]epeals [by implication] are strongly disfavored on the ground that Congress is normally expected to be aware of its previous enactments and to provide a clear statement of repeal if it intends to extinguish an extant remedy."); Chem. Mfrs. Ass'n v. EPA, 673 F.2d 507, 512 (D.C. Cir. 1982) (implied repeal is "an argument that rarely succeeds").

132. United States v. Batchelder, 442 U.S. 114, 122 (1979) ("[T]he legislative intent to repeal must be manifest in the 'positive repugnancy between the provisions.'" (quoting United States v. Borden Co., 308 U.S. 188, 199 (1939)).

133. *Silver*, 373 U.S. at 357 ("Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.").

134. *Borden Co.*, 308 U.S. at 198.

135. Wood v. United States, 41 U.S. 342, 362-63 (1842) ("[I]t is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary.").

an implied repeal, the newer statute must be unworkable with, or "plainly repugnant" to, the earlier one.[136]

The "plain repugnancy" standard is central to the functioning of this doctrine. The long history of the rule, as consistently applied by courts in the United Kingdom and in federal and state courts in the United States, establishes as a "canon" of judicial statutory interpretation that implied repeals are disfavored.[137] The objective of avoiding unnecessary repeals by implication is given effect by the "plain repugnancy" standard, which requires courts to harmonize and preserve both laws if possible, and only invokes an implied repeal in the limited circumstance where harmonization is unachievable.[138] Thus the "plain repugnancy" standard supports the presumption against implied repeals and explains why courts have so rarely invoked the doctrine of implied repeal.[139] The history of the doctrine is instructive as to its very limited reach.

A. *Historical Roots and Early Articulations of the Implied Repeal Doctrine*

Among the earliest and most cited invocations of the rule is Lord Edward Coke's seminal 1614 decision in *Dr. Foster's Case*.[140] Dr. Foster's failure to attend common prayer for a period of nearly one year violated two separate statutes, which imposed different fines. The Act of 23 Eliz., c.1, provided that "every person above the age of 16 years, which shall not repair to some church, chapel or usual place of common prayer, etc. contrary to the tenor of a statute made, and being thereof convicted, shall

136. Stuart v. Maxwell, 57 U.S. 150, 157 (1853).

137. *E.g.*, Gordon v. N.Y. Stock Exch., 422 U.S. 659, 682 (1975); United States v. Phila. Nat'l Bank, 374 U.S. 321, 350 (1963); United States v. Borden Co., 308 U.S. 188, 198-99 (1939); Harford v. United States, 12 U.S. (8 Cranch) 109, 109-10 (1814); Dr. Foster's Case, (1614) 77 Eng. Rep. 1222, 1232 (K.B.); SINGER, *supra* note 6, § 23:9, at 459-66.

138. SINGER, *supra* note 6, § 23.9, at 461.

139. As Justice O'Connor recently observed: "We have not found *any* implied repeal of a statute since 1975." Branch v. Smith, 538 U.S. 254, 293 (2003) (O'Connor, J., concurring in part and dissenting in part). State courts have also adopted the rule that implied repeals are disfavored as a canon of judicial construction. *See*, *e.g.*, Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1096 (Cal. 1998) ("The law shuns repeals by implication. In fact, the presumption against implied repeal is so strong that, to overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.") (internal citations, brackets and quotation marks omitted). An interesting and determined attack on the presumption against implied repeal can be found in Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487 (2004). As that article acknowledges, a retreat from the longstanding presumption requires introducing an entirely new vocabulary to approach the issue, and the argument cites not a single legal authority for the contrary proposition that implied repeal is either favored or casually employed. *See id.*

140. (1614) 77 Eng. Rep. 1222, 1232 (K.B.).

forfeit to the Queen's Majesty for every month which he or she shall so forebear twenty pounds, etc." and imposed one level of penalty to be divided evenly among the Queen for her own use, the Queen for the relief of the poor, and the private qui tam litigant who had brought the suit to enforce the law.[141] A later statute, Act of 28 Eliz., c.6, imposed a different fine payable exclusively to the Queen.[142] Thus while the earlier statute provided both a public and a private remedy and formed the basis of the private plaintiff's suit, the later enactment, while not an express repeal, provided only a public remedy enforceable by the attorney general.[143] Dr. Foster argued that the later statute impliedly repealed and superseded the earlier one and deprived the private qui tam plaintiff of his suit.

The court *might* have found an inconsistency between the two laws because the remedies in the later enactment redressed the identical conduct, provided a new form of sanction payable only to the Exchequer, and indicated no legislative intention to continue the availability of a private remedy on behalf of a qui tam plaintiff. At a minimum, Parliament had left ambiguity to be resolved. The later enactment was for the express purpose of providing a "more speedy execution" of the earlier prohibition, but *only on behalf of the Queen*.[144] Did such an enactment abrogate the private remedy? Lord Coke ruled that it did not and established the principal that became the "canon" of implied repeal.[145] Seeking to avoid finding inconsistency, Lord Coke found that "here are two Acts of Parliament, and the Act of [Act. of 28 Eliz] doth not give. . . [standing] to a new person, but to the same person that the [Act of 23 Eliz] has given it, viz. to the Queen; and it is but an act of addition to give a more speedy remedy than was given by the Act of 23."[146] On this approach, Coke sought to harmonize the two statutes, reasoning that by giving the Queen a speedier remedy Parliament was not implicitly depriving either the Queen or the qui tam private litigant of the remedies that were previously in place for the same conduct under the earlier law.[147]

It is worth considering that Lord Coke *could* have taken a number of different approaches to the problem he confronted in *Dr. Foster's Case*. For example, he might simply have concluded (as he doubtless did) that the Parliament had blundered by neglecting to resolve whether the qui tam remedy was to remain available. Parliament obviously had left the law in a muddle. On that ground the court might have refused to enforce either law until Parliament set the matter right because the enactments did not work unambiguously well together. As a general principal, Lord

141. 1580, 23 Eliz., c.1, § 4 (Eng.).
142. 1586, 28 Eliz., c.6, § 3 (Eng.).
143. *Dr. Foster's Case*, 77 Eng. Rep. at 1228-29.
144. *Id.* at 1228 (discussing 1586, 28 Eliz. c.6, § 3 (Eng.); 1580, 23 Eliz., c.1, § 4 (Eng.)).
145. *Dr. Foster's Case*, 77 Eng. Rep. at 1232.
146. *Id.* at 1233.
147. *Id.* at 1228-29.

Coke might have articulated a rule of complete judicial deference to the legislature, requiring all ambiguities in legislation to be sent back to the legislature rather than taking upon the court to fix legislative oversights. Alternatively he might have given even greater preference for the most recent enactment. The doctrine, as Lord Coke fashioned it, gives almost equal weight to the newer and older statutes, tipping the balance only slightly toward the newer law.[148] An alternative theoretical starting point could have been that the court should pay far greater deference to the *later* enactment by allowing it to displace inconsistent earlier ones broadly or even entirely.[149] The later enactment might be regarded as reflecting the more recent expressed will of a legislature and thus more currently embodying the "commonwealth." Put differently, the legislature that enacted the earlier law was no longer accountable through democratic processes when the subsequent legislature enacted the newer law. The more recent law would therefore embody the most current expression of the public will.

