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THE ANTITRUST IMMUNITY DOCTRINE AND
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OF SECURITIES DEALERS: STEPPING
ON OTTER TAIL

That yesterday's abuse of free trade gave rise to today's broad network of antitrust legislation is a matter of common knowledge. Certainly no extensive discussion is required here, therefore, to support the statement that "the antitrust laws represent a fundamental national economic policy." Courts and commentators alike recognize that despite "the tense interplay of differing and at times conflicting public policies," the current amalgamation-conglomeration juggernaut by which corporate power has become so concentrated serves only to reaffirm "the felt indispensable role of antitrust policy in the maintenance of a free economy . . . ."


Accordingly, the parameters of express and implied immunity from that policy may have been most conservatively drawn by a remarkably consistent line of Supreme Court decisions. It has become axiomatic, for example, that both express and implied exemptions are strongly disfavored. Indeed, this disfavor is so virulent that express immunity is subject to rigorously narrow construction, and implied immunity is granted solely upon a strong showing of either "pervasiveness" in the particular regulatory scheme on the one hand, or "the necessity of antitrust repeal to make the regulatory scheme work," on the other.

Such was the unquestionably well-established immunity standard prior to the recent decision of United States v. National Association of Securities Dealers. For nearly three decades the Court has adamantly refused, with one exception, to grant antitrust immunity to any of the numerous regulated industries with which it has dealt. Nonethe-


10. Both "pervasiveness" and "necessity of repeal" are terms of art in the context of implied immunity. Although necessarily cryptic at this point, both terms will ultimately be deciphered.


less, a majority of five justices in *NASD* flatly exempted mutual funds exchanges from antitrust suit for both price-fixing and collective refusals to deal. On the basis of little more than its finding that mutual fund self-regulation is governed by a public interest standard under the administrative aegis of the Securities Exchange Commission and that the activities under attack had never been expressly disapproved by that agency, the *NASD* majority concluded that the regulatory scheme was sufficiently "pervasive" to imply a congressional intent to grant antitrust immunity, and that immunity was "necessary" to the operation of the mutual funds industry.

Until the *NASD* holding the Supreme Court had without exception expressly rejected the public interest standard as sufficient to confer antitrust immunity upon self-regulated industries, and had flatly refused to accord deferential weight to prior administrative approval of anticompetitive practices. By virtue of its radical departure from this formidably cohesive body of case law, the *NASD* decision clearly poses the question whether it represents a narrow exception to, a complete abrogation of, or a perverse distortion in the traditional antitrust immunity doctrine. This note will attempt to demonstrate that the third alternative is in fact the most accurate answer. It will do so first by examining the traditional immunity standard as it has evolved in earlier case law, and then by systematically analyzing the shortcomings of the *NASD* majority's attempt to establish that the self-regulatory scheme of the mutual funds industry meets that standard's well-defined criteria.

**The Express Immunity Standard**

"Express immunity" means no more than that Congress has integrated into given regulatory legislation a clause expressly insulating the industry in question from liability under the antitrust laws for activity undertaken pursuant to statutory mandate. Numerous express exemptions exist by which activity otherwise illegal per se is permitted for purposes of effectuating any number of regulatory objectives. The courts insist, however, that such legislative waiver be unambiguous.

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13. *Per se* violations of the Sherman Act, for example, include price-fixing, collective refusals to deal (group boycotts), market allocations, and tying arrangements. *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Standard Oil Co. v. United States, 221 U.S. 1 (1911).


The judicial function in enforcing the Sherman and Clayton Acts is preempted where Congress itself has weighed competing regulatory and antitrust interests and has deliberately chosen to subordinate the latter to the former. Public policy having been clearly determined by the legislature, the judiciary properly stays its hand.\(^\text{16}\)

It is, however, the rare statute that is sufficiently clear to qualify as an express exemption. And it is those cases requiring construction of an ambiguous, albeit arguably express, statutory exemption which best exemplify the concept of regulatory exemption. In such cases the strong judicial distaste for the express exemption doctrine is particularly manifest, and the statutory language of exemption is uniformly subjected to rigorously narrow construction. A brief overview of the cases in which express exemptions have been asserted will suffice by way of illustration.\(^\text{17}\)

*United States v. Borden Co.*\(^\text{18}\) arose out of a claimed exemption from charges of violating section 1 of the Sherman Act\(^\text{19}\) for conspiracy to fix the retail price and restrict the supply of milk in Chicago. Immunity was claimed on the basis of the express statutory exemption embodied in the Agricultural Marketing Agreement Act\(^\text{20}\) which empowered the secretary of agriculture to fix commodity price levels by authorizing marketing agreements. In overruling the lower court’s grant of immunity the Supreme Court declared that the limited statutory exemption of *agency initiated* agreements could not be construed to create “so great a breach in historic remedies and sanctions” as to likewise exempt agreements among purely *private* associations.\(^\text{21}\) The fact that the exemptive provision of the Agricultural Marketing Agreement Act was not coterminous with the Sherman Act was held to be fatal:

> These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.\(^\text{22}\)

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17. In addition to the cases discussed in the succeeding text, see United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956). Interpreting the Miller-Tydings and McGuire Acts, the Court said: “Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy”. *Id.* at 316.

18. 308 U.S. 188 (1939).


21. 308 U.S. at 198.

22. *Id.* at 201.
Some years later, in *Georgia v. Pennsylvania Railroad Co.*, suit was filed alleging a private conspiracy to fix discriminatory, arbitrary, and noncompetitive rates by means of the general rate-setting procedure of the Interstate Commerce Act. In granting plaintiffs' prayer for an injunction against defendants' rate-fixing activity, the Court rejected the claim that antitrust shelter lay in the express exemption clause of section 16 of the Clayton Act, which provides that no injunction shall issue against a carrier subject to the Interstate Commerce Act "in respect of any matter subject to the . . . jurisdiction of the Interstate Commerce Commission." Section 16 of the Clayton Act was inapplicable for two reasons. First, the Interstate Commerce Commission in fact had no jurisdiction over the subject matter for which injunctive relief was sought:

Georgia . . . is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined . . . . That is a matter over which the Commission has no jurisdiction.

Second, while section 11 of the Clayton Act authorizes the ICC to immunize mergers and consolidations from antitrust attack, it grants no such power with respect to rate-fixing combinations:

[W]e find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in fixing the rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier.

*Maryland & Virginia Milk Producers Association, Inc. v. United States* involved a similar claim of both express and implied immunity from a civil antitrust attack launched under sections 2 and 3 of the Sherman Act and section 7 of the Clayton Act for attempted monopolization, conspiracy to monopolize, and illegal acquisition of a competing independent producer. The express grant of antitrust shelter was first claimed to exist in section 6 of the Clayton Act, which exempts agricultural organizations from antitrust liability as illegal combinations or con-

27. 324 U.S. at 455.
29. 324 U.S. at 458.
32. *Id.* § 18 (1970).
spiracies in restraint of trade. After reviewing the legislative history of section 6 and emphasizing that the purpose of the provision was solely to promote farmers' cooperatives by insulating their organization from state antitrust attack, the Court declared that while under the statute "an association cannot be restrained 'from lawfully carrying out the legitimate objects thereof' [such as cooperative transportation and equipment purchasing arrangements] . . . the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." The defendant next asserted that section 7 of the Clayton Act expressly exempted the illegal agreements as "transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary . . . ." Rejecting this contention, the Court pointed out that the secretary's authority was confined to approving marketing agreements, and stated that the acquisition of an independent producer therefore could not be construed to be within the ambit of section 7's limited reach. In California v. Federal Power Commission, the Court also narrowly construed section 7 of the Clayton Act with respect to transactions "consummated pursuant to the authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission . . . ." The clause was held to provide no defense to a suit alleging illegal acquisition of stock pursuant to the merger of defendant pipeline companies. The fact that the acquisition of assets had been authorized by the Federal Power Commission pursuant to the Natural Gas Act was held insufficient to bring the merger within the exemptive purview of section 7 of the Clayton Act. FPC statutory jurisdiction, the Court said, was confined to transactions involving the acquisition of assets of natural gas companies and could not therefore be construed to insulate defendants from a Clayton Act

34. 362 U.S. at 464.
35. Id. at 465-66 (emphasis added).
41. Id. § 717f(c).
42. Id.
suit attacking their illegal acquisition of stock.  

Cases in the realm of antitrust exemption may also straddle an inevitably esoteric line between exemptions ambiguously express and exemptions merely implied. *Pan American World Airways, Inc. v. United States*  is one such case. The immunity ultimately granted defendant air carriers from charges of division of territories and allocations of routes in violation of the Sherman Act was implied rather than express. Nonetheless, the circumspect language of the Court is noteworthy in the context of express exemptions.

The Court emphasized that limitations of routes and division of territories were "precise ingredients" of the Civil Aeronautics Board's general authority under the Federal Aviation Act to approve or deny air carrier certificates and were therefore essential to the regulatory scheme. While granting that a limited repeal of the antitrust laws was therefore implicitly necessary, the Court made it clear that its holding nonetheless reserved for the courts enforcement of antitrust standards as to at least part of the airlines industry:

[W]e hesitate here . . . to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—absent an unequivocally declared congressional purpose so to do. While the [Civil Aeronautics] 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.

This question of the scope of CAB exemptive jurisdiction was again raised in *Hughes Tool Co. v. Trans World Airlines, Inc.*, some

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43. 369 U.S. at 489. For a discussion of this case in the context of implied immunity, see text accompanying notes 107-13 infra.
46. Because the *Pan American* grant of immunity was based upon an implied exemption rationale, the case is most significant in the area of implied immunity. See text accompanying notes 77-87 infra.
48. No detailed discussion of the implied exemption principle applied in *Pan American* will be undertaken at this point. Suffice it to say that antitrust repeal was indicated to the extent that the conflicting regulation was essential to the regulatory scheme as a whole. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963).
49. 371 U.S. at 304-05 (1963) (citations omitted).
ten years after *Pan American*. Unlike *Pan American*, however, the case represents one of the distinctly rare grants of express statutory immunity, and the holding was specifically predicated upon construction of the exemptive provision of section 414 of the Civil Aeronautics Act.

Trans World Airlines' treble damages action against defendant Toolco alleged that Toolco had used its controlling interest in TWA to manipulate TWA's purchase and financing of aircraft equipment to TWA's competitive disadvantage. Rejecting the claim that defendant's actions were vulnerable to attack under the Sherman Act, the Court pointed out (1) that Toolco's initial de facto control of TWA had been approved by the CAB in 1944 pursuant to section 408 of the Civil Aeronautics Act, which specifically governed consolidations, mergers, and acquisition of control over air carriers; (2) that the 1944 approval had narrowly limited subsequent intercompany sales to those specifically approved by the CAB; (3) that all such sales of aircraft had in fact received the requisite approval; and (4) that having been duly approved, the transactions were expressly immunized from antitrust attack by virtue of section 414 of the act. While the *Hughes* Court viewed sections 408 and 414 in tandem as an unequivocally express statutory exemption clearly dispositive of the antitrust issue, it nonetheless felt compelled to repeat its *Pan American* caveat that the exemption power of the CAB is strictly limited by statute and therefore subject to narrow construction.

