

THE IMPLIED ANTITRUST
IMMUNITY ANALYSIS OF
CREDIT SUISSE V. BILLING:
A FRAMEWORK CONGRESS SHOULD
APPLY TO MCCARRAN-FERGUSON ACT
REPEAL EFFORTS

Morgan Lee*

*Since 1945 the McCarran-Ferguson Act has exempted the “business of insurance” from the federal antitrust laws to “the extent that such business is not regulated by State law.” This Note questions whether the ongoing attempts by members of Congress to repeal the antitrust exemption for the business of insurance is good policy. In assessing the implications of repeal, this Note analyzes whether the addition of federal antitrust enforcement would be compatible with the increasingly regulated health insurance industry. As a case study, this Note applies the implied antitrust immunity framework developed by the Supreme Court in *Billing v. Credit Suisse to Massachusetts’ insurance regulations.**

This Note argues that the implied immunity doctrine, in seeking to determine how Congress would have intended two regulatory systems to interact, can function as a prudential tool to aid Congress when it seeks to either alter the reach of the antitrust laws or create regulations that assume the function of the antitrust laws.

* J.D. Candidate 2015, Columbia Law School; A.B. 2008, Princeton University. Many thanks to Professor Harvey J. Goldschmid for his invaluable insight and guidance throughout the research and writing process. Additional thanks to Charles, Gloria, and Chelsea Lee for their support, and to the outstanding staff and editorial board of the *Columbia Business Law Review* for their assistance in preparing this Note for publication.

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I. INTRODUCTION

Since 1945 Congress has granted the “business of insurance” an exemption from the federal antitrust laws.¹ This exemption is part of the McCarran-Ferguson Act² (“MFA”), which generally places the regulation of the “business of insurance” under the control of state, not federal, government.³ Specifically, the MFA limits the application of the federal antitrust laws to “the extent that such business is not regulated by State law.”⁴ More recently, during the congressional negotiations surrounding the Patient Protection and Affordable Care Act⁵ (“ACA”), “[e]arlier versions of the health care reform bill . . . contained provisions that would have effectively repealed the health

¹ See McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (2012). This act states:

That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Id. Between the passage of the MFA and June 30, 1948, the federal antitrust laws were suspended. 15 U.S.C. § 1013 (2012). These provisions state:

Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act [15 U.S.C. 41 et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

Id.

² McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (2012).

³ See *id.* § 1011.

⁴ *Id.* § 1012(b).

⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010).

insurance industry's federal antitrust exemption"⁶ Ultimately, Congressional Democrats removed the repeal provisions in order to attract enough votes to pass the healthcare reform bill.⁷ Yet this bargain has not deterred members of Congress from presenting bills to eliminate the antitrust exemption as applied to the business of health insurance.⁸

This Note seeks to explore whether these ongoing attempts to repeal the MFA antitrust exemption are sound policy. This Note assesses whether repeal of the MFA antitrust exemption would lead to better regulatory outcomes for the business of insurance, primarily by analyzing whether the addition of federal antitrust enforcement would be compatible with the increased regulation of the health insurance industry envisioned by the ACA. As a means of evaluating the compatibility of the two regulatory systems, antitrust and insurance, this Note will borrow the test developed in the Supreme Court's recent jurisprudence on implied antitrust immunity. Generally, implied repeal is employed where a newer statute conflicts with an existing statute, forcing the court to "minimally [pare] back [the] older law where there is no plausible understanding of the laws that can avoid the inconsistency."⁹ Antitrust immunity involves situations in which Congress has developed a series of regulations for an industry without

⁶ Carl W. Hittinger & John D. Huh, *Health Insurance Antitrust Exemption Temporarily Escapes Repeal*, THE LEGAL INTELLIGENCER (Apr. 5, 2010); see also John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBR. J. 131 (2013).

⁷ See sources cited *supra* note 6.

⁸ Since the passage of the ACA eight such bills have been proposed: H.R. 1150, 112th Cong. (2011); H.R. 1943, 112th Cong. (2011); H.R. 5838, 112th Cong. (2012); H.R. 99, 113th Cong. (2013); H.R. 344, 113th Cong. (2013); H.R. 743, 113th Cong. (2013); H.R. 911, 113th Cong. (2013); H.R. 3121, 113th Cong. (2013).

⁹ Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy,"* 45 GONZ. L. REV. 437, 439 (2010).

explicitly stating whether the existing federal antitrust laws still apply. An implied antitrust exemption is thus found in instances where the courts determine that there is “sufficient incompatibility [between the regulatory framework and federal antitrust laws] to warrant an implication of preclusion”¹⁰ from the antitrust laws.

In utilizing the implied immunity test, this Note transplants a judicial test, strongly associated with federal securities law, to insurance regulations that have historically been the domain of state government. This Note will argue that the implied immunity doctrine, in seeking to determine how Congress would have intended the two regulatory systems to interact, can function as a prudential tool to aid Congress when it aims to either alter the reach of the antitrust laws or create regulations that could be perceived as assuming the function of the antitrust laws.

Some believe that *Billings*¹¹ and *Trinko*¹², two recent Supreme Court decisions that discuss the relationship between federal antitrust laws and regulated industries, infringe on the legislative role of Congress by proposing tests which permit courts to privilege industry-specific regulation over antitrust enforcement.¹³ While such critiques might be valid, this Note argues¹⁴ that the Court’s implied immunity test provides an opportunity to apply judicial antitrust expertise to congressional decision-making that involves the interaction of antitrust and regulated industries. In using the *Billings* test as the foundation for the MFA analysis, this Note is not suggesting that a court would necessarily find the test applicable to state insurance regulation. Instead, the *Billings* test is merely one way of assessing the compatibility of antitrust and regulated industries and thus an effective means of evaluating the implications of repealing the MFA.