Such a "later enactment prevails" approach would thus have had a plausible theoretical justification and the added benefit of leaving courts with a mere textual problem rather than having to conjure legislative intent. On a textual approach, any inconsistency between the newer and older law could be resolved simply by displacing the earlier with the later enactment entirely in the absence of an unambiguous legislative intent to preserve both. The implied repeal approach to finding inconsistency involves more nuanced questions about whether, as well as the extent to which, the legislature "intended" the newer law to repeal the earlier one, and courts may have sought to avoid imputing intentions to a legislature made up of many individuals having potentially quite divergent ideas. If one applies this alternative textual approach, for example, in *Dr. Foster's Case*, the plain text of the later statute gave a private plaintiff no standing to sue and recover part of the fine since the later enactment provided a public remedy rather than a private one.[150] On a purely textual approach, the earlier law that had provided a private remedy was thereby displaced by a newer one that expressly did not, and that could have been the end of the analysis.[151]

It is also conceivable that Lord Coke could have adopted a presumption whatsoever against implied repeals. The presumption he adopted often pays (probably) false homage to the legislature by pretending that it must have thought its enactments through more carefully than it really did. Looking at the two prohibitions in the enactments in *Dr. Foster's Case*, it seems likely that Parliament enacted the newer law without giving the older one a moment's reflection. Presuming it had paid

148. *Id.* at 1232.

149. It has been suggested that the historic presumption against implied repeals should be modified to include the concept of the "later enactment" rule. *See* Petroski, *supra* note 140, at 488-89.

150. *Dr. Foster's Case*, 77 Eng. Rep. at 1225-26.

151. *Id.*

full attention to all of its earlier enactments is by no means mandated by raw logic, but instead reflects the court's determination to pay respect to the legislative branch.

However, instead of these other possible approaches, Lord Coke sought to maximize the continued validity of *all* legislative enactments where ambiguity left doubt as to the intent of the Parliament. Judicial deference to the legislative prerogative is thus deeply ingrained in the doctrine of implied repeal that Lord Coke devised.

Early cases in the New World followed *Dr. Foster's* lead for similar policy reasons. As early as 1857, the leading American commentator on statutory construction, Theodore Sedgwick, explained that a subsequent statute should only repeal an earlier one where it "is clearly repugnant to a prior [statute]," and where the legislature clearly intends to repeal the former statute.[152] Referring Lord Coke's decision in *Dr. Foster's Case*, Sedgwick concluded:

> So in this country, on the same principle, it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence, a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together.[153]

In support, Sedgwick cites state court decisions from Pennsylvania, Massachusetts, and New York.[154] A Massachusetts case cited by Sedgwick is instructive. There, the legislature in 1836 outlawed the sale of "spirituous" liquors and in 1850 enacted another statute that instead outlawed the sale of "intoxicating" liquors, each carrying different sanctions. The Massachusetts court dismissed an argument that the latter had impliedly repealed the former, reasoning that "intoxicating" is broader than "spirituous" because not all intoxicating liquors are "spirituous." Because the newer law outlawed the same conduct as the older one and also additional conduct, the two were held to be sufficiently compatible to preclude an implied repeal.[155]

Early decisions of the United States Supreme Court adopted the doctrine, confirming that courts should take a conservative approach when addressing whether

152. SEDGWICK, *supra* note 11, at 124.

153. *Id.* at 127.

154. *Id.* at 127-28 and cases cited therein.

155. Commonwealth v. Herrick, 60 Mass. 465, 468-69 (1850). To similar effect see United States v. Batchelder, 442 U.S. 114, 122 (1979) (stating that newer statute did not repeal earlier one where both applied to defendant's criminal conduct and yielded different penalties).

later-enacted statutes impliedly repeal prior ones.[156] The earliest clear pronouncement appears to be Justice Story's observation in *Harford v. United States* that "a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable."[157] In *Cope v. Cope*, the Supreme Court addressed whether the Utah anti-polygamy Act of 1862 impliedly repealed an 1852 statute that confirmed the inheritance rights of illegitimate children.[158] In holding that the 1852 statute continued to apply, the Court asserted that "[n]othing is better settled than that repeals . . . by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction."[159] The Court went on to conclude that in order to repeal the 1852 statute, the conflict must have been "direct and unmistakable," and "[n]o law will be declared void because it may indirectly, or by a possible, and not a necessary, construction be repugnant to an annulling act."[160]

The Supreme Court's position that implied repeals are not favored persisted throughout the twentieth century.[161] In *Morton v. Mancari*, non-Indian employees of the Bureau of Indian Affairs challenged a rule enabled by the Indian Reorganization Act of 1934 allowing employment preference for Indians, claiming that the 1934 Act had been repealed by the Equal Employment Act of 1972.[162] The Court held that the 1934 Act was not repealed and asserted that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."[163] The Court looked extensively at the intent of Congress on the issue of preferential treatment for Native Americans in finding that there was no intent to repeal the 1934 Act.[164]

156. *See*, *e.g.*, Red Rock v. Henry, 106 U.S. 596, 601 (1882) ("The leaning of the courts is against repeals by implication, and if it be possible to reconcile two statutes, one will not be held to repeal the other."); McCool v. Smith, 66 U.S. 459, 470-71 (1861).

157. 12 U.S. (8 Cranch) 109, 109-10 (1814).

158. 137 U.S. 682, 686-89 (1891).

159. *Id.* at 686.

160. *Id.* at 687; *see also Red Rock*, 106 U.S. at 601 ("[A] repeal by implication must be by 'necessary implication; for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary.'").

161. *See, e.g.*, Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S. 186, 193 (1968) (stating the principle that "repeals by implication are not favored"); United States v. Jackson, 302 U.S. 628, 631 (1938) ("Repeals by implication are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied."); Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible.").

162. 417 U.S. 535, 537 (1974).

163. *Id.* at 550.

164. *Id.* at 541-48.

Specifically, the Court relied on the fact that employment of Native Americans had been excluded from the 1964 Act, which addressed discrimination in private employment (the 1972 Act at issue expanded on the 1964 Act for federal employees).[165] Next, the Court noted that Congress had enacted two new laws with preferences for Native Americans after passing the 1972 employment act, and Native Americans had been traditionally treated as exceptions to Executive Orders prohibiting government employment discrimination.[166] Ultimately, the Court found no evidence that Congress intended to repeal the 1934 Act and also found that the two acts were not irreconcilable, and therefore the 1934 Act was not repealed.[167]

Until *Credit Suisse* the Court remained consistent in disfavoring implied repeals and declining to find implied repeals in the vast majority of cases where the issue arose. One commentator has noted that between 1900 and 2003, implied repeals were found in at most twenty-two cases out of one hundred and sixty-seven where the issue arose, noting that "the presumption against implied repeals, as used by the Supreme Court, seems to have evolved into a virtual rule against implied repeals."[168] For example, in *Regional Rail Reorganization Act Cases*, at issue was the Regional Rail Reorganization Act of 1973, which, in seeking to reform the country's rail system, required that certain railroads turn over property to a private corporation formed under the Act to create a plan for reorganization.[169] The railroads then sought compensation for these properties as a taking under the Fifth Amendment, made possible by the Tucker Act, which gives the Court of Claims jurisdiction to award compensation for certain takings.[170] The Court found that the Rail Act had not repealed the Tucker Act since the compensation under the Tucker Act could co-exist with the Rail Act system, and Congress had not spoken on the issue, noting that "[p]resumably Congress had given serious thought to the earlier statute."[171] Citing *Morton*, the Court held that "since the Tucker Act and the Rail Act are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"[172] The Court has re-affirmed that implied repeals should be rarely recognized on numerous occasions in recent years.[173]

165. *Id.* at 545-46.

166. *Id.* at 548-49.

167. *Id.* at 547, 550-51.

168. Petroski, *supra* note 140, at 511, 532-540 app.

169. 419 U.S. 102, 108-17 (1974).

170. *Id.* at 121.

171. *Id*. at 134 (quoting *In re* Penn Central Transportation Co., 384 F. Supp. 895, 943 (1974)).