*Federal Maritime Commission v. Seatrain Lines, Inc.* is perhaps the most significant case to consider in the context of express exemp-

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52. 49 U.S.C. § 1384 (1970) provides that any carriers acting pursuant to CAB approval under sections 408, 409, 411 and 412 of the Civil Aeronautics Act are relieved from the operation of the antitrust laws, including the Sherman Act.
53. Id. § 1378 (1970).
54. But note Chief Justice Burger's dissent, which criticized the Court's' grant of immunity. The grant was based on section 408, which gave the CAB broad authority over air transportation. Burger maintained that the defendant's conduct alleged monopolization of aircraft sales and fell outside the ambit of section 408.
55. 409 U.S. at 387. With respect to strict judicial construction of express exemptions, the *Hughes* opinion is straightforward enough on its face. But the Court cited *Pan American* along with section 414 as a ground of decision. Id. at 385. This clearly indicates that *Hughes* involved some of the standard of agency review problems that afflict the implied exemption area. This is true because section 408 approval, albeit expressly exemptive, is nonetheless predicated upon a standard of review which is not necessarily pervasive, the "public interest" as defined by section 102. Id. Thus, while the transactions in *Hughes* were unquestionably within the exemptive ambit of sections 408 and 414 as a matter of strict construction, the review standard upon which section 408 is based may not be sufficiently pervasive to justify section 414's expressly exemptive effect.
tions; the decision is relatively recent, and arguably represents the most extreme application of the narrow construction doctrine to date. Exemption was claimed on the basis of section 15 of the 1916 Shipping Act, which expressly insulates from antitrust attack seven categories of agreements between shippers when approved by the Federal Maritime Commission. Two of the categories include agreements "(3) controlling, regulating, preventing, or destroying competition . . ." and "(7) in any manner providing for an exclusive, preferential, or cooperative working arrangement."57

The Court held that defendant Oceanic Steamship Co.'s purchase of defendant Pacific Far East Lines' entire fleet was not an agreement immune from Clayton Act68 liability by virtue of the third categorical exemption, despite commission approval. Scrutinizing the statutory language of section 15, the Court first pointed out that all seven exemptive categories involved agreements which were ongoing in nature, requiring continuous commission supervision. Because none of the seven categories expressly referred to discrete, one-time merger or acquisition of assets agreements, the Court concluded that defendants' transaction was outside the section 15 exemptive ambit.69 This interpretation was further supported by the *ejusdem generis* canon of construction: "catchall" statutory provisions must be construed as summarizing the type of agreements covered by the statute in general. Because the seventh exemption was expressly limited to working arrangements, it excluded discrete merger agreements as a matter of construction.

It is significant, however, that the Court in *Seatrain* discussed both the construction and legislative history60 of the statute merely as a bolster for the more important rationale underlying its denial of an express exemption:

Without more [than the Commission's contention that the disputed agreements were within the ambit of the third categorical exempt-

59. 411 U.S. at 730.
60. The Court pursued a thorough analysis of the legislative history of the Shipping Act and concluded that discrete mergers and acquisitions of assets were not within the purview of the commission for three reasons. First, at the time the act was passed the commission was required to approve, without consideration of adverse empirical effects, merger agreements which simply met given statutory criteria. Second, the word "agreements" was a term of art which did not embrace agreements not requiring ongoing commission rights and obligations. Third, congressional intent to require approval of mergers and acquisitions has been unambiguous in other contexts, such as the Interstate Commerce Act (49 U.S.C. § 5(2)(a)(i) (1970)), the Federal Communication Act (47 U.S.C. §§ 222(b)(1) (1970)), and especially the Federal Aviation Act (49 U.S.C. § 1382(a) (1970)), after which the Shipping Act was modelled. 411 U.S. 726, 736-44 (1973).
tion], we might be inclined to agree that many merger agreements probably fit within this category. But a broad reading of the third category would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed . . . . This principle has led us to construe the Shipping Act as conferring only a "limited antitrust exemption" in light of the fact that "antitrust laws represent a fundamental national policy."61

Thus, while the NASD decision itself involves no express exemptive, clause,62 it is clear from the foregoing discussion that it does deal with what has come to be regarded as a very "fundamental national policy," and that the responsibility for safeguarding that policy against the inroads of piecemeal federal regulation of industry is one which the Court to date has taken most seriously indeed. The impact of the express exemption cases cannot be overestimated; so basic are the public policy principles embodied in the antitrust laws that the Court has consistently sought to preserve their vitality and to prevent their haphazard legislative abrogation. The Supreme Court's position with respect to implied exemptions, moreover, has been even more adamant.

The Implied Immunity Standard

Claims of congressional repeal of the antitrust laws have not been made exclusively upon expressly exemptive statutes. Indeed, immunity from the antitrust laws has been sought far more frequently under the implied doctrine.63 The theoretical foundation of this doctrine is a simple one. It is very generally the function of federal regulatory


62. The reader familiar with the Maloney Act, 15 U.S.C. § 78o-3 (1970), will recall the language of section 78o-3(n): "If any provision of this section is in conflict with any provision of any law of the United States in force on June 25, 1938, the provision of this section shall prevail." This section occasionally has been interpreted as an express exemption from the antitrust laws. See International Ass'n of Machinists v. Street, 367 U.S. 740, 809 n.16 (1961) (Frankfurter, J., dissenting); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 227 n.60 (1940); National Ass'n of Sec. Dealers, Inc., 19 S.E.C. 424, 478 n.9 (1945). Compare Note, The New York Stock Exchange Minimum Commission Rate Structure: Antitrust on Wall Street, 55 VA. L. REV. 661, 682-83 (1969), with Note, Antitrust Immunity of the NASD Under the Maloney Act, 14 B.C. IND. & COM. L. REV. 111 (1972) (concluding that any express exemption is limited to section 78o-3(i)). But the Court in NASD did not rely upon the provision, and chose, rather, to base the holding upon an implied immunity theory.

63. It may be argued that implied immunity should not be elevated to the status of a "doctrine": only two cases, Pan American and NASD, have granted immunity on that basis. However, because implied immunity has become a major ground for defending Sherman and Clayton Act suits and because of the likelihood of future cases dealing with the concept, this note treats it as a disfavored but established doctrine of antitrust law.
agencies either passively to oversee those industries which Congress elected to make self-regulatory or actively to police those in which self-regulation has been deemed not feasible. While any number of legitimate economic and public policy considerations underlie Congress’ differentiating such regulatory schemes, it is obvious that agency regulation of either type inevitably impinges to some extent upon the free competition principle embodied in the Sherman and Clayton Acts. Implicit, therefore, in the passage of regulatory legislation may be a congressional intent to repeal the antitrust laws at least to the extent necessary to effectuate the regulatory scheme.

Pristine theory is, of course, notoriously difficult to apply in practice. It is clear from the express exemption cases that the strong policy in favor of antitrust enforcement weighs heavily in the balance. In practical application, therefore, the Court’s exclusive criteria for implying a congressional intent to subordinate that policy to a given conflicting regulatory policy have been but two: (1) the regulatory scheme must be so pervasive as to imply congressional intent to create an administrative substitute for antitrust enforcement; or (2) the given

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64. Public utilities and transportation are examples of industries governed by active regulatory schemes; passively regulated industries include securities, banking, and agriculture. It would be premature at this point to analyze the implications of these two types of schemes with respect to implied immunity. See text accompanying note 211 infra. Suffice it to note here that active regulatory schemes are designed to police naturally monopolistic industries which demand a high degree of governmental control and preclude self-regulation as a safeguard against market abuse. See generally Hale & Hale, Competition or Control VI: Application of Antitrust Laws to Regulated Industries, 111 U. PA. L. REV. 46, 53-56 (1962); Note, An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered, 65 NW. U.L. REV. 260, 339 (1970) [hereinafter cited as Reconciling Antitrust Law].


66. This criterion must not be confused with the altogether different question of whether a given agency has been granted primary jurisdiction over antitrust matters. The doctrine of primary jurisdiction requires certain initial factual determinations by the agency and may result in an administrative judgment. Such a judgment may either have “considerable weight” or simply “make a meaningful contribution” when the issue is ultimately tried to a court of law. Compare United States v. National Ass’n of Sec. Dealers, Inc., 422 U.S. 694, 719 (1975), with Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 307 (1973). The doctrine merely delays the ultimate judicial determination of antitrust issues; it by no means preempts it. See Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973); United States v. RCA, 358 U.S. 334, 346 n.14 (1959); Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 498 (1958); Far East Conference v. United States, 342 U.S. 570 (1952) (classic treatment of the primary jurisdiction issue). When satisfied, the criterion of pervasiveness on the other hand means that agency jurisdiction over antitrust violations is exclusive because it is sufficiently comprehensive to equal the jurisdiction and remedial power of the courts under the Sherman and Clayton Acts. See Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963).

A defendant’s invocation of the doctrine of primary jurisdiction, then, is clearly
regulation must be so necessary to the objectives of the regulatory scheme as a whole as to imply that Congress intended to repeal the antitrust laws to the extent that their application would frustrate the general regulatory purpose.

Both pervasiveness and necessity perhaps initially appear to be little more than judicial epithets in search of utilitarian definitions. As will become apparent, however, pre-NASD case law had refined and consistently applied quite workable definitions. Only by analyzing the case law can one discover the precise juridical meanings of both pervasiveness and necessity—concepts which appear to have been recently redefined in the NASD case. Nor can such an analysis be said to be a question of mere semantics; a far more readily implied repeal of the antitrust laws hangs in the balance.

Regulation of Communications

Among the first decisions of the Court to address the problem of implied immunity was United States v. RCA. Charged with having violated section 1 of the Sherman Act by virtue of an exchange of stations pursuant to a conspiracy to monopolize commercial broadcasting, RCA claimed implied immunity on the ground that the transaction had been approved by the Federal Communications Commission. FCC approval of station acquisitions is mandatory under section 310(b) of the Communications Act of 1934, which provides that license applications must be administratively reviewed by the statutory standard of "public interest, convenience, and necessity." RCA's assertions were that by virtue of section 310(b), the FCC had the authority to pass on antitrust issues, and that the regulatory scheme of the Federal Communications Act was therefore sufficiently pervasive to displace the Sherman Act.

RCA's defense was rejected on three grounds. The Court first pointed out that neither the statute nor its legislative history indicated a congressional intent to vest in the FCC exclusive power to pass on more innocuous in its public policy effect than a claim of regulation sufficiently pervasive to preclude judicial application of the antitrust laws.

67. A methodological caveat is appropriate at this point. The analyses of the implied immunity cases will be somewhat unorthodox to the extent that they will focus solely upon the existence of certain agency powers to regulate competition in the industry in question. This purely functional approach is purposefully taken as the best means by which to isolate those discrete factors required for a finding of pervasiveness or necessity. See "Summary: The Evolved Immunity Standard," infra.