¹⁰ *Credit Suisse Secs. (USA) LLC. v. Billings*, 551 U.S. 264, 275 (2007).

¹¹ *Id.*

¹² *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹³ *See infra* Part III.C.

¹⁴ This is not to diminish the fact that the Court in these decisions may have made judgments typically reserved to Congress.

Congress was motivated to pass the MFA by a desire to protect the traditional state regulation of insurance from infringement by federal actors¹⁵—a view that might be outdated in light of the passage of the ACA.¹⁶ Further, federal and state¹⁷ regulation of the health insurance industry is only growing, suggesting that increasing federal antitrust enforcement might be disruptive to the new regulatory framework imposed by the ACA. As this framework is presently in a state of transition, this Note will use Massachusetts' current insurance regulations as a placeholder in assessing the interaction of federal antitrust laws with the regulation of insurance. By applying the Supreme Court's implied immunity test to the Massachusetts insurance regulations, this Note seeks to determine whether the increasing state and federal regulation of the business of insurance provides a new justification for the MFA's exemption.

Part II discusses the enactment of the MFA and summarizes the standards developed by the Supreme Court to determine the breadth of the antitrust exemption. It also assesses the competency, both perceived and real, of state antitrust regulators and the extent to which the MFA creates an enforcement gap (specifically as it relates to ratemaking activities) in the "business of insurance." Part III explores the relationship between the doctrine of implied immunity and antitrust law, with a focus on the reasoning of

¹⁵ See *infra* Part II.A.

¹⁶ The ACA increases the federal government's ability to regulate what has historically been called the business of insurance by requiring states to review insurance rate increases of more than ten percent. If a state does not have an effective rate review system, the Department of Health and Human Services will review rate increases over ten percent. Rate Increase Disclosure and Review, 76 Fed. Reg. 29,964, 29967–69 (May 23, 2011) (to be codified at 45 C.F.R. pt. 154).

¹⁷ While the ACA, a federal law, provides general guidelines about the structure of state insurance exchanges, states have discretion "over the model, governance, and performance measures of the exchanges." Kimberly Cogdell Boies, *Using the Flexibility of the Affordable Care Act to Reduce Health Disparities by Creatively Structuring Health Insurance Exchanges*, 26 J. C.R. & ECON. DEV. 1, 3 (2011).

the *Trinko* and *Billing* decisions. Finally, in an analysis that both assesses the applicability of the implied immunity test to non-securities regulation and evaluates the implications of repealing the MFA, Part IV applies the implied immunity test to the insurance regulations of Massachusetts.

II. THE SCOPE OF THE MCCARRAN-FERGUSON ANTITRUST EXEMPTION AND THE CREATION OF AN ENFORCEMENT GAP

Much scholarly work¹⁸ has been devoted to the question of whether the MFA antitrust exemption makes sense in light of the general presumption¹⁹ against such exemptions.²⁰ While the complete history of the MFA is beyond the scope of this Note, and can be found in existing literature,²¹ Part II provides an overview of how the federal courts have interpreted the scope of the antitrust exemption created by the MFA and the extent of the enforcement gap created by

¹⁸ See Betram C. Dedman et al., *Comments on the Repeal or Amendment of the McCarran-Ferguson Act: Task Force of the Antitrust Exemptions Committee Antitrust Section*, American Bar Association, 48 ANTITRUST L.J. 997 (1979).

¹⁹ Recently this presumption was forcefully articulated by the Supreme Court in *FTC v. Phoebe Putney* where the Court began its discussion of the state action doctrine with the following sentence: "But given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication." *FTC v. Phoebe Putney*, 133 S. Ct. 1003, 1010 (2013) (internal citation omitted).

²⁰ Christine A. Varney, *Antitrust Immunities*, 89 OR. L. REV. 775 (2011). "[T]here are about thirty federal statutes that exempt some conduct from antitrust entirely, that limit the applicability of antitrust laws to it, or that limit the penalties that can be assessed against it." *Id.* 775 n.1.

²¹ See Sandra B. McCray, *Federal Preemption of State Regulation of Insurance: End of a 200-Year Era?*, 23 PUBLIUS: J. FEDERALISM 33, (1993); Chris Sagers, *Much Ado About Possibly Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort*, 28 YALE L. & POL'Y REV. 325 (2010); Charles D. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587 (1978).

the exemption. To provide some context, this Part will begin with a summary of the origins of the MFA.

A. Congressional Reaction to the Supreme Court's Inclusion of the "Business of Insurance" Within the Scope of the Commerce Clause

While today the MFA is viewed by some as "one of the worst accidents of American history,"²² its origins were decidedly deliberate. The Act was conceived as a means of safeguarding the authority of the states to regulate the insurance industry.²³ This move was prompted by the Supreme Court's decision in *South-Eastern Underwriters Association*,²⁴ in which the Court overturned decades of precedent²⁵ to hold that the business of insurance is "commerce," and accordingly, Congress has the authority to regulate interstate insurance transactions.²⁶ Additionally, because the insurance company at the center of the case was accused of price fixing and staging boycotts,²⁷ the Court went on to hold that the Sherman Act applies to the anticompetitive conduct of an insurance company.²⁸

²² Press Release, Senator Charles E. Schumer, Two Days After Health Insurance Lobby Tried to Sucker-Punch Health Care Reform Effort . . . Schumer: Revoke Health Insurance Industry Antitrust Exemption as Part of Health Care Overhaul (Oct. 14, 2009), available at <http://www.schumer.senate.gov/record.cfm?id=318929>, archived at <http://perma.cc/BZ55-X6WS>.

²³ See Spencer L. Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 554–55 (1958).

²⁴ *United States v. S.-E. Underwriters Ass'n.*, 322 U.S. 533 (1944).