172. *Id.* at 133-34 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

173. *See*, *e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007) ("We will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that the words of the later statute

B. *Traditional Applications of Implied Repeals in Antitrust*

With the expansion of federal economic regulation in the twentieth century, the implied repeal doctrine came to have especially important application in resolving potential inconsistencies between economic regulation and antitrust. The historic application of the traditional doctrine in antitrust cases also sheds light on the extent to which *Credit Suisse* deviated from this traditional approach to the matter. Prior to *Credit Suisse*, the presumption against implied repeals was applied without modification in the context of antitrust cases, perhaps even amplified by the acknowledged primacy of antitrust law as embodying a fundamental national policy that should not be displaced by subsequent regulatory laws absent an unambiguous congressional intent.[174] In this area, implied repeal is sometimes cast in terms of whether a particular statute or regulatory scheme provides "implied immunity" from, or "implied preclusion" of, antitrust law for particular regulated conduct but the doctrine is the same and the terms are used interchangeably.[175] Even in highly regulated industries, the Court has generally declined to recognize implied immunity,[176] and where the Court has found immunity, it has strictly limited its contours.[177]

A leading case is *United States v. Philadelphia National Bank*, in which the Court found that antitrust laws applied even in the highly regulated banking industry.[178] There, the government sued under the Clayton Act to enjoin a bank merger, where the banks in question had complied with the numerous requirements of the Bank Merger Act of 1960.[179] The central issue was whether the Bank Merger Act had displaced the antitrust laws, specifically Section 7 of the Clayton Act.[180] The elaborate regulatory system that governed bank merger activity is instructive—particularly the elaborate regulatory features directed at assuring bank solvency

shall have any meaning at all.'" (internal citatons, brackets and quotation marks omitted)); J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 142 (2001) ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (quoting Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996))).

174. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 350-51 (1963).

175. *See, e.g.*, Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 271-72 (2007) and cases cited therein, referencing "implied immunity," "implied preclusion of antitrust laws" and "implied repeal."

176. *See, e.g.*, Justin Lacour, Note, *Unclean Repugnancy: Antitrust Immunity in Securities Markets After* Credit Suisse Securities (USA) L.L.C. v. Billing, 82 ST. JOHN'S L. REV. 1115, 1118 (2008).

177. *See, e.g.*, *id.* at 1122.

178. 374 U.S. 321 (1963).

179. *Id.* at 323, 332-33.

180. 15 U.S.C. § 18 (2006).

against "undue competition."[181] This core solvency objective of federal bank regulatory law creates an obvious tension with antitrust law, which fundamentally presupposes that competition is "not undue" and which does not seek to protect market participants from their own failure or their rivals' most vigorous competition.[182] A complex web of regulatory objectives was entrusted to three agencies, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the Federal Reserve Board.[183] Entry, branching and acquisitions fell under a "network" of regulatory statutes.[184] The Federal Reserve regulated the supply of money and credit and the cost of funds, and indirectly thereby controlled interest rates—the prices of loan products.[185] Bank examiners, under authority to curtail lending practices and even to suspend federal deposit insurance for banks found to have engaged in unsafe or unsound practices, conducted frequent and intensive examinations.[186] With particular regard to the bank merger under antitrust review in *Philadelphia National Bank*, the Bank Merger Act of 1960 empowered all three federal bank regulatory agencies with prior approval authority and required each agency to review the merger on, among others, antitrust and public interest grounds.[187] Still, the Court held that the merger was not immune from antitrust scrutiny—that the antitrust laws were not impliedly repealed by the Bank Merger

181. *Phila. Nat'l Bank*, 374 U.S. at 328 ("Entry, branching, and acquisitions are covered by a network of state and federal statutes. A charter for a new bank, state or national, will not be granted unless the invested capital and management of the applicant, and its prospects for doing sufficient business to operate at a reasonable profit, give adequate protection against undue competition and possible failure … Permission to merge, consolidate, acquire assets, or assume liabilities may be refused by the agencies on the same grounds.").

182. An axiom of antitrust law is that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). Thus to the extent that banking regulation seeks to protect the solvency of individual banks against the potential threats from competition, such regulation represents a modification of, and departure from, normal antitrust rules applicable in the absence of regulation. The antitrust laws themselves offer no protection against "cutthroat" competition, and regulatory measures like the Bank Merger Act that seek to place limits on competition "modify the reach of the Sherman Act." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 389 (1956).

183. *E.g.*, George W. Brown, *Current Legislation: Banking: Proposed Amendment to the Bank Merger Act of 1960*, 7 B.C. INDUS. & COM. L. REV. 302, 302 n.1 (1966).

184. United States v. Phila. Nat'l Bank, 374 U.S. 321, 328 (1963).

185. *Id.* at 327-28.

186. *See id.* at 329.

187. *Id.* at 333 n.8 ("In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest.").

Act—relying on the general principles of implied repeal: "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."[188]

The test applied by the Court in *Philadelphia National Bank* was whether "federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure."[189] The test applied by the Court was not merely to ask whether there was comprehensive banking regulation, which indisputably was the case. Instead, the Court assessed the comprehensiveness of bank regulation with an eye toward determining whether private conduct that would otherwise violate antitrust laws was necessarily freed from those laws in order to allow the bank regulatory scheme to work.[190] While the Court *might* have found that the comprehensive nature of bank regulation superseded antitrust law, it instead found that bank regulation actually eliminated the need to free up anticompetitive private conduct from antitrust rules. Most interestingly, the Court did not find that the outright conflict between the solvency-protectionist features of bank regulation and antitrust law created a "plain repugnancy." As the Court concluded: "Indeed, that there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws."[191] That is, since regulatory law already imposed restrictions on the behavior in question, no harm would come from the application of additional antitrust prohibitions to the same conduct. Thus, the standard of "plain repugnancy" followed in *Philadelphia National Bank* conformed to the historic standard. The standard applied and the approach to limiting implied repeals suggested a framework under which a regulatory scheme would not impliedly repeal antitrust law unless the regulation was both extensive and more than simply in tension with antitrust rules.

The Court's decision in *Pan American World Airways, Inc. v. United States* also reflects judicial restraint in displacing antitrust even in the context of explicit antitrust-override provisions in applicable regulatory law.[192] In 1929 Pan American and W. R.

188. *Id.* at 350-51 (footnotes omitted).

189. *Id.* at 352.

190. *See id.* at 324-30.

191. *Id.* at 352.

192. 371 U.S. 296 (1963). *Pan American* is sometimes referred to as a case applying the implied repeal doctrine. *See*, *e.g.*, Jacob L. Kahn, Note, *From* Borden *to* Billing*: Identifying a Uniform Approach to Implied Antitrust Immunity from the Supreme Court's Precedents*, 83 CHI.-KENT. L. REV. 1439, 1445-46 (2008). However, it is far from clear that the Court in Pan American understood itself to be applying the implied repeal doctrine as it had been set out in *Borden*, and the main point of the Brennan dissent is precisely this omission. The Court nowhere refers to "implied repeal," and makes only passing reference to *Borden* in footnote 9. The liturgy of implied repeal is

Grace & Company had formed Panagra, a joint venture for air transport along certain United States and Latin American routes.[193] The parties agreed to an allocation of routes that would effectively eliminate competition between them.[194] Pan American used its vote within the venture to preclude Panagra from competing in other markets by blocking its filing of applications for authorization from the Civil Aeronautics Board ("CAB").[195] The Department of Justice, at the request of the CAB, initiated the lawsuit charging the venture participants with market allocations and monopolization offenses and seeking divestiture of Panagra by both of its owners.[196] By the time the lawsuit was brought, Congress had enacted a pervasive regulatory scheme, ultimately embodied in the Federal Aviation Act of 1958 (the "1958 Act").[197] Section 411 of the 1958 Act authorized the CAB to order that unfair or deceptive practices or "unfair methods of competition" be ceased.[198] Section 409 gave the CAB broad authority over interlocking directorships among air carriers and between air carriers and other common carriers. The Act also required CAB approval for any common carrier to control "in any manner whatsoever" the operations of any air carrier.[199] Anyone subject to an order of the CAB under any of these provisions was expressly relieved from liability under the antitrust laws, and the Clayton Act itself was relegated to enforcement by the CAB.[200] The Court found a partial repeal, but

absent, such as that implied repeals are strongly disfavored and are fashioned to minimize displacements of earlier enactments—except in dictum in which the Court disavows any intent to deprive the Justice Department of its general authority over the airline industry. Instead, the Court analyzes the regulatory statutes to determine the extent to which their provisions, including express antitrust immunity, give rise to immunity for the particular route allocations under challenge. *Pan American*, therefore, is not clearly an application of this doctrine, and is perhaps more accurately regarded as interpreting the reach of an explicit antitrust immunity.