71. Id.
antitrust matters. Indeed, the fact that section 311 of the act was amended in 1927 merely to authorize rather than to require denial of a license to an applicant found to be in violation of the antitrust laws was held to have been an indication of congressional intent to leave antitrust enforcement wholly within the judicial realm.\textsuperscript{72} Second, while section 153(h) of the Communications Act\textsuperscript{73} defined telephone and telegraph companies as rate-related common carriers expressly exempted from antitrust attack, neither radio nor television broadcasters were similarly defined. The broadcasting industry, the Court concluded, was thus congressionally denominated one of free competition, and as such clearly remained subject to the antitrust laws.\textsuperscript{74}

Third and perhaps most significant, the Court emphasized that mere agency approval which is limited to a statutory standard of “public interest, convenience, and necessity” is no criterion for either express immunity or implied immunity on a theory of pervasiveness in the regulatory scheme:

[RCA], like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an unregulated concern only in that they also had to obtain the approval of a federal agency. But [the] scope of that approval in the case of [the] FCC was limited to the statutory standard, public interest, convenience, and necessity. . . No pervasive regulatory scheme was involved. . .\textsuperscript{76}

[A] Commission determination of “public interest”, convenience and necessity” cannot either constitute a binding adjudication upon any antitrust issues . . . or serve to exempt a licensee pro tanto from the antitrust laws.\textsuperscript{76}

\textbf{Regulation of Transportation}

This emphasis upon the standard of agency review became more pointed in subsequent implied immunity cases and indeed ultimately evolved as perhaps the foremost criterion of pervasiveness itself. The holding in \textit{Pan American World Airways, Inc. v. United States},\textsuperscript{77} for example, which represents the Court’s singular grant of immunity on the basis of pervasive industrial regulation, was grounded in large part upon the fact that Clayton Act review and remedies were an integral

\begin{itemize}
  \item \textsuperscript{72} 358 U.S. at 343.
  \item \textsuperscript{73} 47 U.S.C. § 153(h) (1970).
  \item \textsuperscript{74} 358 U.S. at 349-50. \textit{See also} 47 U.S.C. §§ 221(a), 222(c)(1) (1970 & Supp. IV, 1974).
  \item \textsuperscript{75} 358 U.S. at 350-51.
  \item \textsuperscript{77} 371 U.S. 296 (1963).
\end{itemize}
part of the regulatory scheme of the Federal Aviation Act of 1958.\textsuperscript{78} Quite beyond the fact that the Aviation Act's legislative history clearly reveals a congressional intent to circumscribe industry competition for the sake of passenger safety,\textsuperscript{79} it also provides for a \textit{sui generis} antitrust standard for mandatory CAB certification,\textsuperscript{80} independent CAB investigative and exemptive power,\textsuperscript{81} and statutory authority to impose Clayton Act sanctions upon the industry.\textsuperscript{82}

In contrast to the very general public interest standard of the communications industry and the nonexistent remedial powers of the FCC,\textsuperscript{83} the airlines industry is under the jurisdiction of an agency with both the statutory duty\textsuperscript{84} and power\textsuperscript{85} independently to enforce the antitrust laws. Because judicial antitrust scrutiny would therefore clearly conflict with CAB authority under the regulatory scheme of the Federal Aviation Act,\textsuperscript{86} congressional intent to insulate air carriers from antitrust attack could reasonably be implied, and immunity was accordingly granted to defendant Pan American.\textsuperscript{87}

\begin{itemize}
  \item \textsuperscript{79} "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." S. REP. No. 1661, 75th Cong., 3d Sess. 2 (1938).
  \item \textsuperscript{80} 49 U.S.C. § 1381 (1970). The Court, however, found the standard analogous to section 5 of the Federal Trade Commission Act for purposes of interpretation. 371 U.S. at 303.
  \item \textsuperscript{81} Under sections 408-09 and 412 of the act, for example, the board has the power to approve mergers, acquisitions, and pooling arrangements; under section 411 it has the power to investigate and to proscribe unfair trade practices; and under section 414 it may expressly exempt approved transactions from Clayton Act proceedings.
  \item \textsuperscript{83} See text accompanying notes 70-75 supra.
  \item \textsuperscript{84} "The Board in regulating air carriers is to deal with at least some antitrust problems." Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304 (1963).
  \item \textsuperscript{85} See note 81 supra.
  \item \textsuperscript{86} "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. at 310. This, of course, applies only in the first instance; agency determinations are subject to appellate review.
  \item \textsuperscript{87} It should be noted, however, that the pervasive regulatory scheme of the FAA may have its gaps, despite the holding in \textit{Pan American}. As the dissent points out, while the exemptive provision of section 414 is expressly applicable to CAB orders under sections 408-09 and 412, it does not apply to section 411 orders which were at issue in the case. Moreover, the exemptive provision does not in any case immunize the industry from attack under the Sherman Act, although it protects the industry from the Clayton Act. Whether such regulation can be said to be so pervasive that it precludes concurrent antitrust jurisdiction to entertain suits for Sherman Act violations is clearly open to question. It suffices for these purposes, however, simply to note that \textit{Pan American} represents the sole grant of implied immunity by the Court prior to \textit{NASD}, and it would appear to have based pervasiveness both upon an avowed legislative intent to create a police rather than a self-regulatory scheme and upon a concomitant
Securities and Commodities Exchange Regulation

While the Court thus held the airlines industry to be pervasively regulated and therefore exempt from antitrust suit, it emphatically ruled that the securities industry enjoyed no such immunity. Indeed, in the landmark case of Silver v. New York Stock Exchange, the Court articulated the definitive test by which that industry would fail to pass exemptive muster. Silver arose under the Securities Exchange Act of 1934 and concerned the complaint of a nonmember broker-dealer that an SEC rule permitting summary severance of telephone connections between outsiders and members of the exchange constituted a conspiracy and a collective refusal to deal in violations of sections 1 and 2 of the Sherman Act. Given that the severance rule was admittedly within the ambit of SEC authority to govern the exchange, the issue was squarely presented whether the scheme of exchange self-regulation under the SEC was so pervasive as to preclude antitrust attack.

The Court's holding that an antitrust action was proper was based upon a dual rationale. First, the Court declared that immunity would be implied "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." This criterion was to be "the guiding principle to reconciliation of the two statutory schemes." By thus couching the rule in terms of necessity, the Supreme Court in Silver declared that nothing short of complete statutory mandate for the comprehensive agency review necessary to implement the scheme.

See also Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966), which arose under the Shipping Act of 1916, 46 U.S.C. §§ 801-42 (1970 & Supp. IV, 1974). In Carnation the defendants contended that rate agreements which had not been approved by the Federal Maritime Commission were nonetheless immunized from antitrust attack merely because the statute vested the agency with approval authority; the unexercised power to approve was claimed to constitute pervasive regulation. The Court rejected this argument and stated: "We have long recognized that the antitrust laws represent a fundamental national economic policy, and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have therefore declined to construe special industrial regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision. . . ." Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966) (emphasis added).

See also Keogh v. Chicago & Nw. Ry., 260 U.S. 156 (1922) (approval of rail rates by ICC did not bar suit for illegal combination to fix rates).
incompatibility between regulatory objectives and judicial antitrust enforcement could justify the subordination of antitrust to regulatory policy.\textsuperscript{94} Emphasizing that due process anteseverence notice and an opportunity to be heard could hardly be said to frustrate either the objectives or operation of the 1934 act, the Court denied immunity on the ground that the defendants’ purported exemption failed to pass its newly articulated necessity test.

Second, the Court held that the regulatory scheme of the act was not so pervasive under established criteria\textsuperscript{95} as to alternatively justify immunity. In keeping with congressional intent to keep the security exchanges self-regulatory,\textsuperscript{96} the general authority of the SEC to approve exchange rules is passive in practice\textsuperscript{97} and does not extend to the review of their specific application. This lack of opportunity for agency review according to antitrust standards was declared fatal to defendants’ claim of pervasiveness:

There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not . . . apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. . . . Should 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.\textsuperscript{98}

\textit{Ricci v. Chicago Mercantile Exchange}\textsuperscript{99} presented the Court with just such a different case. At issue was whether transfer of plaintiff’s membership into the Chicago Mercantile Exchange, allegedly in violation of both exchange rules and the Commodity Exchange Act,\textsuperscript{100} was insulated from civil antitrust proceedings because rules violations were within the mandatory adjudicative and remedial jurisdiction of the Commodity Exchange Commission.\textsuperscript{101} The pith of the Court’s decision was that the antitrust action should merely be stayed pending an administrative factual determination of whether the rules of the exchange

\textsuperscript{94} “The issue is only that of the extent to which the character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action.” \textit{Id.} at 358.

\textsuperscript{95} See text accompanying notes 77-87 \textit{supra}.

\textsuperscript{96} Congressional intent was apparently not to create a public utilities type participatory scheme. See notes 64 \textit{supra} \& 211 \textit{infra}; Johnson, Application of Antitrust Laws to the Securities Industry, 20 Sw. L.J. 536 (1966); Reconciling Antitrust Law, \textit{supra} note 64.

\textsuperscript{97} Reconciling Antitrust Law, \textit{supra} note 64, at 294-97. But see Rules of the New York Stock Exchange, 10 S.E.C. 270 (1941) (multiple trading case).

\textsuperscript{98} 373 U.S. at 358, 360.


\textsuperscript{101} 17 C.F.R. § 0.53(c) (1974).
had actually been violated. Whatever the outcome of that particular hearing, however, the ultimate issue of whether the antitrust laws would in fact be enforced could only be judicially resolved. Because no antitrust considerations were mandated in Commodity Exchange Commission proceedings, pervasiveness in the self-regulatory scheme of the commodities exchange industry was explicitly rejected.

Applying the lessons of Ricci to the criteria of Silver thus yields three conclusions: (1) Self-regulation in the securities and commodities exchanges does not give rise to an inference of congressional intent to immunize those industries in general; a statutory grant of administrative jurisdiction over an industry is not, ipso facto, incompatible with the maintenance of an antitrust action; and (3) regulatory schemes which do not embrace an antitrust standard cannot be said to be pervasive.

Utilities Regulation

California v. Federal Power Commission contributed yet another criterion to the pervasiveness test. Denying that even this traditionally highly regulated industry could lay claim to antitrust immunity, the Court cited the fact that FPC administration was governed by a "public convenience and necessity" standard rather than an antitrust

102. Such a stay represents a classic exercise of the doctrine of primary jurisdiction as properly applied in the antitrust immunity context. See note 66 supra.


104. "Nor do we find that Congress intended the Act to confer general antitrust immunity on the Exchange and its members with respect to that area of conduct within the adjudicative or rule-making authority of the Commission or the Secretary. The Act contains no categorical exemption of this kind; indeed, it confers no express exemption at all, not even with respect to conduct that is directed or authorized by the Commission or the Secretary. Moreover, the area of administrative authority does not appear to be particularly focused on competitive considerations; there is no express provision in the Act directing administrative officials to consider the policies of the antitrust laws in carrying out their duties and there is no other indication that Congress intended the adjudicative authority given the Commission and the Secretary to be a complete substitute for judicial enforcement of the antitrust laws." 409 U.S. at 302-03 n.13 (citations omitted).

105. As will be demonstrated, schemes of industrial self-regulation by their very nature imply less than rigorous agency supervision. The antitrust function in such cases clearly remains in the judiciary. See notes 64 supra & 211 infra.

106. See cases cited note 153 infra.


108. The utilities industry has been said to be even more highly regulated than the banking industry discussed subsequently. See Otter Tail Power Co. v. United States, 410 U.S. 366, 390 n.7 (1973) (Stewart, J., concurring in part, dissenting in part). This extensive control probably arises largely from the rate regulation to which industries such as utilities and transportation are subject. But see note 139 infra.
standard. It then proceeded to emphasize that the FPC was powerless to provide remedial relief under section 11 of the Clayton Act, while other agencies had in fact been granted that power. Because a complainant could therefore find adequate relief for alleged antitrust violations only in a separate civil action, no congressional intent to displace the antitrust laws, the Court said, could be implied from the Natural Gas Act. Thus, on the basis of California v. Federal Power Commission, the determination of whether administrative remedial power is in fact commensurate with that of the judiciary under the Sherman or Clayton Acts is clearly relevant to any pervasiveness inquiry.

The Court's next occasion to consider the antitrust immunity of the public utilities industry came eleven years later with Otter Tail Power Co. v. United States. Suit was filed under section 2 of the Sherman Act, charging the defendant with monopolization of the retail distribution of electrical power by its refusal to wholesale to independent municipal systems. The defense was based upon the assertion that implicit in the express authority of the FPC to compel involuntary interconnections of power is the congressional intent to posit in the FPC exclusive jurisdiction over utilities. The defendant's contention was that the commission's refusal to exercise its statutory discretion therefore barred judicial antitrust action.