²⁵ See *Paul v. Virginia*, 75 U.S. 168, 183 (1868) (holding that the issuance of an insurance policy is not commerce); *Hooper v. California*, 155 U.S. 648, 654, 655 (1895) ("The business of insurance is not commerce."); *N.Y. Life Ins. Co. v. Deer Lodge Cnty.*, 231 U.S. 495, 510 (1913) ("contracts of insurance are not commerce at all, neither state nor interstate").

²⁶ *S.-E. Underwriters Ass'n.*, 322 U.S. at 553.

²⁷ *Id.* at 535.

²⁸ *Id.* at 553–55 ("A general application of the [Sherman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which

The Court's decision troubled both insurance companies and the individual states; the former feared that some of their current activities would run afoul of the Sherman Act and the latter feared that state taxation of insurance companies would be jeopardized.²⁹ In a conscious effort to undo the Supreme Court's decision and keep the regulation of insurance within the domain of the states,³⁰ the House of Representatives first sought a blanket exemption of the insurance industry from federal antitrust laws, but the Senate rejected this attempt.³¹ In what was to become the framework for the MFA, the National Association of Insurance Commissioners ("NAIC") also proposed a plan that maintained state regulation of insurance without rendering the use of the federal antitrust laws moot with respect to the industry.³² The Supreme Court has interpreted the MFA as going beyond restoring the status quo: the MFA was transformative in that it altered the legal landscape by "overturning the normal rules of pre-emption."³³

gave it birth."). Additionally, the Court went on to dismiss the argument that the imposition of federal antitrust enforcement would be disruptive to the state regulatory schemes. While the Court's rejection of this argument might have been correct at the time, later sections of this Note will question whether the changing nature of insurance regulations undermines the premise for the Court's ruling on this specific argument.

²⁹ See Alan M. Anderson, *Insurance and Antitrust Law: the McCarran-Ferguson Act and Beyond*, 25 WM. MARY L. REV. 81, 85 (1983).

³⁰ While the MFA created a presumption of state regulation of insurance, Congress is still able to regulate the business of insurance, provided the legislation "specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (2012).

³¹ See Anderson, *supra* note 29, at 85.

³² See *id.* at 86.

³³ United States Dep't of Treasury v. Fabe, 508 U.S. 491, 507 (1993). This case held:

The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of pre-emption. Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted "for

B. The Definition of the “Business of Insurance” for Purposes of the McCarran-Ferguson Antitrust Exemption

Initially, in *Pireno*,³⁴ the Court highlighted³⁵ three factors in determining whether the antitrust exemption of the MFA applies. The first is whether the practice has the effect of either transferring or spreading the policyholder’s risk. The second consideration is whether the practice is “an integral part of the policy relationship between the insurer and the insured.”³⁶ The third consideration is whether the practice is limited to parties in the insurance industry.³⁷

Subsequently in *Fabe*,³⁸ the Court suggested that the above analysis, developed in the antitrust context, should be distinguished from cases involving the first clause of the MFA,³⁹ which only deals with the state regulation of insurance, not the antitrust exemption for the “business of insurance.”⁴⁰ The Court supported this distinction by characterizing the MFA’s antitrust exemption as a “secondary goal” that “carve[d] out only a narrow exemption for the “business of insurance from the federal antitrust

the purpose of regulating the business of insurance” do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.

Id.

³⁴ Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982).

³⁵ Three years prior to *Pireno* the Supreme Court in *Group Life & Health Ins. Co. v. Royal Drug Co.* identified the relationship between insurer and insured and the spreading of risk as “commonly understood aspect[s] of the business of insurance.” *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211–15 (1979).

³⁶ *Pireno*, 458 U.S. at 129.

³⁷ *Id.*

³⁸ U.S. Dep’t of Treasury v. Fabe, 508 U.S. 491 (1993).

³⁹ Two clauses of the MFA are at issue in the proceeding analysis; the first is 15 U.S.C. §§ 1012(a) (2012), which declares that business of insurance “shall be subject to the laws of the several states which relate to the regulation or taxation of such business.” The second clause is 15 U.S.C. §§ 1012(b)(2012), which limits the application of the antitrust laws to the business of insurance.

⁴⁰ *Fabe*, 508 U.S. at 504.

laws.”⁴¹ The primary goal of the MFA is to “grant the States broad regulatory authority over the business of insurance.”⁴² Accordingly, courts should focus on whether the state laws “possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance.”⁴³ By utilizing different definitions of the “business of insurance,” the Court has preserved the breadth of state regulation of insurance while limiting the reach of the antitrust exemption.

The Court’s application of Congress’ policy judgment with respect to the co-existence of state insurance regulation and federal antitrust enforcement can be juxtaposed against the Court’s use of the implied antitrust immunity framework in *Billing*, where the Court grappled with Congress’ silence on the relationship between securities regulation and antitrust enforcement. While it is expected and necessary for the Court to develop the parameters of an implied antitrust immunity, due to congressional silence, it is less expected that the Court would play such a central role in shaping the scope of an explicit statutory antitrust exemption. Part IV will explore the competing competencies of Congress and the Supreme Court to make antitrust policy judgments.

C. The Nature and Adequacy of State Antitrust Enforcement of the “Business of Insurance”

The traditional discussion of the MFA involves the question of whether state regulation is sufficient to ensure that activities characterized by the courts as the “business of insurance” are patrolled for anticompetitive behavior.⁴⁴ Even though many of the states modeled their antitrust statutes after the federal antitrust laws,⁴⁵ a number of scholars have

⁴¹ *Id.* at 505.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Note, *State Supervision over Insurance Rate-Making Combinations under the McCarran Act*, 60 YALE L.J. 160, 163–64 (1951).