193. *Pan American*, 371 U.S. at 298.

194. *See id.*

195. *Id.*

196. *Id.*; United States v. Pan Am. World Airways, Inc., 193 F. Supp. 18, 20 (S.D.N.Y. 1961), *rev'd* 371 U.S. 296 (1963).

197. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

198. 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.

49 U.S.C. § 1381 (1958) (repealed 1994).

199. 49 U.S.C. § 1379 (1958) (repealed 1994).

200. *Pan Am.*, 371 U.S. at 304 ("Any person affected by an order under §§ 408, 409 and 412

went out of its way to observe that it was not granting broad antitrust immunity to the airlines:

> No mention is made [in the 1958 Act] of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here, as in comparable situations, to hold that the new regulatory scheme . . . was designed completely to displace the antitrust laws—absent an unequivocally declared congressional purpose so to do. While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total. Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined. We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce."[201]

The analytical framework in the *Pan American* decision is far from crystalline, but guidance can be drawn from the case. First, the displacement of specific antitrust rules and remedies was in the context in which those very rules and the remedy at issue had, as far as the Court was concerned, been explicitly delegated by Congress to the regulator.[202] Second, the delegation of that authority was pursuant to an explicit congressional finding that, for reasons of public safety and convenience, competition was to a certain extent undesirable as a market controlling mechanism in the industry.[203] Even in this context, where Congress had explicitly displaced competition and antitrust law, the Court went out of its way to restrict the scope of antitrust immunity. *Pan Am* reflected a consistent theme that antitrust law in particular should not be judicially displaced other than pursuant to an unambiguous congressional directive.

C. *Policy Underpinnings of the Implied Repeal Doctrine*

There are both practical and fundamental policy reasons for the judicial restraint embodied within the traditional implied repeal doctrine. The doctrine, as observed

is relieved from the operations of the antitrust laws, including the Sherman Act. § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board." (internal quotation marks omitted)).

201. *Id.* at 304-05 (internal footnote and citation omitted).

202. *Id.* at 305.

203. S. Rep. No. 75-1661, at 2 (1938) ("Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense.").

above, is not mandated by the unavoidable force of logic but instead represents a policy choice that has, until just recently, remained stable over approximately four centuries of common law in the United Kingdom and then here in the United States. By choice, the doctrine minimized intrusion of the courts into the legislative process and provided a stable and predictable construct for reconciliation of inconsistent enactments.[204]

1. Separation of Powers and the Proper Boundaries of Judicial Reach in Legislative Review

While the philosophical premises for democratic institutions may be debated, certain limitations on the judicial function are widely agreed upon and, in any event, taken here as valid. Judges ought not substitute their own preferences for those of the legislature. As Blackstone summarized this point in his *Commentaries*:

> I know it is generally laid down . . . that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it. . . for that were to set the judicial power above that of the legislature, which would be subversive of all government.[205]

Alexander Hamilton echoed this same thought:

> I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments. . . ."[206]

Hamilton thus urged, and the United States Constitution adopted, a system that insulates judges from political pressures by virtue of lifetime tenure and vests the legislative function to a democratically elected Congress. The role of the judiciary in interpreting statutes must be seen against this backdrop or that function may inevitably merge with the legislative function itself. No one would argue that the Court properly could *interpret* the Sherman Act as prohibiting the sale of intoxicating

204. In the context of antitrust, the doctrine's deference for legislation mapped nicely onto the Supreme Court's view of the Sherman Act as embodying important national policy and also gave reasonable clarity to a law whose essential purpose is undermined by uncertain rules that thus deter the very competitive activity intended to be fostered. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

205. 1 WILLIAM BLACKSTONE, COMMENTARIES 91 (1765).

206. THE FEDERALIST NO. 78, at 491 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

liquors. *That* would be legislating, not interpreting legislation. If Congress chose to re-enact Prohibition, members of Congress presumably would be voted out of office unless the electorate agreed or at least acquiesced in the legislative determination. It would be quite a different matter if the Supreme Court re-enacted Prohibition. The electorate could not vote the Supreme Court out of office. True, a judicial "interpretation" of the Sherman Act prohibiting sales of liquors could be overturned by Congress, and to some extent that sort of "conversation" between the Court and Congress takes place from time to time when the Court misconstrues a statute and is later overturned legislatively. However, any voter anger directed at the Congress for failing to override the Court would be diffused by virtue of the fact that no particular member of Congress would have voted for the offensive new law. Legislation by courts is essentially unaccountable.

The separation of powers thus relegates the legislative function to a politically accountable branch. Even those who argue for a "dynamic" statutory interpretation would not advocate that the Court ought to invent its own legislation in accordance with its own values in the guise of interpretation. Undoubtedly, defining a sharp line between interpreting laws and legislating is probably hopeless. Laws endure, circumstances change, and even in a most stable world a law will inevitably confront unanticipated circumstances. Laws thus need to be interpreted in contexts where a court must step in to fill gaps left by the enacting legislature. Yet the essential distinction remains, however blurred it might be: Congress enacts the laws and courts interpret the laws. The distinction is fundamental to a constitutional democratic framework of government. Even where a court concludes that a statute is simply a bad idea or that it works poorly in practice, the judicial role is limited and does not include remedying even the most ill-considered legislation by repealing it or rewriting it to conform to the court's better judgment.[207]

The implied repeal doctrine is one important tool by which courts observe the division between legislative and judicial functions.[208] Courts do not properly make legislative policy determinations about whether to enact or to repeal laws—by implication or otherwise. A judicial finding of implied repeal is a finding that *Congress* impliedly repealed a law, not a repeal by the court itself. The judicial

207. Modern textualists, of course, are especially solicitous of the distinction. Justice Scalia, among others, has advanced separation of powers as a basis for discouraging judicial lawmaking. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

208. The implied repeal doctrine also implicates the relationship between the courts and the executive branch. Indeed, the run of implied repeal antitrust cases have pitted the Sherman Act or the Clayton Act *not* against any statute enacted by Congress, but rather against the regulations promulgated by an executive agency under enabling legislation from Congress. Thus the doctrine applied in the context of potential conflict between laws and executive regulations pays deference to both, seeking to avoid undoing the acts of either branch. *See, e.g.*, Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963) (case brought on behalf of Civil Aeronautics Board in accordance with agency regulations).

function involves interpreting and applying rather than enacting or repealing laws. In its original formulation by Lord Coke and as subsequently adopted in the United States, what came to be known as the implied repeal doctrine reflected a profound judicial deference to the legislative prerogative and to the dynamic equilibrium among the branches of government in a pluralistic democracy. The doctrine is nominally one of legislative intent with the court acting as "honest agent" of the legislature, applying statutes in accordance with the Court's best understanding of the will of the enacting legislature.[209] The metaphor of legislative intent reflects a deeper judicial commitment to restraint and to the avoidance of antidemocratic intrusion by courts into the legislative arena.