The Supreme Court dismissed the immunity claim categorically. First, FPC discretion to compel involuntary interconnections is governed by a public interest standard only, thus precluding pervasiveness in the regulatory scheme. Second, the legislative history of section 202(b) reveals that Congress rejected a proposed common carrier provision for mandatory sale of power in favor of an essentially self-regulatory system of voluntary interconnections. It was clear that a


111. Specifically, section 11 vests authority to enforce compliance with section 7 in the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, and the Federal Trade Commission. Id.


116. Id.

scheme "governed in the first instance by business judgment and not regulatory coercion" was not intended to insulate the utilities from antitrust proceedings, the Court declared;\textsuperscript{118} no flexible scheme of self-regulation in which agency involvement is de minimus could be said to be incompatible with antitrust enforcement. Finally, the defendant argued that as municipalities increasingly opted for independent power systems, commercial power companies would be unable to service their customers properly without protection from antitrust actions. The Court held that the burden on power companies was insufficient to outweigh the anticompetitive effect of an antitrust immunity: "The promotion of self-interest alone does not immunize otherwise illegal conduct."\textsuperscript{119}

This orthodox scrutiny of the regulatory scheme of the Federal Power Act was, of course, properly directed and resolved by the traditional indicia of the immunity doctrine. But the lesson of \textit{Otter Tail} only begins with the majority opinion; the dissent in the four-to-three decision is equally significant as the ghost of \textit{NASD} immunity yet to come.\textsuperscript{120} The dissent would have allowed the defense of "business justification," for example, on the grounds that "the health of power companies and the abundance of our energy supply were considerations central to the congressional purpose in devising the regulatory scheme,"\textsuperscript{121} and that as a vertically integrated retailer of power, Otter Tail "asserted a legitimate business interest in keeping its lines free for its own power sales and in refusing to lend a hand in its own demise by wheeling cheaper power from the Bureau of Reclamation to municipal consumers which might otherwise purchase power at retail from Otter Tail itself."\textsuperscript{122}

Nor was business self-interest the sole justification; the dissent thought that the antitrust laws could not be "blindly applied to . . . unilateral refusals to deal" by utilities which "operate in a regime of rate regulation and licensed monopolies."\textsuperscript{123} If this is not an assertion that

\textsuperscript{118} 410 U.S. at 374. This stated rationale represents the first articulation of the Court's implicit differentiation, for purposes of antitrust exemption, between participatory, self-regulatory schemes on the one hand and supervisory regulation on the other.


\textsuperscript{120} Indeed, had Justice Powell, who authored the \textit{NASD} decision, taken part in \textit{Otter Tail}, the inevitable shift in the Court's application of the immunity doctrine might well have come in 1973 rather than in 1975.

\textsuperscript{121} 410 U.S. at 389. But see the majority opinion: "Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with 'restraint of free and independent competition' among public utility holding companies." \textit{Id.} at 374, \textit{citing} 15 U.S.C. § 79a(b)(2) (1970).

\textsuperscript{122} 410 U.S. at 388.

\textsuperscript{123} \textit{Id.} at 389.
rate regulation alone constitutes exemptive pervasiveness, it comes perilously close to it.\textsuperscript{124} But one last rationale for exemption was also proffered by the dissent:

With respect to decisions by regulated electric utilities as to whether or not to provide nonretail services \ldots in the absence of horizontal conspiracy, the teaching of the "primary jurisdiction" cases argues for leaving governmental regulation to the Commission instead of the invariably less sensitive and less specifically expert process of antitrust litigation.\textsuperscript{125}

Why the dissent chose to consider vertical integration determinative,\textsuperscript{126} to promote primary jurisdiction as a basis for antitrust immunity, and to defer to the clientele of regulatory agencies the power to effect decisions intimately affecting market control is not readily apparent. The long history of the implied immunity doctrine contravenes such wholesale regulative usurpation of antitrust law and policy. But perhaps the dissent was simply trying to prepare the antitrust bar for the NASD decision.

Regulation of Banking

The conclusions compelled by the banking cases,\textsuperscript{127} however, are perhaps the most enlightening with respect to the parameters of the antitrust immunity doctrine. Because these cases involve an industry generally more highly regulated than the exchanges, as well as an anticompetitive standard of regulative review and an act of Congress designed to shift antitrust jurisdiction largely from the judicial to the regulatory arena,\textsuperscript{128} the banking cases probably represent the most compelling circumstances in which antitrust exemptions were nonetheless denied.

Decided in the same year as \textit{Silver} and fully as influential, \textit{United State v. Philadelphia National Bank}\textsuperscript{129} was the first of the trilogy of bank merger suits arising under section 7 of the Clayton Act.\textsuperscript{130} The

\begin{itemize}
  \item \textsuperscript{124} While the administrative power to fix rates within a given industry has been considered a factor in determining regulatory pervasiveness, it has never been raised to prima facie status. \textit{Cf.} Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).
  \item \textsuperscript{125} 410 U.S. at 391.
  \item \textsuperscript{126} No court had hitherto considered the distinction between vertical and horizontal integration to be relevant, much less determinative.
  \item \textsuperscript{129} 374 U.S. 321 (1963).
\end{itemize}
proposed merger of two Philadelphia banks\textsuperscript{131} had been approved by the
Comptroller of the Currency as required by the Bank Merger Act of
1960,\textsuperscript{132} which in turn had required the comptroller to solicit reports
from the Federal Reserve Board, the Federal Deposit Insurance Corpora-
tion, or both, as well as the attorney general, as to the probable anti-
competitive effects of any proposed merger. Despite these agencies’
opinions that the \textit{Philadelphia National Bank} merger was substantially
anticompetitive, the comptroller authorized it, and the United States
subsequently filed suit under section 7 of the Clayton Act. The Court
rejected defendants’ claim that an antitrust exemption barred the action.

First, the comptroller’s approval was held insufficient grounds for
antitrust shelter because, although admittedly required to consider a
merger’s effect upon competition, the comptroller in fact “was not re-
quired to give this factor any particular weight.”\textsuperscript{133} This, of course,
goes theoretically far beyond those cases which denied immunity for
want of any antitrust standard of agency review; under \textit{Philadelphia
National Bank}, even when present, such a standard apparently must
be actively and affirmatively applied to ensure full exercise of the anti-
trust function and thereby justify exemption.

The Court also rejected defendants’ claim that the high degree of
regulation in commercial banking necessarily evinced a congressional
intent to create a pervasive regulatory scheme:

The fact that the banking agencies maintain a close surveillance
of the industry with a view toward preventing unsound practices
that might impair liquidity or lead to insolvency does not make fed-
eral banking regulation all pervasive. . . .\textsuperscript{134}

\textit{After Philadelphia National Bank}, then, the showing of pervasiveness
apparently must be a very strong one indeed. Although the banking
industry operates within a broad network of state and federal regula-
tion,\textsuperscript{135} the Court nonetheless refused to hold regulation of the indus-
try “so comprehensive that enforcement of the antitrust laws would

\textsuperscript{131} The Court summarized the effects of the proposed merger as follows: “Were
the proposed merger to be consummated, the resulting bank would be the largest in
the four-county area, with (approximately) 36% of the area banks’ total assets, 36% of
deposits, and 34% of net loans. It and the second largest . . . would have between
them 59% of the total assets, 58% of deposits, and 58% of the net loans, while after
the merger the four largest banks in the area would have 78% of total assets, 77% of
deposits, and 78% of net loans.” 374 U.S. at 331 (1963).


\textsuperscript{133} 374 U.S. at 351 (1963), \textit{citing} California v. Federal Power Comm’n, 369 U.S.
482 (1962). \textit{See also} Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973)
(Antitrust considerations may be relevant but are not determinative).

\textsuperscript{134} 374 U.S. at 352 (1963).

\textsuperscript{135} The Court provides a useful discussion of this network. \textit{See Id.} at 327-29.
either be unnecessary in light of the completeness of the regulatory structure, or disruptive of that structure."

The Court's response to defendants' claim that application of section 7 could only lead to "cutthroat competition" detrimental to the national economy was a succinct statement that not every claim of special economic circumstances would oust the antitrust laws:

Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary. It does require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry. The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so.\[136\]

The congressional response to Philadelphia National Bank was the Bank Merger Act of 1966,\[138\] which explicitly incorporated the judicial antitrust standard into administrative review of merger applications, and attempted thereby to insulate the comptroller's determinations from subsequent judicial attack. The approach was two-pronged; the act first requires the comptroller to apply a Clayton Act standard in reaching his initial decision.\[139\] If the merger should fail that scrutiny, the comptroller is expressly authorized to balance the anticompetitive effects of the proposed merger against the "convenience and needs of the community;" a merger would pass muster under this test only if its statutorily defined benefits "clearly outweighed" its traditionally defined anticompetitive effects.\[140\] In all reviews de novo, for which the act expressly provides,\[141\] "the standards applied by the court shall be identical with" those applied by the banking agencies.\[142\]

It became apparent in United States v. First City National Bank\[143\] that the Court saw in the Bank Merger Act of 1966 no real change in the substantive law. The standard incorporated into the act, declared the Court, merely established for banks an affirmative defense to—not a pre-emption of—judicial application of section 7 of the Clayton Act.\[144\] Nor did the act posit antitrust jurisdiction exclusively in the

\[136\] Id. at 352.
\[137\] Id. at 371-72. The defense to which the Court refers, of course, is the traditional failing company affirmative defense. See id. at 372 n.46.
\[139\] Id.
\[140\] Id. § 1828(c)(5)(B).
\[141\] Id. § 1828(c)(7)(A).
\[142\] Id. § 1828(c)(7)(B).
\[143\] 386 U.S. 361 (1967).
\[144\] The Court indicated that it viewed the "convenience and needs" standard of the 1966 act as a congressional effort to ensure that the failing company doctrine be
comptroller simply because reviewing courts were to apply the agency's statutory standard as well. Stating that "the grant of administrative power to give immunity unless the agency's decision is arbitrary, capricious, or unsupported by substantial evidence, would be a long step" in the direction of lightly implying antitrust immunity, the Court emphatically declined to take that step:

Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure . . . . A determination of the effect on competition within the meaning of § 7 of the Clayton Act is a familiar judicial task. The area of "the convenience and needs of the community to be served," now in focus as part of the defense under the 1966 Act, is related, though perhaps remotely, to the failing-company doctrine, long known to the courts in antitrust merger cases. The appraisal of competitive factors is grist for the antitrust mill . . . We see no problem in bringing these standards into the area of judicial competence. Although strictly speaking not an implied immunity case, United States v. Third National Bank is nonetheless noteworthy as reaffirming the principle that judicial deference to agency antitrust determinations has no proper place in civil antitrust actions against banks under the Bank Merger Act. After the comptroller determined that a merger placing three banks in control of 97.9 percent of the relevant markets did not substantially lessen competition in light of "community needs," the district court found "substantial evidence" to justify such a determination. The Supreme Court rejected this as an improper scope of review and reversed on grounds that the findings of the district court did not sufficiently establish the lack of alternative solutions more beneficial to the public interest than an anticompetitive merger.

At least taken into the anticompetitive calculus of the comptroller and the courts by way of affirmative defense only. Id. at 369.