⁴⁵ *The Antitrust Laws*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>, archived at <http://perma.cc/E96J-24ZU> (“[M]ost states have antitrust laws that are enforced by state attorneys general or private

been critical of the effectiveness of state attorneys general in the realm of antitrust. Part of this criticism is premised on the fact that the offices are sometimes underfunded and thus ill-equipped to take on investigations.⁴⁶ Alternatively, others have questioned the policy choices of the state antitrust enforcers. Combining these two concerns, Judge Richard Posner, after working as a mediator on the *Microsoft*⁴⁷ litigation, suggested that state attorneys general be stripped of most of their authority to bring federal and state antitrust suits. He argued that their lack of resources renders them unable “to do more than free ride on federal antitrust litigation, complicating its resolution.”⁴⁸ Posner also noted that “[state attorneys general] are too subject to influence by interest groups that may represent a potential antitrust defendant’s competitors.”⁴⁹

At the same time, certain scholars argue that state attorneys general sometimes operate through less formal channels to provide competition advice to state administrative agencies.⁵⁰ While it is true that the federal antitrust agencies offer advisory opinions to state agencies,⁵¹ these opinions can hardly be characterized in the same way as the informal “interventions” that occur between state

plaintiffs. Many of these statutes are based on the federal antitrust laws.”).

⁴⁶ Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 685 (2003).

⁴⁷ U.S. v. Microsoft Corp., 253 F.3d 34, 47–48 (D.C. Cir. 2001).

⁴⁸ See Calkins, *supra* note 46, at 685.

⁴⁹ See *id.* at 685.

⁵⁰ Peter C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where is Attorney General “Waldo”?*, 56 ANTITRUST BULL. 771, 807 (2011).

⁵¹ Comment from FTC Staff to Texas State Board of Dental Examiners (Oct. 6, 2014), available at http://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-state-board-dental-examiners/141006tsbdecomment1.pdf, archived at <http://perma.cc/2J9M-QBGV> (“[FTC] staff have submitted comments about the competitive effects of restrictions on the business practices of state-licensed professionals to state legislatures, administrative agencies, and others.”).

officials.⁵² Moreover, the informality of the interactions might hinder the independence of state attorneys general to investigate “business of insurance” activities of companies regulated by state insurance regulators. Such interactions could be helpful in better informing antitrust enforcers about the structure of the industry and what insurers are permitted to do. However, this cooperation also has the potential to result in state antitrust enforcers unnecessarily deferring to state insurance regulators⁵³ who may be susceptible to regulatory capture due to their long-term relationship with insurance companies. Thus, state antitrust enforcers might themselves become subject to “capture by proxy” due to their deference to “captured” state insurance officials.

The above criticisms are not meant to characterize the work of all state attorneys general;⁵⁴ in fact, some state regulators have argued that state attorneys general are “uniquely qualified to represent the interests of their consumers and public entities in state and federal antitrust matters.”⁵⁵ Instead, the concerns cited above reinforce the

⁵² Carstensen, *supra* note 50, at 807 n.115 (recalling conversations with “several present and former assistant attorneys general” who “intervened in regulatory and legislative matters to suggest that proposals were unjustifiably anticompetitive.”). The aforementioned interventions concern state regulations that potentially have anticompetitive effects. As state insurance regulators are often entrusted with ensuring that insurance markets are competitive, the informal nature of these interactions might also appear in situations where the state attorneys general believe that a regulated insurer has escaped the supervision of the state agency. In essence, this Note suggests capture by proxy.

⁵³ *Id.* at 774.

⁵⁴ Even detractors of the effectiveness of state attorneys generals acknowledge that some have been effective in investigating anticompetitive conduct in the health insurance industry. *Id.* at 806 (highlighting the inaction of the Florida AG but acknowledging the work of the New York AG in uncovering “massive price fixing in insurance markets”).

⁵⁵ Patricia A. Conners, *Current Trends and Issues in State Antitrust Enforcement*, 16 LOY. CONSUMER L. REV., 37, 38 (2003).

view of some federal antitrust officials⁵⁶ that the MFA creates an enforcement gap due to the unwillingness of the courts to make the extent of state insurance regulation a factor in deciding whether federal antitrust laws are preempted.⁵⁷ Thus, under this view, the fact that federal antitrust enforcement is preempted is no guarantee of adequate state antitrust enforcement. Finally, with regards to the existence of an enforcement gap, some critics argue that federal antitrust agencies “enjoy too many advantages to make a comparison [with state enforcers] meaningful.”⁵⁸ Thus, the question is not whether the state antitrust agencies function as well as the federal agencies, but rather whether they function adequately enough to patrol anticompetitive behavior in the business of insurance.

⁵⁶ See *Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry*, Hearing Before S. Comm. on Judiciary, 111th Cong. 6–34 (2009) (statement of Christine A. Varney, Assistant Att’y Gen., Antitrust Div, U.S. Dep’t of Justice).

⁵⁷ See Staff Paper, *Selections of Materials Submitted to the National Commission for the Review of Antitrust Laws and Procedures: Part II*, 48 ANTITRUST L.J., 1245, 1259 (1979) (“[M]ost courts have ruled that the mere presence of a state regulatory scheme having the potential to investigate and remedy challenged conduct—regardless of the actual effectiveness of the scheme in supervising insurance firms—is sufficient to constitute the type of “regulation” necessary to oust antitrust jurisdiction under the McCarran Act.”).

⁵⁸ Calkins, *supra* note 46, at 696 (“While state antitrust enforcers enjoy only three primary comparative advantages, federal enforcers enjoy boundless advantages. The two federal antitrust enforcement agencies, the FTC and the Antitrust Division, enjoy comparatively massive resources, sweeping criminal enforcement powers, an elaborate merger notification system, and traditional respect from Congress and the courts.”).