This policy foundation for the implied repeal doctrine has been observed and respected for over four centuries, at least as far back as the 1614 decision in "Dr. Foster's Case."[210] There, Lord Coke expressed deference to the legislative process as the policy reason favoring judicial restraint:

> It must be known, that forasmuch as Acts of Parliaments are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated [but] . . . ought to be maintained and supported with a benign and favourable construction. . . .[211]

Although the implied repeal doctrine is arcane enough to have remained far removed from public debate, its underpinnings are not detached from the sometimes politically charged equilibrium between the powers of the Supreme Court and Congress.[212] The pejorative "judicial activism" reflects a concern about laws being created or destroyed by judges, especially those with effectively lifetime tenure under Article III of the United States Constitution. The balance between the virtues of judicial independence on the one hand and the evils of judicial encroachment into legislative functions has indeed sparked heated public debate, most prominently when the Court has come into conflict with Congress.[213] As Justice O'Connor has written since leaving the Court:

209. *See, e.g.*, Frank H. Easterbrook, Foreword: The Court and the Economic System, 98 HARV. L. REV. 4, 60 (1984).

210. *See* Dr. Foster's Case, (1614) 77 Eng. Rep. 1222 (K.B.); *see also* SEDGWICK, *supra* note 11, at 126-27.

211. *Dr. Foster's Case*, 77 Eng. Rep. at 1232.

212. *See generally, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

213. *See, e.g.*, *id.*

> The nature of the role of the judiciary in the U.S. government's intricate system of checks and balances is such that the courts' determinations will at times conflict with the positions of the other two branches. Sometimes, the judicial branch checks the legislature and the executive directly, by exercising the power of judicial review—the power to declare statutes or executive acts unconstitutional. At other times, the courts check the political branches indirectly, by qualifying the interpretation of a statute in light of constitutional values or by ruling that a regulation or executive act is not authorized by statute. In either case, when courts tell a political branch of government that it will not be getting its way, and an angry response may follow.[214]

Such conflicts between legislature and judiciary force a balance to be drawn between the values of independent judicial review on the one hand and power to legislate or to regulate on the other. Some of the Court's greatest achievements have been its most independent exercises of power, but that independence is fragile and at times politically vulnerable.[215]

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214. Sandra Day O'Connor, *Foreward* to CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM, at viii (paperback ed. 2008).

215. Judicial independence has been under pressure from recent activity in Congress. For example, in 2003, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 18 U.S.C. § 3553(b)(2) (2006). The so-called "Feeney Amendment" in this statute purported to restrict the authority of United States District Courts to depart from the sentencing guidelines in sexual offense and child pornography cases. Tension between Congress and the courts over the sentencing guidelines has been palpable. Senator Orrin Hatch reportedly remarked that judges on the 9th Circuit "don't care what the law is. They just care what they want it to be. This hurts how people view the judiciary." The Federalist Society, *2005 ABA Midyear Meeting, President Grey remarks, Dialogue between Congress & the Judiciary*, BAR WATCH BULL. (Feb. 12, 2005), *available at* http://www.fed-soc.org/publications/pubID.274/pub_detail.asp. Downward departures from the sentencing guidelines led some in Congress to advocate the impeachment of individual judges, leading then Chief Justice Rehnquist to respond:

> Congress establishes the rules to be applied in sentencing; that is a legislative function. Judges apply those rules to individual cases; that is a judicial function. There can be no doubt that collecting information about how the sentencing guidelines, including downward departures, are applied in practice could aid Congress in making decisions about whether to legislate on these issues. There can also be no doubt that the subject matter of the questions, and whether they target the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties. We must hope that these inquiries are designed to obtain information in aid of the congressional legislative function, and will not trench upon judicial independence.

William H. Rehnquist, *Chief Justice Addresses Sentencing Issues*, THIRD BRANCH, May, 2003, *available at* http://www.uscourts.gov/ttb/may03ttb/sentencing.html.

Judicial activism has at times been perceived to have brought courts into conflict with democratic values even without provoking Congress itself.[216] The expansive judicial precedents of the 1960s under the Sherman Act are a good example. Perceived judicial excesses in the application of antitrust laws led to what has been described as the "antitrust revolution" traced to the seminal work of Judge Robert Bork in his 1978 monograph *The Antitrust Paradox*.[217] Observing that the language of the Sherman Act is "singularly opaque," Judge Bork acknowledged the essential role of the courts in giving meaning to the statute through subsidiary rules.[218] However, in his view, the courts had exceeded their proper boundaries and had moved away from the legislative decision of Congress by usurping the legislative prerogative to impose a set of policies that were "incompatible with the preservation of a liberal capitalist social order":

> We are right to be concerned about the integrity and legitimacy of the lawmaking process, both for its own sake and because ideas about the power and discretion proper to courts in one field of law will inevitably affect their performance elsewhere. At issue is the question central to democratic society: Who governs?[219]

216. *See, e.g.*, Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 324-25 (1963) (Brennan, J., dissenting) (noting that certain antitrust questions should be conditioned on judicial implementation).

217. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

218. *Id.* at 20.

219. *Id.* at 10. Conversely, there have been complaints more recently about judicial activism in dismantling antitrust remedies without legislative authority for doing so. Tension between the courts and Congress has on occasion erupted over the court's displacement of antitrust rules in spite of congressional expressions of contrary intent in savings clauses. For example, in Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, the Supreme Court ruled that exclusionary unilateral conduct of an incumbent monopoly—that was unlawful under the Telecommunications Act of 1996 and designed to deter and remedy competitive abuses in the telecommunications industry—did not violate antitrust laws. 540 U.S. 398, 415-16 (2004). The Court's narrow reading of the reach of antitrust laws in this context provoked angry reaction in some members of the Congress, who noted that the Act explicitly provided that "nothing in this Act of the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, § 601, 110 Stat. 56, 143. The *Trinko* decision led the Chairman of the U.S. House of Representatives Committee on the Judiciary to testify that "this holding has done violence to remedial antitrust enforcement and competitive gains in the telecommunications marketplace. This assault on the antitrust laws should be of concern to Members of both bodies of Congress . . . ." *Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Hon. F. James Sensenbrenner, Jr., Chairman, H.R. Comm. on the Judiciary), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=1937&wit_id=5414. Chairman Sensenbrenner described "a record of considerable confusion [that has] developed in

Out of respect for the fundamental importance of the separation of powers, courts have even gone so far as to decline attempts by legislatures to delegate a legislative function to the judiciary. In *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Alexander Bickel analyzed cases under the void-for-vagueness doctrine and found that "when the Court finds a statute unduly vague, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision. It does not hold that the legislature may not *do* what is complained of but, rather, asks that the *legislature* do it, if it is to be done at all."[220]

If one accepts the premise that the court should not legislate, even where it has been handed the opportunity to do so by virtue of conflicting laws requiring resolution, the traditional implied repeal doctrine provides a desirable framework. It does so both by tending to avoid findings of statutory conflict, and, beyond that, by resolving any that are found mechanically, or at least from a position of value-neutrality, rather than by the court's exercise of legislative powers. Avoiding findings of conflict steers the court away from the need to tamper with what the legislature did. If conflict cannot be avoided, it becomes equally important for the court to proceed mechanically rather than making legislative policy choices of its own. When a court finds that Congress impliedly repealed one of its earlier enactments by passing a subsequent one, such a finding comes as close as any that a court makes to encroachment on the legislative prerogative. A finding of implied repeal means that the court has concluded that there is no plausible way in which an earlier law can be read consistently with a newer one; that in effect the legislature neglected its own earlier legislative acts when it enacted something more recent, or at least neglected to provide a needed reconciliation of the two laws. It then entails the court stepping in to "clean up" the resulting legislative conflict by fashioning a substitute legislative framework that lacks the conflict. This involves the court doing some legislative work of its own. A rule that minimizes legislative conflicts and then, when they are unavoidable, guides the court to a resolution along a narrow and regimented pathway serves well to minimize the substitution of judges' values for those of legislators, allowing a resolution without weighing the pros and cons of one possible legislative result versus any other.