145. Id. at 368.
146. Id. at 367, 369-70 (citations omitted).
148. The Court pointed out that "The District Court did not ask whether the Weaver group had made concrete efforts to recruit new management, especially a chief executive officer, who was needed most. . . . The court made no reference to the possibility that the new owners themselves might have taken active charge of the bank. None of them was a banker, but their successful predecessor Hackworth had not been one before becoming president of Nashville Bank. Nor did the court assess the possibility of a sale to others who might have been willing to face up to the management difficulties over a more extended period. We find nothing in the findings indicating that a bank with assets of $50,000,000 was simply too small to attract competent management or that the Weaver group, the new owners, were intransigently insisting on unreasonably conservative managerial policies. Indeed, the Weaver group included competent and experienced men who realized the desirability of improving an unsatisfactory situation. Rather than making serious efforts to do so themselves or to sell to others
under the Banking Act, then, any determination as to the necessity of antitrust repeal for the sake of regulatory viability necessarily embraces a search for alternative solutions to an industry's economic malaise rather than the impromptu abrogation of the antitrust laws: "[B]efore a merger injurious to the public interest is approved, a showing must be made that the gain expected from the merger cannot reasonably be expected through other means."\footnote{149}

As an amplification of "necessity" useful outside the context of the Bank Merger Act, however, this requirement does not appear qualitatively different from the Silver "complete incompatibility" requirement. The availability of alternative solutions, of course, negates complete incompatibility between regulatory and antitrust policies. Third National Bank thus provides at least some perspective on the implied immunity doctrine.

**Summary: The Evolved Immunity Standard**

To summarize briefly the immunity standard as developed by the Court in the foregoing cases, it is clear that the elements requisite to exemption from antitrust liability are as follows:

**Express Exemption**

Specific exemptive clause, narrowly construed, integrated into the regulatory legislation.\footnote{150}

**Implied Exemption**

Independent judicial analysis\footnote{151} to determine either:

1. The necessity of antitrust repeal to effectuate regulatory objectives,\footnote{152} or

who would, they preferred to merge with a competing bank—a step which produced a profit of $750,000 on a two-month investment of $3,800,000." \textit{Id.} at 190-92 (footnotes omitted).

\footnote{149} Id. at 190. Although the Third National Bank case involved suit under section 7 of the Clayton Act, there is of course no reason to believe that the alternatives factor would not be equally relevant in a Sherman Act analysis.


\footnote{151} Independent analysis precludes deference to a prior administrative determination. See cases cited note 127 \textit{supra}.

\footnote{152} See, \textit{e.g.}, Silver \textit{v.} New York Stock Exch., 373 U.S. 341 (1963); and Pan
(2) The existence of a pervasive regulatory scheme, the primary indici of which are:

(a) legislative history indicating a congressional intent to subordinate antitrust to regulatory policy;\(^{163}\)

(b) duty to actively enforce a nondiscretionary antitrust standard of administrative regulation;\(^{164}\)

(c) availability of remedial relief under the regulatory scheme commensurate with that of the antitrust laws.\(^{165}\)

**United States v. National Association of Securities Dealers**

Thus to *United States v. National Association of Securities Dealers*.\(^{156}\) The case is a factually complex one involving multiple suits on behalf of both investors and the government, who alleged that certain practices in the distribution of open-end mutual funds securities were in violation of section 1 of the Sherman Act.\(^{157}\) Named as defendants were the NASD, certain mutual funds, and dealers, all of whom claimed express and implied immunity\(^{158}\) on the ground that by virtue of the regulatory scheme embodied in the Maloney Act\(^{159}\) and the Investment Company Act of 1940,\(^{160}\) SEC authority over the mutual funds industry made section 1 of the Sherman Act inapplicable to the mutual funds industry as a matter of law.

Specifically at issue were companion sections 22(d) and 22(f) of the Investment Company Act,\(^{161}\) which authorize, respectively, a uniform public offering price in dealer sales of mutual fund shares and fund restrictions on their negotiability and transferability. The precise statutory language is important:

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156. 422 U.S. 694 (1975).


158. With respect to the arguably express exemption which could have been professed, see note 62 supra.


161. *Id.* § 80a-22(d), (f).
22(d) . . . [N]o dealer shall sell [mutual fund shares] to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus. 162

. . . .

22(f) No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company. 163

Plaintiffs made two allegations. The first charged a horizontal combination and conspiracy among members of the NASD and others with the intent to prevent the growth of a secondary market in mutual funds. The second attacked various vertical restrictions in the distribution of fund shares as per se illegal resale price maintenance and concerted refusals to deal. 164

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162. Id. § 80a-22(d).
163. Id. § 80a-22(f).

It will suffice for these purposes simply to distinguish the secondary and primary markets in mutual fund shares. Mutual funds are investment companies with 40% of their assets in the form of securities in other companies. 15 U.S.C. § 80a-3(a) (1970). They are distinguished from other forms of investment primarily in being open ended; i.e., the mutual fund sells an unlimited number of shares and invests the capital in new securities. The fund, however, must also redeem any of its own securities upon demand of the holder at a price approximating its proportionate share of the fund's net asset value at the time of the redemption. Id. § 80a-2(a)(32). Thus, to avoid the theoretical threat of liquidation through mass redemption, a fund must continually issue new shares to the investing public.

A mutual fund frequently retains an underwriter to serve as its wholesaler who in turn retains a number of broker-dealers who sell to the public. When either mutual funds underwriters or broker-dealers sell to the investing public, they are obliged to sell at a public offering price, commonly computed by adding to the value the security represents vis-a-vis the net assets of the mutual funds, a "sales load" (or commission) by which the underwriters and dealers are compensated. This distribution-redemption system constitutes the primary market in fund shares.

Trade in mutual funds securities, however, occurs outside the primary market as well. Dealers, for example, may build up personal inventories and sell to investors on their own behalf. When so doing they act as statutory "dealers". (When selling for the underwriter, on the other hand, they act as statutory "brokers." See note 166 infra.) Dealers, moreover, also sell to other dealers and to investors on behalf of
The NASD attempted to justify its resale price maintenance scheme at least in part by claiming that section 22(d)’s price maintenance mandate for sales by statutory “dealers” applied to broker-dealers acting in their capacity as statutory “brokers” as well as statutory “dealers.” The practical effect of such an interpretation is to preclude transactions in which a broker-dealer acting as an agent rather than as a principal sells at less than the public offering price. The antitrust ramifications are that if interpreted as embracing brokered as well as dealer sales, section 22(d) authorizes resale price maintenance in all sales to all investors. This of course constitutes a per se violation of the Sherman Act unless either expressly authorized by statute or impliedly exempted by the Court. The various alleged vertical restrictions upon interdealer sales effected by prohibiting broker-dealer transactions with any party other than an investor, likewise constitute per se violations of the Sherman Act absent legislative or judicial exemption.

The holding of the Court was bifurcated. With respect to the alleged vertical monopolization the Court expressly held that the NASD interpretation of section 22(d) was overly broad; neither statutory construction nor legislative history could logically bring brokered

other investors. These latter two transactions are secondary market transactions not expressly subject to the public offering price restriction of section 22(d). It is the sales price at this secondary market level, then, which was at issue in the NASD case: is it to be competitive or noncompetitive vis-a-vis the primary market?

It should be noted that the secondary market is to be further distinguished from the pre-1940 “bootleg” market comprised largely of noncontract broker-dealers at which section 22(d) was largely aimed. See SEC REPORT ON INVESTMENT TRUSTS AND INVESTMENT COMPANIES, H.R. Doc. No. 279, pt. 3, 76th Cong., 1st Sess. (1940) [hereinafter cited as INVESTMENT TRUST STUDY]; Greene, The Uniform Offering Price of Mutual Fund Shares Under the Investment Company Act of 1940, 37 J. URBAN L. 369, 371 (1960) [hereinafter cited as Greene]; Heffernan & Jorden, Section 22(d) of the Investment Company Act of 1940—Its Original Purpose and Present Function, 1973 DUKE L.J. 975, 1001 (1973) [hereinafter cited as Heffernan & Jorden].

165. SEC acquiescence in the NASD reading of section 22(d) is implicit by virtue of its authority under the Maloney Act to oversee the activities of the mutual funds. 15 U.S.C. §§ 78o-3(b), (e), (h), (j), (k) (1970).

166. The Investment Company Act of 1940 defines a “broker” as a person engaged in the business of effecting transactions in securities for the account of others and a “dealer” as one engaged in the business of buying and selling securities for his own account. Id. § 80a-2(a)(6), (11). The broker-dealer is thus a chameleon-like figure whose status at any given time as broker or dealer is contingent upon the identity of his principal in a given transaction. See United States v. National Ass’n of Sec. Dealers, 422 U.S. 694, 712 n.22, 717-18 (1975).

167. See note 13 supra.

168. Such agreements are concerted refusals to deal, and therefore per se violative of the Sherman Act. See note 13 supra.

169. 422 U.S. at 713 (1975).

170. Id. at 713-19.
transactions within its ambit. The various distributive restrictions, however, were held to be authorized by section 22(f) on the rationale that they had never been disapproved by the SEC:

Together, §§ 22(d) and 22(f) protect the primary distribution system for mutual-fund securities. 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. Appellant's limiting interpretation of § 22(f) compromises this flexible mandate, and cannot be accepted.

. . . By its terms, § 22(f) authorizes properly disclosed restrictions unless they are inconsistent with SEC rules or regulations. The provision thus authorizes funds to impose transferability or negotiability restrictions, subject to Commission disapproval. 171

As if unsure of this rather innovative and apparently express exemption, the Court concluded by stating that implied antitrust repeal was necessary in order to avoid "compromising" the SEC's "flexible" regulatory authority and the objectives of the 1940 Act:

Here, however, Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated "in the interests of the holders of all the outstanding securities" of mutual funds.

The SEC, the federal agency responsible for regulating the conduct of the mutual-fund industry, urges that its authority will be compromised seriously if these agreements are deemed actionable under the Sherman Act. We agree. 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. In this instance the antitrust laws must give way if the regulatory scheme established by the Investment Company Act is to work. 174

With respect to the alleged horizontal combination between the NASD and its members to restrict the growth of a secondary market, 175 the Court simply held with sparse comment that the Investment Com-

171. Id. at 724-26 (emphasis added).
172. Id. at 729-30.
173. Id. at 724-25.
175. The alleged horizontal conspiracy was designed to insure that all mutual funds and their underwriters instituted the vertical restrictions described in the text accompanying notes 165-74 supra. See 422 U.S. 694, 730-31, n.42 (1975).
pany and Maloney Acts created a regulatory scheme sufficiently pervasive to immunize the defendants:

The SEC, in its exercise of authority over [NASD] rules and practices, is charged with protection of the public interest as well as the interests of shareholders, and it repeatedly has indicated that it weighs competitive concerns . . . . As the Court previously has recognized the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from [NASD] activities approved by the SEC.176

The Shortcomings of the Case

Four justices dissented in the NASD decision,177 and not without reason: for aught that appears, the majority chose to dismiss some three decades of antitrust immunity precedent in order to chart its own course for the doctrine. The task at hand is to determine where the Court's majority radically deviated from its own well-established standard for antitrust immunity and what new standard was applied in its stead.