III. DOCTRINE OF IMPLIED IMMUNITY

The judicial determination that one statute impliedly immunizes actors from the reach of another statute is not a new tool of statutory interpretation. What some consider a paradigm shift is the Supreme Court's expansion of the existing doctrine in two recent cases. Part III will begin with a brief history of the doctrine of implied immunity, shift into a discussion of *Trinko* and *Billing*, and conclude by exploring how some scholars have reacted to these two decisions.

A. History of the Implied Immunity Doctrine

The doctrine of implied immunity is a tool of statutory interpretation of general application.⁵⁹ Implied immunity is used in situations where two acts of a single legislature are inconsistent; the doctrine ultimately seeks to reconcile the laws in a way that preserves each to the greatest extent possible.⁶⁰ Prior to *Trinko* and *Billing*, the Supreme Court decided three cases⁶¹ that articulated the principle of implied immunity from the antitrust laws with respect to the securities laws. Even though commentators debate whether the Court has deviated from these cases,⁶² the doctrinal basis on which *Trinko* and *Billing* stand is still relevant.

In *Silver*, the defendant New York Stock Exchange ("NYSE") ordered its members to terminate stock ticker wire service for the plaintiff.⁶³ The issue before the Court was whether the Securities and Exchange Act of 1934⁶⁴ ("Exchange Act") created a duty for exchanges to self-regulate which was "so pervasive" as to exempt the NYSE

⁵⁹ See Markham, *supra* note 9, at 454.

⁶⁰ *Id.*

⁶¹ The cases are: *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 344 (1963); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 682 (1975); and *U.S. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694, 719–720 (1975).

⁶² See *infra* Part III.C.

⁶³ See *Silver*, 373 U.S. at 344.

⁶⁴ Securities and Exchange Act of 1934, 15 U.S.C. §§ 78(a)–78pp (2012).

from antitrust liability.⁶⁵ The Court acknowledged both the importance of exchanges to the economy and the fact that the Exchange Act granted exchanges the ability to create rules for its members.⁶⁶ Nevertheless, the Court concluded that the correct analysis was one that “reconcile[d] the operation of both statutory schemes with one another rather than holding one completely ousted.”⁶⁷ Noting that the Exchange Act did not contain an express antitrust exemption (meaning that any repeal would need to be implied), the Court reconfirmed that “repeals by implication are not favored.”⁶⁸ Accordingly, the Court held that the guiding principle for reconciling the two statutes was that the repeal of the antitrust laws would be implied “only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.”⁶⁹

After establishing this background principle, the Court found that because the Securities and Exchange Commission (“SEC”) lacked jurisdiction to review the enforcement of the rules created by exchanges,⁷⁰ the issue of an antitrust exemption did not “involve any problem or conflict or coextensiveness of coverage” with that of the SEC.⁷¹ Further, the Court found that because there was no mechanism built into the SEC regulatory scheme to monitor exchange rules for anticompetitive effects,⁷² the application of the antitrust laws would be an appropriate means to check such conduct.⁷³ Applying the principle that any violation of the antitrust law is justified only to the extent necessary to achieve the aims of the Exchange Act, the Court concluded that no such justification could be found for the conduct of the NYSE.⁷⁴

⁶⁵ *Silver*, 373 U.S. at 347.

⁶⁶ *Id.* at 349–50.

⁶⁷ *Id.* at 357.

⁶⁸ *Id.* at 357.

⁶⁹ *Id.* at 347.

⁷⁰ *Id.*

⁷¹ *Id.* at 358.

⁷² *Id.* at 358–59.

⁷³ *Id. at*, 359–60.

⁷⁴ *Id.* at 361.

One of the Court's citations provides additional background on how the majority perceived the doctrine of implied exemption. Commenting on the SEC regulations, the Court noted, "the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws."⁷⁵ As a comparison, the Court cited sections of an article where the authors, after analyzing the regulation of electrical energy distribution, found that "the scope of the regulation [was] so great as to render management virtually an agent of the regulatory commissions."⁷⁶ The authors concluded that punishing conduct under such a regime "would constitute an indirect negation of administrative authority."⁷⁷ The second section cited by the Court covered a test proposed by the authors: "the mushroom doctrine."⁷⁸ This theory assumes that true regulatory intervention will expand until it "fills the gaps in the existing structure of controls," thus making it "foolish to confuse matters by applying antitrust legislation in the interim."⁷⁹ Accordingly, the thesis of the mushroom doctrine is that "[o]nce true intervention has been decided upon, there is no further room for enforcement of antitrust legislation."⁸⁰ Though the Court only cites to the article as a comparison and does not explicitly adopt the mushroom doctrine, this reference can be interpreted to mean that the Court believes it is possible for a regulatory framework to be so pervasive as to preempt the role of antitrust law.

While the *Silver* Court concluded that an implied exemption could not be found given the composition of the regulatory regime, it also suggested that a different outcome might be reached if the "review of exchange self-regulation" was "provided through a vehicle other than the antitrust

⁷⁵ *Id.* at 360–61.

⁷⁶ G.E. Hale & Rosemary D. Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 48 (1962).

⁷⁷ *Id.*

⁷⁸ *Id.* at 57.