One important value, therefore, that has undergirded the implied repeal doctrine from its earliest formulation has been the observance of the limits of the proper judicial function in connection with legislative interpretation.[221] The doctrine has sought to minimize the disruption of legislative enactments in three distinct ways, each forming a familiar element of the doctrine. First, implied repeal is the rare

our Nation's courts," and argued that "[t]his is precisely the judicial analysis that Congress precluded in the 1996 Act." *Id.*

220. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 152 (1962).

221. *See, e.g.*, United States v. Claflin, 97 U.S. 546, 551 (1878).

doctrine that disfavors itself. It is the "'cardinal rule,' applicable to legislation generally, that repeals by implication are not favored."[222] Thus the very point of departure of a court in assessing whether to apply the implied repeal doctrine is to do everything reasonable to avoid doing so. A court, faced with an asserted inconsistency between enactments, moves cautiously and, in this way, avoids any unnecessary incursion into the legislative sphere. A second and related element of the doctrine is that courts have traditionally attempted to *avoid* finding inconsistencies between laws in the first place.[223] The need for judicial intrusion only arises when two laws are in conflict, and the implied doctrine has been framed to avoid findings of inconsistencies wherever possible. If two laws can be reasonably reconciled without alteration, then the court has no need to become involved in the enterprise of reworking any part of the legislative schemes. Third, by preserving to the maximum extent possible both laws in cases of unavoidable conflict, the court only minimally intrudes upon what the legislature has done. When inconsistency between two enactments forces a partial implied repeal of the earlier law, a basic tenet of the implied repeal doctrine is that the repeal applies pro tanto, "only to the minimum extent necessary."[224] Each of these three elements of the doctrine work to deliberately avoid conflict and intrusion into the law-making function preserved for the legislature.

It has been disputed whether the presumption against implied repeals keeps courts out of the legislative enterprise[225] and argued that, to the contrary, a more relaxed presumption would have the desired effect.[226] When a court starts the analysis by seeking to avoid finding an implied partial repeal, it can indeed be led to construct its own unintuitive interpretations of the statutes so as to avoid finding anything needing reconciliation. *Philadelphia National Bank* is perhaps an example of this. There the Bank Act expressly sought to protect the solvency of banks against the pressures of unrestrained competitive market forces.[227] From an antitrust law and policy perspective, insolvency is in general a desirable cleansing agent that removes inefficiently deployed assets from one enterprise and forces them to be redeployed somewhere else.[228] The Bank Act on its face made clear Congress's determination that competition, in this regard, does not work well in the banking industry where the

222. Cantor v. Detroit Edison Co., 428 U.S. 579, 598 n.37 (1976) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

223. *Cantor*, 428 U.S. at 596.

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

225. *Compare, e.g.*, Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1459-60 (2005), *with* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1984).

226. *See, e.g.*, Petroski, *supra* note 140, at 531-32.

227. United States v. Phila. Nat'l Bank, 374 U.S. 321, 334 (1963).

228. *See, e.g.*, Richard V. Butler & Scott M. Gilpatric, *A Re-Examination of the Purposes and Goals of Bankruptcy*, 2 AM. BANKR. INST. L. REV. 269, 277 (1994).

protection of solvency for the sake of depositors' interests is inimical to the often destructive forces of competitive markets.[229] To find no inconsistency in that legislative fabric of antitrust and banking law certainly could be questioned, so it may well be the case that courts have sometimes gone beyond reasonable statutory interpretation to reconcile statutes in order to follow the mandatory presumption against implied repeal.

However, it is at least equally true that, by resolving doubts in favor of finding inconsistencies and then partially repealing statutes, the court also may be drawn into counterintuitive interpretations of the provisions. *Credit Suisse* presents at least as counterintuitive an assessment of the provisions of securities regulation as *Philadelphia National Bank* did of the banking statute. In *Credit Suisse* the Court can be fairly described as engaging in linguistic gymnastics to conclude that two laws that prohibit the same conduct are "plainly repugnant" to one another on the theory that allowing both statutes to operate would require courts and private actors to understand obscure securities regulations in order to sort out the antitrust rules (and because of the risk that the antitrust courts might make serious mistakes).[230] In *Credit Suisse* the regulator had already issued a formal finding strenuously condemning the tying conduct under antitrust challenge and fined the same antitrust defendants for the very conduct alleged in the antitrust litigation.[231] In these circumstances, the Supreme Court's finding of "plain repugnancy" is at least a little surprising. Courts ought not engage in tortured interpretations of statutes, nor should they casually repeal legislative enactments. The ultimate question is whether the court creates more legislative disruption by finding inconsistencies and repealing laws pro tanto than it does by avoiding such findings and repeals, and the answer seems obvious, so long as courts avoid torturing the plain or reasonable meaning of laws. While the presumption against implied repeal should not be so strong as to press courts into finding no inconsistencies when laws in fact collide, at the same time there is no principled reason for courts to struggle linguistically or otherwise to make disruptive findings of inconsistencies among laws. Doing so forces the courts into the inherently legislative activity of repealing statutes that Congress enacted.

The traditional implied repeal doctrine minimized judicial encroachments on the legislative prerogative and fostered the separation of judicial and legislative powers.

2. Predictability, Stability, and Administrability of Legal Standards

Although largely ignored by courts and scholars, another important policy advantage of implied repeal is the maintenance of a legal framework that is

229. *See* 12 U.S.C. § 1828(c) (2006).

230. 551 U.S. 264, 267, 281-82 (2007).

231. *See* SEC v. Credit Suisse First Boston Corp., Litigation Release No. 17327, 2002 SEC LEXIS 147 (Jan. 22, 2002).

predictable, stable, and administrable. The immediate task of the implied repeal doctrine is to reconcile apparently conflicting enactments, and thus to bring order to a partly chaotic or inconsistent legal framework. Citizens are expected to know and comply with the laws, and so rules of construction that are predictable are of value.

In the specific context of compliance with antitrust law the stakes are generally high, and the need on the part of businesses to be in a position to fashion their activity to conform to the law is commensurately great. Whether one favors antitrust as a legal framework or not, it is doubtless preferable that the rules of engagement are knowable in advance—indeed due process at some level requires as much. The need for predictability is magnified where essential objectives of the statute are frustrated by uncertainty about the legal rules. It has been widely recognized, for example, that clear and predictable antitrust rules tend to minimize over-deterrence and under-deterrence, both of which can impair the statutory objectives of robust competition and consumer welfare.[232] Since at least 1981, the Supreme Court has repeatedly expressed the need for courts to guard against the application of antitrust rules to chill, perversely, the very sort of competitive conduct the law seeks to foster.[233] The Court more recently has referred to this phenomenon as the "problem of false positives," or the imposition of antitrust liability for procompetitive conduct mistakenly condemned by judicial proceedings.[234]

In practice, considerable over-deterrence results from opaque antitrust rules. In their compliance programs, businesses and their antitrust counsel instruct employees and managers to stay well inside the boundaries of legal conduct and emphasize the high risks of compliance failures. Antitrust compliance manuals routinely open with a veritable parade of the horrors that await the antitrust law violator and then list "do's and don'ts" that flatly prohibit employee conduct that may very well be perfectly lawful, all in the interest of avoiding exposure.[235] Those companies that are risk-averse in the face of the antitrust liability exposure, or that for other reasons value compliance, can be expected to avoid conduct of questionable legality. For regulated companies, uncertainty about whether a regulatory law relieves the company from antitrust risks will lead risk averse and compliance-oriented businesses to assume the worst. Conversely, under-deterrence is risked when a company, by virtue of its industry being regulated, misperceives that it may ignore antitrust rules. Like other

232. *See, e.g.*, ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 11 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf.

233. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

234. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (stating that a false positives' mistaken inferences "chill the very conduct the antitrust laws are designed to protect").

235. Antitrust compliance manuals of many companies are republished online. For an example, see TENNECO CORPORATE COMPLIANCE POLICY MANUAL: ANTITRUST (2003), http://www.tenneco.com/Governance/CorporateCompliancePolicyManual/.

uncertainties in antitrust law, a lack of clarity about the boundaries between exempt regulated conduct and conduct that is subject to antitrust rules risks both over-and under-deterrence and tends to frustrate the essential objectives of antitrust policy.

The traditional implied repeal standard is relatively predictable. It announces that statutes will nearly always continue to govern without much likelihood of being displaced by later enactments. In the rare instance in which something has to give way, only that part of the earlier law gives way that must do so in order for the two laws to work. In the context of antitrust, for example, a regulatory law would therefore only rarely suspend or supersede antitrust rules and remedies by implication, and only when it is clear and unavoidable. It is precisely because the traditional implied repeal rule is mechanical and narrow that it is predictable. Under that rule, a regulated enterprise could predict that the regulatory scheme would displace antitrust rules infrequently and minimally, and only where it is obvious that it must. Under the traditional standard, the result in no way turned on value-laden factors, such as a court's likely view of the importance of the regulated industry or the particular activity challenged in an antitrust case; or whether the court believes that courts are competent to engage in the "line drawing" to discern conduct that comports with the regulator's commands; or whether "pervasiveness" of regulation by itself creates a conflict even where antitrust and regulation actually prohibit the same conduct.

IV. A HIDDEN AGENDA?

Why did the Court retreat from such a well-established and reliable doctrine? It is worth considering whether the Court really intended to revamp implied repeal broadly or just for antitrust cases (and possibly only for antitrust cases involving the securities industry). Was the Court willing to apply a deviant implied repeal approach for the purpose of undermining the antitrust remedies?

That antitrust has lost its glow with this Supreme Court has become evident. Antitrust for decades was described by the Court in quite reverential terms.[236] The bloom is off that rose. Justice Breyer in *Credit Suisse* described antitrust courts as "likely to make unusually serious mistakes."[237] In the earlier decision of *Bell Atlantic Corp v. Twombly*, the Court worried about the possibility that an antitrust claimant could be "a plaintiff with 'a largely groundless claim' . . . allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'"[238] The unflattering characterizations of antitrust enforcement expressed in *Twombly* and *Credit Suisse*, unprecedented up to that point,

236. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.").

237. Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264, 282 (2007).

238. 550 U.S. 544, 558 (2007) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

prompted Justice Stevens to note in his *Credit Suisse* concurrence that: "Surely I would not suggest, as the Court did in *Twombly,* and as it does again today, that either the burdens of antitrust litigation or the risk 'that antitrust courts are likely to make unusually serious mistakes'. . . should play any role in the analysis of the question of law presented in a case such as this."[239] Justice Stevens's concurrence also seems at odds with traditional applications of antitrust law in the context of motions to dismiss, finding a reason to dismiss in facts that were outside the allegations of the complaint and unsupported by any record evidence. Although Justice Stevens rejected some of the majority's reasoning, he did so on the basis that the antitrust claim was in his view obviously deficient based on his understanding of securities markets. Justice Stevens thus concluded—without any record evidence—that the relevant market in *Credit Suisse* was the vast marketplace for securities transactions and could not possibly be manipulated in the manner alleged due to the defendants' lack of collective market power. That too seems a questionable resolution of a dense fact issue on a motion on the pleadings, even if Justice Stevens would have preferred to avoid majority's denouncing of antitrust law and the attendant business of picking favorites among laws.

The Court's retreat from favoring antitrust is also reflected in the debate between the majority and Justice Thomas, and made clear from Justice Stevens's concurrence in *Credit Suisse* itself. Justice Thomas protested the Court's refusal to consider the savings clauses issue raised by the case.[240] The Court's analysis of how securities regulatory law impliedly repealed antitrust laws declined to consider the savings clauses in the Securities Exchange Act, even though that point had been argued to the Court and Justice Thomas's vigorous dissent pressed the court to acknowledge it.[241] As Justice Thomas points out, the same securities laws that the majority held to have "impliedly" repealed antitrust rules included savings clauses that *expressly did not repeal* pre-existing rights and remedies under other laws.[242] Since, as Justice Thomas also points out, the Sherman Act was passed in 1890, the savings clauses can only be read as having expressly left intact the claims under that earlier enactment—especially in the context of the mandate of the implied repeal doctrine to avoid finding inconsistency wherever possible.[243] The securities regulation in question could not conflict with the Sherman Act if the former was limited by Congress so as

239. *Credit Suisse*, 551 U.S. at 287 (Stevens, J., concurring) (internal citation omitted).

240. *Id.* at 288-89 (Thomas, J., dissenting).

241. *Id.*

242. *Id.* at 288. Section 16 of the Securities Act provides that "the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 77p(a) (2006). Section 28 of the Securities Exchange Act of 1934 similarly provides that "the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C.§ 78bb(a) (2006).

243. *Credit Suisse*, 551 U.S. at 288 (Thomas, J., dissenting).

not to conflict with the latter. The Court declined to consider this issue on the somewhat awkward ground that it had been unsuccessfully raised by the Justice Department in earlier cases in which the Court also did not consider the issue in its opinion. As Justice Thomas tersely observed: "Omitted reasoning has little claim to precedential value."[244] The majority must have certainly had a motive to ignore the possibility that an express savings clause trumped the implied repeal of the pre-existing law.

So, is the decision intended to be applicable only to antitrust cases? Did the Court fashion a special implied repeal rule for the interplay between antitrust and regulation? One can read the decision that way, especially in the wake of *Twombly* where the Court may have refashioned a pleading rule in response to litigation abuses that the Court associated with antitrust cases. In *Twombly* the Court upheld the dismissal of a private antitrust claim in part on the policy ground that antitrust litigation is peculiarly expensive and antitrust juries peculiarly prone to error.[245] *Twombly* requires antitrust conspiracy claims to not only put the defendants on notice of the nature of the claim against them, but to allege facts sufficient to make that claim plausible.[246]

Alternatively, *Credit Suisse* might be narrowly understood to apply only in the context of securities regulation. There are indications of that in the decision, which makes no secret of the unique importance of securities markets. However, a special implied repeal rule for securities regulation would be a poor idea because on that view of things there could be as many implied repeal rules as there are industries, each requiring a ranking of its importance to the nation. How would banking, energy, food and drug safety, health care, air transportation, etc. rank? Is regulation in these industries "more important" than antitrust in the Court's hierarchy of preferences? What if they come into conflict with each other—what preferences would then apply? Does the application of implied repeal entitle the Court to rank statutes according to its own preferences? Not only would that intrude on the legislative function, but it would create an unpredictable legal framework. One could not know whether one statute displaces another until the Court had voted its relative preferences between the competing rules.

However, the suggestion that *Twombly* represents a specialized antitrust conspiracy pleading rule has now been explicitly rejected by the Supreme Court.[247] Nor do the (far fewer) lower court decisions applying *Credit Suisse* support the view that there is now a specialized implied repeal doctrine for antitrust claims in the securities industry.[248]

244. *Id.* at 289.

245. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

246. *Id.* at 556.

247. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

248. *See generally* Kendall W. Hannon, Note, *Much Ado About* Twombly? *A Study on the*

Regardless of whether *Credit Suisse* created an anomalous implied repeal doctrine for antitrust claims, the Court did exactly what the traditional implied repeal doctrine sought to block: the partial repeal of a law that the Court believes is unsound as a matter of policy—a law the Court no longer approves of. It is unavoidably implicit in its recent decisions that the Court no longer endorses the full reach of the antitrust laws. It regards antitrust litigation as frequently extortive, wasteful, unnecessary, and costly. Conversely, it seems to regard federal securities regulatory law a sounder public policy, notwithstanding the rather high-profile and catastrophic recent failures of that legal regime. The Court's expressions of displeasure with the workings of the Sherman Act are not a proper basis for a judicial partial implied repeal of that statute in favor of a statutory framework it has come to prefer. For all of the sound policy reasons that continuously supported the implied repeal doctrine over the centuries, the Court erred in *Credit Suisse* because it resorted to picking favorites among the laws Congress enacted.

Credit Suisse is not limited to the interplay between antitrust law and economic regulation. It stands for a much broader expansion of the implied repeal doctrine by redefining "plain repugnancy" and even recasting the issue as "plain inconsistency," which includes possible future inconsistency "however unlikely."[249] It stands as an opening through which the Court may engage in more frequent playing-of-favorites among the statutes the Congress enacts. It represents a breach in the important line that separates the judicial from legislative powers.

V. CONCLUSION

The implied repeal doctrine should be restored to one that is sparingly, rather than creatively, applied. *Credit Suisse* announces a new approach, without admitting so, and it is unrecognizable when compared with the doctrine that emerged over 400 years ago and endured without much alteration until now. The new implied repeal doctrine represents an ill-considered departure from longstanding legal precepts and sound policy and is unsupported by any articulated or discernible benefits. The Supreme Court should revert to and reaffirm the traditional implied repeal rule to clarify that: (a) implied repeals are disfavored in general; (b) a later enactment impliedly repeals part of an earlier one only where the two are so plainly repugnant that they *actually* conflict and thus *cannot* work together; and that (c) even in the event of a plain conflict, the later enactment impliedly repeals the earlier one only to the most limited extent necessary to allow the two to work. The creative and energetic quest for inconsistency in *Credit Suisse* should be repudiated as incongruous with the sound legal policy of judicial restraint. The Court should

Impact of Bell Atlantic Corp. v. Twombly *on 12(b) (6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

249. *Credit Suisse*, 551 U.S. at 275.

disavow that a mere possibility of conflict between the two laws ever justifies an implied repeal of the earlier enactment.

No real harm would have come to anyone or to any agency from the application of the Sherman Act to the laddering and tying conduct in *Credit Suisse*. The securities regulators had already made clear that the abuses that formed the core of the antitrust complaint were not just merely securities law violations, but brazenly and fundamentally so: "a particularly egregious form" of prohibited transactions that "undermine the integrity of the market."[250] The Supreme Court's solicitude for underwriters struggling with "fine line drawing" was nothing short of imaginary. Fines that the defendants had paid into the United States Treasury did nothing to compensate those who had been commercially coerced into securities transactions by the illegal conduct of investment banks. To have added antitrust compensation to those that had been cheated by these illegal activities would have done more good than harm, and indeed no harm at all would have resulted.

The benefit that should follow from an application of implied repeal is the reconciliation of truly colliding legal rules. The courts should displace no statute under this doctrine unless a later enactment cannot be applied without interference from the earlier one. Such interferences should not be invented and can often be avoided. In deciding whether to apply the doctrine, it is important to bear in mind that it is not *every* difference between two legal rules that requires reconciliation: some conflicts fall far short of irreconcilability. There is not necessarily any conflict worth avoiding in every instance in which two legal rules produce (or might possibly produce) different outcomes: the avoidance of conflict only becomes important when two legal rules collide and cannot be reconciled to work together. For example, there are many rules that tolerate what other rules forbid. This occurs routinely and harmlessly within the boundaries of a single case and also arises frequently when different jurisdictions come to different conclusions about parallel cases.[251] Within a single litigation matter, for example, it is quite common that antitrust law might be found not to condemn conduct that violates some other legal standard under state tort law (or *vice versa*).[252] Then, the two legal rules diverge without conflicting irreconcilably. Legal rules can produce different outcomes simply because they have different reach without being "plainly repugnant" in the requisite sense that one cannot function if the other remains operative. Similarly, applying the *identical* legal standard under Section 7 of the Clayton Act[253] state governments have on at least rare

250. U.S. SEC. AND EXCH. COMM'N, MARKET REGULATION: STAFF LEGAL BULL. NO. 10, PROHIBITED SOLICITATIONS AND "TIE-IN" AGREEMENTS FOR AFTERMARKET PURCHASES (2000), *available at* http://www.sec.gov/interps/legal/slbmr10.htm.

251. *See, e.g.*, Am. Nat'l Red Cross v. S.G. and A.E., 505 U.S. 247, 259 (1992).

252. *See, e.g.*, Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 504 (3d Cir. 1998).

253. 15 U.S.C. § 18 (2006).

occasions condemned the exact same merger that was approved by a federal agency,[254] and surely the Clayton Act is not colliding with itself (so as to impliedly repeal itself).

By the same token, why should it necessitate a partial repeal of antitrust rules if those rules come out differently than a regulatory review of the same problem? In *Philadelphia National Bank*, exactly how bad was it that bank regulators approved the same transaction that the Department of Justice and the Supreme Court disapproved of on antitrust grounds? Why, for instance, would that pose any problem that was not created for American Stores when its acquisition of Lucky Stores was held up by the State of California after obtaining conditional clearance from the Federal Trade Commission—conflicting outcomes that the Supreme Court found unobjectionable?[255] It is—or it should be—only where a newer statute or regulatory scheme imposes procedures or standards of conduct that collide irreconcilably with a preexisting law that the latter should give way, and then only when partial repeal is the only solution.

Credit Suisse ruled that a very different and lesser form of inconsistency could support an implied repeal than had been traditionally required whenever pervasive regulation of an industry *might* collide with the application of antitrust prohibitions.[256] No truly colliding rules were presented for reconciliation. Both rules prohibited tying conduct for overlapping reasons. Securities regulation targeted the conduct because it gave capital markets a "rigged" appearance that could tend to stifle investment. Antitrust prohibited that same conduct because it tends to exclude free and open competitive bidding to set the prices of securities in the marketplace. Conduct that is objectionable for two reasons under two statutes should not be freed from compliance with either statute, at least not without an unavoidable adverse consequence. The *Credit Suisse* decision could point to no such thing.

Credit Suisse should be overturned as an ill-advised and ill-supported error. It is not faithful to the cases it relies on since nothing in *Silver, NASD* or *Gordon* purported to take apart the traditional implied repeal analysis and recast it. *Credit Suisse* clearly does so. That the decision is unfaithful to the longer history of the implied repeal doctrine is equally clear from even a cursory tracing of the doctrine through time. The expansion of "plain repugnancy" into "possible, though perhaps unlikely, inconsistency" permits courts to invade the legislative prerogative. The Court's thinly-veiled hostility to private antitrust enforcement contrasts with its reverence for securities regulation, and the very enterprise of drawing such a contrast takes the Court into the realm of selecting laws to prefer over others. Unless Lord Cooke, Sir Blackstone, Alexander Hamilton and the United States Constitution are all wrong

254. *See, e.g.*, California v. Am. Stores Co., 495 U.S. 271, 276 (1990).
255. *Id.*
256. Credit Suisse Sec. (USA) L.L.C. v. Billing, 551 U.S. 264, 284 (2007).

about the virtues of separation of powers, *Credit Suisse* should be repudiated and reversed.