No Specific Statutory Exemptive Clause Integrated into the Regulatory Legislation

It is well to begin by establishing that what was apparently a grant of express immunity via section 22(f) clearly was not based upon a "specific statutory exemptive clause" grafted onto the Maloney or Investment Company Acts.178 The foundation upon which the Court built its express statutory authorization rationale was, rather, section 22(f)’s qualified prohibition against distributive restrictions. Unfortunately, the Court rode roughshod over precedent to find in that section the semblance of express statutory immunity. First, unambiguously express exemptive clauses are contained in several regulatory schemes,179 and the Court has traditionally required no less an indication from Congress of its intent to displace the antitrust laws.180 Had section 22(f) been intended to operate as such a clause vis-à-vis section

176. 422 U.S. at 732-33 (emphasis added & citations omitted).
178. The fact that the Court arguably could have relied upon an express exemption has been addressed, and further discussion of the point would appear unnecessary. See note 62 supra.
179. See note 14 supra. Cf. Note, Antitrust Immunity of the National Association of Securities Dealers Under the Maloney Act, 14 B.C. IND. & COM. L. REV. 111 (1972). The author maintains that the express exemption of § 78o-3(n) is imprecise compared to those embodied in other schemes and is therefore probably limited to § 78o-3(i) and does not immunize activities under the act in general.
180. See text accompanying notes 13-61 supra.
22(d), certainly it could easily have been similarly drafted. Second, given the strong judicial disfavor of antitrust repeal, section 22(f) should have been subject to rigorously narrow construction.\footnote{See, e.g., Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973).} Contrary to the Court's optimistic reading of section 22(f) as "authorizing" restrictions in the transferability of shares, for example, the statute is in fact couched in patently prohibitive terms: "No [fund] shall restrict . . . ."\footnote{15 U.S.C. 80a-22(f) (1970).} This is hardly language of authorization under the rule of Federal Maritime Commission v. Seatrain Lines, Inc.\footnote{411 U.S. 726 (1973).} Finally, assuming arguendo that section 22(f) does constitute an express, affirmative grant to the SEC of regulative authority to approve or disapprove industry practices, by no means would such a grant a priori give rise to an express exemption from liability should those practices run afoul of the antitrust laws.\footnote{The argument that it does, of course, echoes defendants' contention in the vast majority of the implied exemption cases, that an express statutory grant of a purely general supervisory authority exempts all industry activity from antitrust attack. This position has been roundly and uniformly rejected. See text accompanying notes 63-145 supra.} Regulatory authority is clearly circumscribed by the antitrust laws until an express exemption in the regulatory scheme dictates otherwise. Nor can NASD by juridical sleight of hand convincingly make a repealer appear where 22(f) stood before; general discretionary agency supervision has never been held sufficient even to implicate immunity,\footnote{See note 154 & accompanying text supra.} and the notion that it can give rise to an express exemption is an innovative one indeed.

\textit{No Necessity of Antitrust Repeal To Effectuate Regulatory Objectives}

As if aware of the foregoing gaps in its apparently express immunity rationale, the majority undertook to establish a purely implied immunity justification for defendants' alleged vertical monopolization. That undertaking unfortunately can only be said to have been abortive: the Silver\footnote{411 U.S. 726 (1973). See text accompanying note 61 supra.} test of incompatibility between the objectives of mutual funds regulation and the enforcement of the antitrust laws sufficient in degree to necessitate repeal of the latter was not demonstrated.

As was stated earlier, a detailed analysis of the mutual funds industry is beyond the scope of this note.\footnote{But see note 164 supra.} Yet the question whether resale price maintenance and vertical fund restrictions are necessary to effectuate the objectives of the mutual funds regulatory scheme requires a rudimentary examination of both the mechanics of fund distri-
The relationship of these two characteristics is symbiotic. Because liquidation via mass redemption is at least theoretically a constant threat, the most effective prophylactic is the continuous sale and distribution of new fund shares. An orderly market for their distribution is thus the sine qua non of the industry.

The Investment Company Act of 1940, and section 22(d) of that act in particular, was passed expressly to ensure an orderly distribution-redemption market by eliminating certain disruptive trading abuses which had flourished under the pre-1940 "backward pricing" system. Briefly stated, backward pricing simply means that a fund's net asset value, which fluctuates constantly, was computed once daily at the close of exchange trading. This valuation did not go into effect until the opening of the exchange the following morning. In the interim period, therefore, two prices were ascertainable: the security price for the current day and the security price for the next day. During the late hours of the current day, after the following day's price was known, an insider could buy and sell completely without risk.

This backward pricing system was exploited principally by two groups: "bootleg" dealers not under contract with a mutual fund or underwriter, who could purchase and sell without paying a sales load, and a secondary market of contract underwriters and their broker-dealers, who by maintaining an inventory position could enjoy virtually riskless trading. With an inventory, for example, a dealer in a rising market could fill today's expensive orders with yesterday's cheaper securities, retaining the profits for himself. Conversely, in a falling market, he could fill today's expensive orders with tomorrow's cheaper securities. In addition to yielding windfall profits to dealers the abuses engendered by backward pricing diluted the value of outstanding public investors, of course, generally could not take advantage of this system, sim-


189. See Mutual Funds Survey, supra note 164, at 834-35.

190. The industry itself sees continual distribution as the inevitable "byproduct of redeemability": "The inexorable law of this business is that when assets rise, redemptions rise proportionately so the more you succeed, the harder you have to sell, just to keep your place on the treadmill." Securities and Exchange Comm'n, SEC Report on Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 202 (1966) [hereinafter cited as Public Policy Statement].

191. See Investment Trust Study, supra note 164, at 851-52; Heffernan & Jorden, supra note 164, at 979-84; Greene, supra note 164, at 371-73.
ing shareholders' securities.\textsuperscript{192}

To the extent that section 22 of the Investment Company Act was enacted to curb these abuses and thereby protect the primary distributive market,\textsuperscript{193} that section of the act could arguably be interpreted as having an anticompetitive regulatory objective. On the other hand, simply because its purpose was to ensure the orderly distribution and redemption of mutual fund shares by eliminating dilutive in-out trading and bootleg price competition, it does not follow that the underlying regulatory objective was to eliminate competition categorically in the market for mutual funds.

[T]he requirement of a uniform sales load was a compromise provision designed primarily as a device to curb abuses resulting in dilution of the value of mutual fund shares and, possibly, to impose some limitations on the activities of "non-contract" dealers. Only incidentally, and as a natural consequence of its operation, did the section entail the "price-fixing" aspects which are now assumed by many to be its \textit{raison d'etre}. . . .

Thus appears the real beginning of what became section 22, including the foundation and rationale for a provision such as 22(d), which would require a sales load to be imposed on all sales. The sales load requirement was imposed primarily as a deterrent to the value-diluting in-out transactions and "riskless trading" encouraged by the backward pricing system. The "price fixing" consequences entailed by the enactment were \textit{mere by-products of the essential scheme}.\textsuperscript{194}

Thus, no per se anticompetitive objective should be assumed to underlie section 22 of the regulatory scheme embodied in the 1940 Investment Company Act.\textsuperscript{195} Assuming that the primary purpose of

\begin{itemize}
\item[\textsuperscript{192}] See INVESTMENT TRUST STUDY, supra note 164, at 862; Heffernan & Jorden, supra note 164, at 980 n.20.
\item[\textsuperscript{193}] See INVESTMENT TRUST STUDY, supra note 164, at 865-66; Heffernan & Jorden, supra note 164, at 983-84. "The dilution referred to resulted from the reduction in value of existing shareholders' pro-rata interest in the fund arising as a natural consequence of backward pricing in a rising market. For example, if yesterday there were 10 shares outstanding and $100 in the fund, and today the fund is worth $110, one who purchases today under the backward pricing system would pay $10 per share rather than $11 (which represents the existing shareholders' pro-rata interest in the $110 fund). Thus, the $10 increase in the fund's value will be diluted to the extent that today's purchaser is permitted to share in that increase by buying at yesterday's price." Heffernan & Jorden, supra note 164, at 983-84.
\item[\textsuperscript{194}] Heffernan & Jorden, supra note 164, at 978, 990 (emphasis added).
\item[\textsuperscript{195}] The legislative history and purposes of the 1940 act in this regard should be compared to that of the Federal Aviation Act, 49 U.S.C. §§ 1301-1542 (1970 & Supp. IV, 1974), which represents an intentionally anticompetitive regulatory objective.
\end{itemize}
section 22 was in fact to prevent the dilution of outstanding shareholders' securities, there would therefore appear to be no regulatory objective of the 1940 act was to ensure that there would be but one market otherwise free of opportunities for dilutive abuses. Or alternatively assuming that its main function was simply to insure a generally orderly distributive system, it is still not apparent from the rather superficial economic analysis in *NASD* that such an orderly system could not in fact accommodate secondary market transactions. The majority's error in this regard appears to lie largely in its implicit assumption that pre-1940 abuses can still exist in the post-1940 market and that the objective of the 1940 act was to insure that there would be but one market for the exchange of mutual fund shares. The second assumption appears to be unwarranted by the legislative history of the act, and if the first is in fact justified, the majority nonetheless failed in its duty to demonstrate as much.\(^{198}\) It follows that if an orderly system of fund distribution *can* embrace a competitive secondary market, then clearly no implied repeal is necessary in the *Silver* sense,\(^{197}\) and an antitrust action against the NASD is not incompatible with the regulatory objectives of section 22.

The *NASD* majority, however, also sought to establish necessity in another, more theoretical sense: if the "flexible mandate"\(^{198}\) granted the SEC to regulate distributive restriction under section 22(f) would be "compromised"\(^{199}\) by an antitrust attack upon those restrictions, repeal is impliedly necessary to effectuate the regulatory scheme. Twenty years of precedent for the implied immunity doctrine, however, have established that necessity and administrative flexibility are *inversely*, not directly, related: the more discretionary the agency supervision, the more self-regulatory the scheme; the greater the degree of self-regulation, the greater the need for judicial antitrust scrutiny.\(^{200}\) The holding that implied repeal was necessary to effectuate a largely discretionary, ambiguous congressional mandate to the SEC therefore clearly does violence to the strong presumption in favor of vigorous antitrust enforcement.

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196. See text accompanying note 146 *supra*. As the Court itself recognized, the dilutive effect of unscrupulous broker-dealer practices, for example, is now precluded by the forward pricing system established in 1968. 422 U.S. 694, 710 n.19 (1975); *see* Investment Company Act Release No. 5519 (1968) [1967-1969 Transfer Binder] CCH Fed. Sec. L Rep. ¶ 77,616; 17 C.F.R. § 270.22c-1 (1974). The necessity for section 22(d) as an anti-dilution bulwark, therefore, is clearly a thing of the past.

197. See text accompanying notes 92-94 *supra*.

198. 422 U.S. 694, at 725.

199. *Id.*

From another perspective, it is rudimentary that complete incompatibility can exist only between two equally strong public policies. Where one of two conflicting policies is flexible, on the other hand, reconciliation is a simple matter of subordination; no complete incompatibility in the Silver sense exists.201 Such was certainly the case in NASD, and the majority opinion found incompatibility only by overlooking the possibility of reconciling antitrust enforcement with the regulatory scheme. This, of course, Silver forbids, and the NASD court was cavalier at best in its manipulation of the Silver necessity and incompatibility doctrines.

No Pervasive Regulatory Scheme

While it is apparent from the foregoing discussion that necessity is perhaps as much an economic as a juridical issue,202 pervasiveness, on the other hand, is a uniquely judicial construct well defined by precedent. And, as will be shown, the regulatory scheme of the mutual funds industry simply does not fit within the precedential definition; the traditional indicia are lacking.

No Legislative History Indicating a Congressional Intent To Subordinate Antitrust to Regulatory Policy

Inasmuch as implied immunity is based upon a presumed congressional intent to subordinate antitrust policy to the objectives of a regulatory scheme—indeed to repeal the antitrust laws insofar as they frustrate regulatory objectives203—the legislative history of the Investment Company and Maloney Acts is most enlightening: it clearly reveals the intent to create a largely self-regulatory scheme for the NASD. Such a scheme of course belies any presumed intent to repeal the antitrust laws with respect to mutual funds.