⁷⁹ *Id.*

⁸⁰ *Id.* at 58.

laws.”⁸¹ A little over ten years later, the Court granted certiorari in *Gordon*.⁸² The Court described *Gordon* as “that ‘different case’ to which the *Silver* Court referred.”⁸³ In *Gordon*, a group of small investors alleged that the rules of the NYSE “fixed commission rates” for “transactions less than 500,000 dollars” in violation of sections 1 and 2 of the Sherman Act.⁸⁴ The distinguishing factor between this case and *Silver* was Congress’ amendment⁸⁵ of the Exchange Act to give the “SEC direct regulatory power over exchange rules and practices with respect to ‘the fixing of reasonable rates of commission.’”⁸⁶ Further, the SEC was authorized to require that exchanges alter their rules if such change was “necessary or appropriate for the protection of investors or to insure fair dealings in securities traded in upon such exchange.”⁸⁷ The Court held that the *Silver* “requirements for implied repeal [were] clearly satisfied” in the present case and that the application of the antitrust laws would “unduly interfere . . . with the operation of the Securities Exchange Act.”⁸⁸

On the same day that the court decided *Gordon*, it also decided another securities-related antitrust case, *United States v. National Association of Securities Dealers, Inc.* (“*NASD*”).⁸⁹ In *NASD*, the Department of Justice alleged that the defendants, a group comprised of “*NASD*, and certain mutual funds, mutual-fund under-writers, and securities broker-dealers” had conspired to “restrict the sale and fix the resale prices of mutual-fund shares in the secondary

⁸¹ *Id.* at 360.

⁸² *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659 (1975).

⁸³ *Id.* at 685.

⁸⁴ *See id.* at 660–61.

⁸⁵ *See id.* at 679.

⁸⁶ *Id.* at 685.

⁸⁷ *Id.* (“[R]epeal of the antitrust laws will be ‘implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.’”) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)).

⁸⁸ *Id.* at 685–86.

⁸⁹ *U.S. v. Nat’l Ass’n of Secs. Dealers, Inc.*, 422 U.S. 694 (1975).

market.”⁹⁰ This case can be distinguished from both *Silver* and *Gordon*. Unlike in *Silver*, the SEC was authorized to regulate the conduct of the alleged conspiracy.⁹¹ Contrary to the facts of *Gordon*, where the SEC had “taken an active role in review[ing]” the conduct at issue,⁹² here the SEC had failed to prescribe any standards for the above-mentioned conduct.⁹³ The Department of Justice argued that this “unexercised power to prescribe rules and regulations [was] insufficient to create repugnancy between its regulatory authority and the antitrust laws.”⁹⁴

The Court rejected the Department of Justice’s arguments and found that the defendants were “immune from liability under the Sherman Act” as the Court could “see no way to reconcile the Commission’s power to authorize these restrictions with the competing mandate of the antitrust laws.”⁹⁵ Additionally, echoing the “conflict language” of *Silver*,⁹⁶ the Court concluded that to permit “an antitrust action for activities so directly related to the SEC’s responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards.”⁹⁷ Thus the Court found an implied antitrust immunity despite the failure of the SEC⁹⁸ to articulate what standards applied in determining what conduct was impermissibly anticompetitive.

⁹⁰ *Id.* at 700.

⁹¹ *See id.* at 721.

⁹² *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 685 (1975).

⁹³ *Nat’l Ass’n of Secs. Dealers, Inc.*, 422 U.S. 694 at 721.

⁹⁴ *Id.*

⁹⁵ *Id.* at 721–22.

⁹⁶ *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963).

⁹⁷ *Nat’l Ass’n of Secs. Dealers, Inc.*, 422 U.S. 694 at 735.

⁹⁸ While no standards were passed with respect to the price fixing conduct at issue, in a footnote the Court writes that the SEC had recently requested that the “NASD amend its Rules of Fair Practice to prohibit agreements between underwriters and broker-dealers that preclude broker-dealers, acting as agents, ‘from matching orders to buy and sell fund shares in a secondary market at competitively determined prices and commission rates.’” *Id.* at 718 n.31.

While the above three securities-based cases dominate the pre-*Billing* jurisprudence on implied antitrust immunity, in cases outside the securities context, the Supreme Court's record is mixed: it has dismissed some due to the existence of a regulatory framework,⁹⁹ but in other instances refused to find implied antitrust immunity.¹⁰⁰ With respect to the telecommunications industry, then-Judge Anthony M. Kennedy noted in a Ninth Circuit opinion¹⁰¹ that the courts have addressed and rejected the defense of implied immunity on numerous occasions.¹⁰² In rejecting the claim of implied

⁹⁹ See *Keogh v. Chi. & Nw.Ry. Co.*, 260 U.S. 156, 163–64 (1922) (dismissing an antitrust claim against freight shippers concerning rates filed with the Interstate Commerce Commission because the maintenance of such action would require the Commission to speculate about the possibility of a “hypothetical lower rate”); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 388–89 (1973) (dismissing antitrust complaint against Airline as the conduct alleged in the complaint “was within the power of the [Civil Aeronautics] Board to control and was central to the mandate of s[ection] 408 [of the Federal Aviation Act]”).

¹⁰⁰ See *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 452, 455 (1945) (rejecting defendant's claim that Georgia failed to state an antitrust claim, as the injunction relief sought by Georgia was “not a matter subject to the jurisdiction of the Commission”); *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 374–75 (1973) (finding “no basis for concluding that the limited authority of the Federal Power Commission . . . was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation”).

¹⁰¹ *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 719, 719 n.1 (9th Cir. 1981) (“Many courts have addressed the question [“whether a telephone company may be sued for damages and injunctive relief for attempting to monopolize and restrain trade in the distribution and sale of telephone terminal equipment”]; the Second, Third, Fifth, and Eighth Circuits have refused to accord immunity under similar circumstances.”).

¹⁰² See *id.* at 727–35 (rejecting defendant's reliance on *NASD* and *Gordon* to argue that there is an implied immunity from the antitrust laws under the Communications Act of 1934); *U.S. v. Radio Corp. of Am.*, 358 U.S. 334, 338 (1959) (rejecting defendant's argument that regulatory scheme created by the Communications Act of 1934 had “displaced that of the Sherman Act” and that “the only method available to the Government for redressing its antitrust grievances was to intervene in the FCC proceedings”); *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 82–83 (2d Cir. 1981) (finding repeal cannot be implied as there is no “agency, acting pursuant to a specific Congressional directive, [that] actively regulates the particular conduct challenged” and “the regulatory scheme is [not] so

antitrust immunity, Kennedy cautioned against “the uncritical transfer of abstract characterizations about the implied immunity of one industry to the different circumstances of another industry.”¹⁰³ While the Supreme Court has not adopted this viewpoint,¹⁰⁴ the warning against “uncritical transfer” will inform this Note’s analysis of whether the evolving state and federal regulation of the business of insurance can create a framework in which actors should receive immunity from federal antitrust laws. Accordingly, it might be necessary to rely on factors outside of the *Billing* framework to critically evaluate the compatibility of federal antitrust laws and the regulation of the business of insurance. Thus, while the cases most closely associated with the application of implied antitrust immunity were decided in the securities context, it is important to remember that the Court has not explicitly limited the doctrine to securities regulation.

B. Recent Developments: *Trinko* and *Billing*

1. *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004)

The statute challenged in *Trinko*,¹⁰⁵ the Telecommunications Act of 1996 (1996 Act),¹⁰⁶ includes an antitrust savings clause which states, “nothing in this Act . . . or the amendments made by this Act shall be

pervasive that Congress must be assumed to have forsworn the paradigm of competition”); *Sound, Inc. v. Am. Tel. & Tel. Co.*, 631 F.2d 1324, 1329–31 (8th Cir. 1980) (finding no implied antitrust immunity after “consider[ing] both the statute [(Communications Act of 1934)] under which the industry is regulated and the exercise of regulatory authority over the challenged activity pursuant to the statute”).

¹⁰³ *Phonetele*, 664 F.2d at 727.

¹⁰⁴ As we will see in the next section, the Supreme Court in *Trinko* appears to express a willingness to apply the securities-rooted implied immunity framework to the telecommunications industry.

¹⁰⁵ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹⁰⁶ Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 143 (codified as amended in scattered sections of 47 U.S.C.).

construed to modify, impair, or supersede the applicability of any of the antitrust laws.”¹⁰⁷ Unlike in *Silver*, *Gordon*, and *NASD* where the securities statutes at issue did not specifically address the relationship between new regulations and antitrust laws, here, Congress clearly expressed an intention for the regulatory framework to coexist with the antitrust laws. The Supreme Court found that this provision “bars a finding of implied immunity.”¹⁰⁸

Yet prior to unequivocally ending the discussion of implied immunity, the Court opined on the regulatory framework created by the 1996 Act. After describing the duties imposed by the 1996 Act, the Court stated that “a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity.”¹⁰⁹ By itself, this comment could hardly be characterized as adding much to the implied immunity canon, but the Court did not stop there. After citing *Gordon* and *NASD*, two cases where the Court previously found an implied immunity, the Court stated, “In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency’s regulatory scheme ‘that might be voiced by courts exercising jurisdiction under the antitrust laws.’”¹¹⁰

Though this last statement is dicta, it is hard to ignore the Court’s suggestion that a non-securities regulatory scheme would be a “good candidate” for implied immunity. Additionally, unlike prior discussions of the implied immunity doctrine, which begin with the premise that the interpretation is disfavored, nowhere in its discussion does the *Trinko* Court express such a sentiment. While such an omission might be due to brevity or the fact that it is dicta,

¹⁰⁷ 47 U.S.C. § 152 (2012).

¹⁰⁸ *Trinko*, 540 U.S. at 406.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting *U.S. v. Nat’l Ass’n of Secs. Dealers, Inc.*, 422 U.S. 694, 734 (1975)).

some commentators have read *Trinko* as expressing a “narrow view of antitrust courts’ institutional competence.”¹¹¹

2. *Credit Suisse v. Billing* (2007)

In *Billing*,¹¹² the Court addressed the question of how the antitrust laws should apply to the conduct of entities subject to the Exchange Act.¹¹³ The defendants, ten investment banks, were accused of conspiring to only sell shares of popular initial public offerings (“IPO”) under conditions which violated the antitrust laws.¹¹⁴ From *Gordon and NASD*, the Court identified four factors that were critical in determining whether there was “sufficient incompatibility to warrant an implication of preclusion.”¹¹⁵ These factors are: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that

¹¹¹ Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1868 (2007). Later in the opinion the Court notes the “costs” of antitrust intervention: “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

¹¹² *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

¹¹³ Securities and Exchange Act of 1934, 15 U.S.C. §§78(a)–78pp (2012).

¹¹⁴ See *Billing*, 551 U.S. at 267. The Court described the alleged conduct:

The buyers claim that the underwriters unlawfully agreed with one another that they would not sell shares of a popular new issue to a buyer unless that buyer committed (1) to buy additional shares of that security later at escalating prices (a practice called “laddering”), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (a practice called “tying.”).

Id.

¹¹⁵ *Id.* at 275.

the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. We also note (4) that in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.¹¹⁶

Applying these factors to the question presented, the Court quickly concluded that “the first condition (legal regulatory authority), the second condition (exercise of that authority), and the fourth condition (heartland securities activity) . . . [were] satisfied.”¹¹⁷ The application of the third factor, whether the maintenance of an antitrust suit is “likely to prove practically incompatible with the SEC’s administration of the [n]ation’s securities laws,”¹¹⁸ required the Court to conduct a more detailed and, to critics of the decision, controversial analysis.¹¹⁹

What truly distinguishes the *Billing* conflict analysis from prior implied immunity cases is the court’s willingness to perceive a conflict between the Exchange Act and the antitrust laws after acknowledging that the “SEC had *disapproved* . . . the conduct that the antitrust complaints attack.”¹²⁰ Despite the aligned disapproval, four considerations led the Court to find that the lower courts were likely to make mistakes, leading to the ultimate

¹¹⁶ *Id.* at 275–76.