While the legislative history of sections 22(d) and (f) is sparse,204 at least one fact of the history is both clear and probative. The original

201. See text accompanying notes 92-94 supra.
202. It bears repeating, however, that this fact does not preclude an ultimate, purely judicial scrutiny of the economic analyses proffered in justification for subordinating the strong public policy in favor of antitrust enforcement. Indeed, the implied immunity doctrine clearly requires it, in order to determine incompatibility. See text accompanying notes 239-50, infra. It is submitted that it is in large part the failure of the NASD majority to subject the distributive restrictions of section 22(f) to that scrutiny which belies the validity of its ultimate holding.
203. See generally Pogue, supra note 4. See text accompanying notes 16 & 63-65 supra.
version of the remedial bill introduced to Congress was the offspring of the SEC's Investment Trust Study, and contained no provision resembling the present sections 22(d) or (f). The significance of the original version of the bill lies in the fact that it would have both granted the SEC power to eliminate backward pricing and would have precluded any scheme of industry self-regulation. The regulatory function of the SEC became, however, increasingly passive as the statute evolved. Originally, the SEC's role was to actively promulgate rules to serve "the public interest and the protection of investors," including rules prohibiting restrictions on the distribution of shares. Section 22(f) as enacted now limits the SEC's rulemaking authority to passive oversight to protect the "interests of the holders of all of the outstanding securities . . . ."

Nor did the NASD majority fail to note this distinctly self-regulatory congressional bent:

The compromise provision, which subsequently was enacted into law . . . manifested a more positive attitude toward self regulation. . . . Viewed in this historical context, the statute reflects a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices.

The Commission repeatedly has recognized the role of private agreements in the control of trading practices in the mutual-fund industry.

With this recognition, however, should have come the realization that such a legislative history only negates any presumption that Congress intended to supplant the antitrust laws. First, self-regulatory schemes by their very nature mandate increased, external "policy-type" antitrust scrutiny to control anticompetitive abuses which could otherwise cloak themselves in the guise of regulative prerogative. Congress must be presumed to have intended that natural competition should safeguard industry practices in such cases; otherwise the regulation would have been made more stringent, i.e., more "participatory."

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206. See Heffernan & Jorden, supra note 164, at 986.
207. Id.
208. See S. 3580, 76th Cong., 3d Sess. § 22(d)(2) (1940).
209. 15 U.S.C. § 80a-22(f) (1970). As two commentators noted, "The industry was wholly opposed to the prospect of forward pricing which could have been (and probably would have been) established by the SEC pursuant to section 22(a) as originally drafted." Heffernan & Jorden, supra note 164, at 987-88.
210. 422 U.S. at 726-27.
211. See Reconciling Antitrust Law, supra note 64, at 339. Comparing self and administratively regulated industries, the author states: "These are two distinct situations that have resulted in two distinct types of regulation. In the first case, regulatory machinery is designed as a supplement to natural competition, not a substitute for what competition exists. This type of regulation is found in the banking and agricultural
Second, and closely related, is the rule established by *Otter Tail*\(^{212}\) that regulatory schemes governed by private business judgment rather than agency coercion are not intended to displace the antitrust function.\(^{213}\) In this respect it is germane to note that the legislative history of the provision of the Federal Power Act at issue in *Otter Tail* is virtually identical to that of sections 22(d) and (f) of the Investment Company Act.\(^{214}\) In each case Congress abandoned proposals for affirmative regulatory supervision in favor of self-regulatory schemes. The *Otter Tail* Court saw in such history a clear congressional rejection of pervasive regulation and an unambiguous intent that utilities should remain subject to the antitrust laws.\(^{215}\) That a less stringently regulated industry such as mutual funds should have received more liberal treatment simply is not sound law. Worse, it is pernicious precedent.

industries, for example, and it is also the type of scheme embodied in the Maloney Act. The second type of regulation is found in the pervasive statutes governing the transportation industries and public utilities. The natural monopoly situation present in these industries compels direct government participation in rate-making and service-allocation decisions. The first type of regulation is more supervisory or policing in nature; the second type is more participatory. This distinction is significant for purposes of construing statutory language when a court attempts to determine the extent of antitrust immunity required to accomplish Congress' purposes. The second type, or "participatory regulation," requires broader antitrust exemptions than the first type, or "supervisory regulation." A participatory-type regulated industry may fix prices because the government agency is involved in the process. A supervisory-type regulated industry may adopt rules for disciplining members if they do not meet group norms of honesty and fair dealing because direct government regulation may not be feasible. But it may not fix prices, since the government agency is not directly involved in this process. There is no provision for that kind of involvement in the act of Congress. While the court retains jurisdiction over antitrust matters in both types of regulatory schemes, the niche that is cut out of the national policy favoring competition is much broader for participatory-type regulated industries than for supervisory-type regulated industries." Another commentator has said: "Whether the antitrust laws apply, some government oversight is warranted, indeed necessary to insure that action in the name of self-regulation is neither discriminatory nor capricious." Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A.J. 244, 246 (1963). Another points out: "Self regulation is vulnerable to the per se theory of antitrust liability because of the many concerted activities which are carried on by the self-policing agencies and because of the intrinsic anticompetitive bias recognized in the concept of self-regulation. . . . Although there are built-in anticompetitive effects in the self-regulatory concept, there is nothing . . . which directly performs the antitrust function of guarding against the misuse of the delegated power of self-regulation [absent an antitrust standard of agency review]. It is universally conceded that some form of government oversight and review of the self-policing efforts of the self-regulatory agencies is necessary to fulfill the purposes of the securities laws as well as the antitrust laws." Nerenberg, *supra* note 188, at 157. See also 2 L. Loss, *Securities Regulation* 1361 (2d ed. 1961).

213. *Id.* at 375. The *NASD* majority, it will be recalled, emphasized "the significant role of private agreements" in industry self-regulation.
214. *Id.* at 372-75.
215. *Id.* at 374.
No Duty To Actively Enforce a Nondiscretionary Antitrust Standard of Administrative Review

As has been shown, in order for implied immunity from the antitrust laws to be found on the basis of pervasive regulation, the supervising agency must govern its clientele by strict antitrust standards. And yet SEC supervisory power under section 22(f) is confined to protecting only "the interests of the holders of outstanding securities."\(^\text{216}\) The majority's characterization of such a standard as sufficient to serve the antitrust function defies precedent which has uniformly held even the more comprehensive "public interest" standard wholly inadequate in this regard.\(^\text{217}\) Nor does the fact that the SEC "repeatedly has indicated that it weights competitive concerns in the exercise of its continued supervisory responsibility"\(^\text{218}\) buttress the majority's pervasiveness rationale. Discretion cannot suffice for duty in this respect; otherwise, the antitrust function is at the mercy of administrative inclination rather than compulsion. The Court in Philadelphia National Bank\(^\text{219}\) and Otter Tail\(^\text{220}\) made that much emphatically clear. This is true especially in light of the SEC's arguably deferential relationship with respect to NASD self-regulation.\(^\text{221}\) The majority's statements, for example, that "commission acceptance of fund-initiated restrictions for more than three decades hardly represents an abdication of its regulatory responsibilities,"\(^\text{222}\) and its reliance upon "the SEC's election not to initiate restrictive rules or regulations" as "precisely the kind of administrative oversight of private practices"\(^\text{223}\) that

\(^{216}\) 15 U.S.C. § 80a-22(f). It is arguable that the scheme of the Maloney Act is more pervasive than that of the Investment Company Act; § 78o-3(b)(8), for example, does forbid restriction of membership and mandates that NASD rules must safeguard "against unreasonable profits or unreasonable rates of commissions or other charges, and . . . remove impediments to . . . the mechanism of a free and open market . . . ." Nonetheless, the NASD majority based its finding of pervasiveness upon the ultimate regulatory authority of the SEC. Thus, the opinion's grant of immunity is ultimately founded upon an inadequate less-than-public-interest standard.

\(^{217}\) See text accompanying note 250 infra.

\(^{218}\) 422 U.S. 694, 732 (1975).


\(^{221}\) The power of the SEC under section 22(f), for example, is presently discretionary; when the original version of S. 3580 was introduced to provide for active SEC supervision, the commission acquiesced in association demands for a less intrusive SEC role. Heffernan & Jorden, supra note 164, at 986-98. Criticism of a history of allegedly lax supervision of the New York Stock Exchange has likewise been levelled at the commission, and concern expressed that that history reflects a general indifference in the agency with respect to antitrust matters. See Reconciling Antitrust Law, supra note 64, at 292-97. Entrusting antitrust supervision to the SEC alone would thus appear, on the basis of past experience, rather like assigning Rip Van Winkle the nightwatch.

\(^{222}\) 422 U.S. 694, 728 (1975).

\(^{223}\) Id.
can immunize would, if taken at face value, eviscerate the passive non-disapproval rule of *Otter Tail*.\(^{224}\) Contrary to the conclusions of the *NASD* majority, however, pervasiveness has always been a question of rigor, not breadth, and the notion that nondisapproval amounts to immunity has never been accepted as valid.

Thus, there is neither an antitrust standard of review, nor a present duty to consider anticompetitive factors, nor a past history of active antitrust enforcement\(^{225}\) sufficient to justify the majority’s finding of pervasiveness in the regulation of mutual funds. The veto power of the SEC under section 22(f), upon which the opinion predicates its grant of exemption, should never have conferred antitrust immunity without a showing that SEC approval was governed by a mandatory antitrust standard. Even where such a standard has been integrated into a given regulatory regime, the judicial preference for vigorous antitrust enforcement has nonetheless defeated implied immunity.\(^{228}\) Certainly, therefore, the SEC’s passive failure to disapprove—as was the case in *NASD*—does not logically justify an exemption.

### No Remedial Relief Available Under the Regulatory Scheme Commensurate with that of the Antitrust Laws

It is apparent that repeal of the antitrust laws also repeals the remedies they provide an injured party. Any implied regulatory displacement of the antitrust laws, therefore, must be shown to be accompanied by an alternate, regulatory means of remedial relief.\(^{227}\) Otherwise, a gap in the surrogate scheme exists which Congress can only have intended the antitrust laws to fill, and such gaps, of course, preclude pervasiveness.

The Maloney Act provides for an essentially insular grievance procedure. A competitively aggrieved party, for example,\(^{226}\) could only demand that the SEC abrogate the allegedly offensive NASD rule,\(^{229}\) or that the NASD revoke the guilty parties’ membership, or impose various fines.\(^{230}\) Should the SEC refuse to take action, judicial

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\(^{225}\) But see the *Multiple Trading Case*, which involved the NYSE, not the NASD. See Rules of the New York Stock Exch., 10 S.E.C. 270 (1941).


\(^{228}\) 15 U.S.C. § 78o-3(b)(8) (1970) probably represents the most reasonable facsimile of a built-in statutory antitrust standard under which a competitively injured party would complain.

\(^{229}\) *Id.* § 78o-3(k)(1).

\(^{230}\) *Id.* § 78o-3(b)(9).
review is available, but this intra-agency remedial scheme compares with those expressly found inadequate in the Borden and Federal Power Commission cases. Having included no provisions for remedies commensurate with those available in an antitrust suit, the Borden and Federal Power Commission regulatory schemes were flatly held to be no complete surrogate for civil antitrust enforcement. The fact that the CAB was empowered to enforce section 7 of the Clayton Act, on the other hand, was a decisive factor in the Pan American Court's willingness to declare that particular scheme to be pervasive. Given that Congress has similarly empowered the ICC, FCC, FTC, and Federal Reserve Board, its failure to do so with respect to the SEC would clearly appear to negate any intent on its part to invest antitrust enforcement exclusively in the commission.

Nor are the sanctions available under the act comparable with the treble damages available in a civil suit. Section 78o-3(b)(9), for example, limits NASD sanctions of members to discipline "by expulsion, suspension, fines, censure . . . or any other fitting penalty, for any violation of its rules." With respect to alleged violations by the NASD itself, the available remedies are commission abrogation or amendment of the rule at issue and suspension of the NASD or its members.

It is thus apparent that any effective relief in the form of damages for mutual funds' violation of the antitrust laws must be sought in the courts; no such relief can be granted by the SEC. A regulatory scheme cannot be said to be a congressionally intended surrogate for the antitrust laws which includes no congressionally established antitrust remedies.

No Independent Judicial Analysis

The doctrine of implied immunity, as a mitigating principle of a

231. See generally Reconciling Antitrust Law, supra note 64, at 290.
232. United States v. Borden Co., 308 U.S. 188 (1939). "That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding." Id. at 206.
233. California v. Federal Power Comm'n, 369 U.S. 482, 486 (1962). "If existing natural gas companies violate the antitrust laws, the [Federal Power] Commission is advised by § 20(a) to 'transmit such evidence' to the Attorney General 'who, in his discretion, may institute the necessary criminal proceedings.' Other administrative agencies are authorized to enforce § 7 of the Clayton Act . . . but the Federal Power Commission is not included in the list." Id. at 486.
237. Id. §§ 78o-3(k)(1)-(2).
238. Id. § 78-3(1).
nonetheless vigorous antitrust policy,\textsuperscript{239} has been girded by increasingly stringent application of the principle that no implied exemption should be based upon anything less than an independent, \textit{judicial} finding of compelling countervailing regulatory objectives, and the principle that a prior administrative determination does not suffice in this regard.\textsuperscript{240} First articulated in \textit{United States v. RCA},\textsuperscript{241} firmly established by the banking cases,\textsuperscript{242} and ultimately unquestioned as a principle of antitrust law in \textit{Otter Tail Power Company v. United States},\textsuperscript{243} prior administrative determinations of antitrust matters need not necessarily be accorded weight in judicial antitrust proceedings. Even administrative findings of fact in an area of admitted agency expertise had been held to make no more than a "meaningful contribution" in ultimate antitrust adjudication.\textsuperscript{244}

The Court in NASD therefore belied its own precedent in according "considerable weight" to the SEC's own interpretation of section 22(f).\textsuperscript{245} In so doing, it abdicated its assigned role as the ultimate arbiter of necessity to an administrative usurper neither required to consider antitrust policy nor to accord it the preferential weight which precedent requires.\textsuperscript{246} Indeed, the stance of the Court is perhaps best described as deferential:

[Under section 22(f)], however, Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry, and has vested in the SEC final authority to determine whether and to what extent they

\begin{itemize}
\item \textsuperscript{239} Note, \textit{Antitrust Laws and the Securities Exchange}, 66 NW. U.L. REV. 100, 104 n.26 (1971).
\item \textsuperscript{240} Indeed, this was the express conclusion of a segment of the Attorney General's Committee to Study the Antitrust Laws as early as 1955. The group stated: "In the absence of express antitrust exemption, Congress did not intend that administrative agencies should, in all cases, be the sole forum for determination of antitrust questions stemming from conduct subject to their jurisdiction. This is especially so . . . since it is by no means clear that the courts will closely scrutinize agency determinations of the weight given to factors in evaluating 'public interest' . . . . Even where [administrative] approval occurs, it is clearly a proper subject for judicial scrutiny to determine whether or not the agency has accorded whatever Congressionally intended weight to promotion of competition the particular statute requires." \textit{REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS} 283-84 (1955).
\item \textsuperscript{241} 358 U.S. 334 (1959).
\item \textsuperscript{242} See note 127 \textit{supra}. The fact that the 1966 Bank Merger Act specifically required review de novo was not crucial to its approach; the provision was referred to as a factor simply additional to the traditional rule of reason approach built into Clayton Act review.
\item \textsuperscript{243} 410 U.S. 366 (1973).
\item \textsuperscript{244} See \textit{Ricci v. Chicago Mercantile Exch.}, 409 U.S. 289, 307 (1973).
\item \textsuperscript{245} 422 U.S. 694, 725 (1975).
\end{itemize}
should be tolerated "in the interests of the holders of all the outstanding securities" of mutual funds.247

Congressional judgments, of course, are found largely in the eye of the juridical beholder. The "unique problems" of the banking industry presented the Court with no difficulty in the Philadelphia National Bank, First City National Bank and Third National Bank cases.248 "Final authority," moreover, with respect to antitrust matters can scarcely be vested in an administrative tribunal by virtue of a non-competitive standard of review.249 And finally, the "interests of holders of all the outstanding securities" as an alternate standard is clearly a qualitatively lower one for insuring antitrust consideration than the "public interest" and "convenience" standards uniformly held inadequate in each and every case in which the contention was made that those standards could oust the antitrust laws.250 Therefore, while SEC expertise is a vital resource for the antitrust court, its section 22(f) imprimatur should not be conclusive. The Court in NASD would better have assumed the independent stance it maintained in the banking cases; its conclusions might have been the same, but perhaps they would have been more convincing.

Conclusion: NASD and the Future of the Antitrust Immunity Doctrine

It is apparent from the foregoing analysis that the NASD decision represents a singularly adamant refusal by a majority of the Court to adhere to its own clearly defined criteria for antitrust immunity—criteria just as adamantly reaffirmed as recently as 1973. If correct, however, any such analysis only begs the question: Is NASD evolution, or mere aberration, in the doctrine of antitrust immunity? A conclusion should be drawn. The antitrust bar must know whether the decision is a mere precedential bastard on the one hand, or the legitimate offspring of a new judicial union on the other; otherwise, whether

247. 422 U.S. at 729 (emphasis added).
248. See text accompanying notes 127-49 and especially the text accompanying note 146 supra.
249. See note 66 supra. Assuming that the Court adopted a deferential stance with respect to the SEC, as the dissent properly points out, the SEC has in fact made no determinations with respect to many of the particular practices alleged and indeed has considered amending the NASD rules to prohibit the same group boycott and price maintenance practices under attack. 422 U.S. at 746, 748 (White, J., dissenting).
the antitrust laws will be henceforth preempted by public interest regu-
latory standards will be forever in doubt.

There appear to be three possible interpretations of the impact of the decision upon the traditional doctrine of antitrust immunity. The first is that the majority chose to reject the traditionally stringent stand-
ard with respect to the mutual funds industry exclusively, and in fact intended no blanket, multi-industry extension of the doctrine at all. In
light of the unique characteristics of mutual funds and the theoretical threat posed by a price-competitive secondary market, the majority might well have concluded that the bulwark provided by vertical and horizontal market restrictions was indeed "necessary" under the Silver test, and that antitrust vulnerability ultimately would breed economic chaos. Thus, precedent was subordinated to pragmatism, and the tradi-
tional standard was ignored for the sake of economic stability. Such policy decisions are of course neither unique in judicial history, nor are they necessarily pernicious.

And yet, if the NASD holding were interpreted as an economic policy decision strictly confined to the mutual funds industry, it could not be said to constitute sound law even within those narrow confines. This is true largely because the Court eschewed an independent eco-
nomic analysis and thereby rendered an empirically unsound policy judgment. Of course, even assuming that the SEC's economic analysis was correct, because the Court so willingly sacrificed the antitrust laws to economic principles, NASD arguably constitutes an unwarranted usurpation of a function uniquely legislative: purely policy decisions with respect to the national economic well-being are properly left to the expertise of Congress and congressional fact finding committees. The primary duty of an antitrust court is to safeguard the public policy
embodied in the antitrust laws; to Congress alone belongs the prero-
gative to wholly preempt those laws for reasons purely economic. The very fact that it has expressly declined to exercise that prerogative vis-
à-vis the mutual funds industry should have made the Court far more circumspect about doing so in its stead.

An alternative approach to the decision, however, would be to classify it as revolutionary; that is, the NASD majority chose to adopt a new, public interest standard of regulatory review as sufficient ground for antitrust immunity. Because the NASD opinion so often echoes the Otter Tail dissent, if this approach is correct, the dissent in Otter Tail has clearly become the law in NASD, and the death knell for the established immunity doctrine could as well have been sounded in Otter Tail.

If the NASD majority in fact intended to foment a revolution, however, it would appear to have been unsuccessful for reasons purely practical. While only the legal neophyte would anticipate that the United States Supreme Court would expressly overrule its own precedent, both bench and bar, on the other hand, may justifiably expect that the Court's major departures from established doctrine will be predicated upon a careful re-examination of precedent. While the Court need not pay deference to precedent in creating new law, it surely cannot either ignore or misuse it without creating confusion in the lower courts as to what has, or has not, been declared to be the law applicable to future cases. In short, the Court cannot pour new wine into old bottles and expect the bench and bar to recognize a new vintage from the label.

The NASD decision fails as an effort to create a wholly new standard of immunity for its fundamental weaknesses in this regard. The Court made but passing reference to its earlier decisions on the immunity doctrine and yet paradoxically took great pains to justify its exemption of the mutual funds industry on traditional grounds of pervasiveness. Admittedly, it had perhaps little choice: as has been demonstrated, the decisions prior to NASD had uniformly held the public interest standard inadequate to exempt, had stringently required active antitrust regulatory scrutiny, without exception had rejected a deferential stance with respect to prior administrative determinations, had consistently required unambiguously express statutory exemption, and in dealing with industries peculiarly subject to limited anticompetitive practices as a matter of functional necessity, had nonetheless strictly applied the antitrust laws in accord with the weighty public policy in favor of their general enforcement.

Unfortunately, the only tangible result of the NASD opinion is thus a purely intangible basis for its finding of pervasiveness. Having failed either expressly to discard traditional immunity criteria on the one hand, or to unambiguously promulgate new ones on the other, the NASD holding is little more than a legal conundrum, and simply cannot be said to be the stuff of which judicial revolutions are made. It would not appear unreasonable to predict that the lower courts and the antitrust bar will agree, and that Otter Tail will be generally regarded as bloodied, but unbowed, by NASD.

The third and probably most accurate interpretation of the NASD holding is that which is dialectically compelled by the other two: If the case does not constitute a sound application of the antitrust immunity doctrine in its own right, and if on the other hand it cannot be said to reflect the caliber and clarity of judicial reasoning necessary to overrule that doctrine, then the decision must necessarily be adjudged wrongly decided. Unfortunately, however flawed NASD may be, it
will not be without some effect upon antitrust law in general and antitrust immunity in particular. Obviously, for example, competition from an active secondary market in mutual funds is now largely a function of SEC prerogative. And certainly NASD will not escape the attention of antitrust counsel representing industries subject to agency regulation under a public interest standard; defense motions on the basis of regulatory oversight will undoubtedly flood antitrust courts in the wake of NASD. Worse, agencies' prior determinations with respect to anticompetitive effects of consolidations, mergers, and price-fixing activities bearing their administrative imprimatur may be accorded inordinate weight in judicial antitrust proceedings.

It is perhaps the public policy embodied in the antitrust laws, however, which will ultimately suffer the greatest harm as a result of the NASD decision. Exemptions from the antitrust laws have always been strongly disfavored, and implicit in the cavalier treatment accorded them in NASD is a potentially pernicious attitude that the antitrust laws represent mere anachronisms in an economy increasingly subject to governmental regulation. But to paraphrase what Justice Douglas so eloquently stated in the Philadelphia National Bank case, the fact that industries critical to the nation's welfare may be subject to increasing regulation only makes the play of competition (and the rigorous enforcement of the antitrust laws necessary to secure it) not less important, but more so.252

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