¹¹⁷ *Id.* at 277.

¹¹⁸ *Id.*

¹¹⁹ See Markham, *supra* note 9, at 475 (“[*Billing*] stands for a much broader expansion of the implied repeal doctrine by redefining ‘plain repugnancy’ and even recasting the issue as ‘plain inconsistency,’ which includes possible future inconsistency ‘however unlikely.’”).

¹²⁰ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 279 (2007). This approach differs from *NASD* where the SEC was silent on whether it approved or disapproved of the conduct. See *supra* text accompanying note 93. In *Gordon* the SEC had “taken an active role in review of proposed rate changes” without rejecting the rate practices of the two exchanges sued by the private antitrust plaintiff. See *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 685 (1975).

conclusion that “securities law and antitrust law are clearly incompatible.”¹²¹ These considerations were, “the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be drawn; and the risk of inconsistent court results” from non-expert judges and juries.¹²²

While the Court acknowledged that these problems are present to some extent in other types of antitrust cases, the above-mentioned considerations convinced the Court that the potential for mistake was “unusually likely” in the context of securities law.¹²³ The Court feared this possibility would force underwriters to “act in ways that [would] avoid not simply conduct that the securities law forbids . . . but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).”¹²⁴ Further, given the importance of IPOs to the “effective functioning of the capital markets . . . the securities-related costs of mistakes is unusually high.”¹²⁵

The Court also identified the “unusually small” need for antitrust lawsuits as another factor that favored immunity.¹²⁶ This conclusion was based on three factors. First, the “SEC actively enforces the rules and regulations that forbid the conduct in question.”¹²⁷ Second, harmed investors are able to “bring lawsuits and obtain damages

¹²¹ *Billing*, 551 U.S. at 279.

¹²² *Id.* at 281–82.

¹²³ *Id.* at 282.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 283.

¹²⁷ *Id.* at 276–77. (“[T]he SEC has continuously exercised its legal authority to regulate conduct of the general kind now at issue. It has defined in detail, for example, what underwriters may and may not do and say during their road shows. It has brought actions against underwriters who have violated these SEC regulations.”) (citations omitted).

under the securities law.”¹²⁸ Third, the SEC is required to consider “competitive considerations when it creates securities-related policy and embodies it in rules and regulations.”¹²⁹

C. Implications of *Billing*

Some perceive *Billing* and *Trinko* as signaling deference for regulated antitrust defendants and representing an unwelcome departure from precedent.¹³⁰ *Billing* has also been characterized as the Court affirming its belief in the importance of the securities industry.¹³¹ Despite these critiques, this Note contends that the *Billing* four-factor test can be used as a means of providing guidance to Congress about the proper role of antitrust in regulated industries.

¹²⁸ *Id.* at 283.

¹²⁹ *Id.* at 283. In supporting this argument, the Court points to statutes that regulate the rulemaking capabilities of the SEC. *Id.* The SEC must consider whether a rulemaking action “will promote efficiency, competition, and capital formation.” 15 U.S.C. § 77b(b) (2012). The SEC is not permitted to adopt a rule or regulation that “impose[s] a burden on competition” that is “not necessary or appropriate in furtherance of the purposes of [Title 15 USCS §§ 78a et seq.]” without disclosing the reasons for imposing such a burden. 15 U.S.C. § 78w(a)(2) (2012).

¹³⁰ See Jacob L. Kahn, *From Borden to Billing: Identifying a Uniform Approach to Implied Antitrust Immunity from the Supreme Court’s Precedents*, 83 CHI. KENT L. REV. 1439, 1457 (2008) (“[T]he Court likely created even more uncertainty by deviating from its established precedents in [*Trinko* and *Billing*]. As a result, the lower courts’ application of the doctrine is likely to become more unpredictable and, in light of the Supreme Court’s apparent inclination to grant claims for implied immunity in *Trinko* and *Billing*, more sympathetic to regulated defendants.”); Richard M. Brunell, *In Regulators We Trust: The Supreme Court’s New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 299 (2012) (“[T]he shift in the approach to immunity also appears to reflect a greater faith in regulators to achieve optimal outcomes and act as an ‘effective steward of the antitrust function.’”).

¹³¹ See Markham, *supra* note 9, at 475 (“[The Court] regards antitrust litigation as frequently extortive, wasteful, unnecessary, and costly. Conversely, it seems to regard federal securities regulatory law a sounder public policy, notwithstanding the rather high-profile and catastrophic recent failures of that legal regime.”).

Some argue that the Court, in favoring regulation over antitrust, makes a policy judgment that should be reserved for Congress.¹³² However, this critique should not undermine the potential value of the test as a tool in forming prudential judgments. In separating the ends (the prudential judgment made by the Court about the value of antitrust as compared to securities regulation) from the means (the analytical framework used by the Court to make its policy judgment), this Note will characterize *Billing* as an aid in evaluating Congressional decision-making instead of solely as a threat to Congressional authority.¹³³

Yet even after distinguishing the ends from the means of *Billing*, the framework utilized by the Court is open to criticism. Two events, which post-date *Billing*, potentially undermine some of the assumptions on which the four-factor *Billing* test is based. First, the financial crisis of 2008 has raised questions about the competency and adequacy of government securities regulation.¹³⁴ In contrast, on the day *Billing* was decided, the Dow Jones Industrial Average, in the midst of a bull market, closed at 13,619.98¹³⁵ and was

¹³² See Markham, *supra* note 9, at 438 (“As traditionally applied over hundreds of years, implied partial repeals were strongly disfavored, reflecting judicial deference to the legislature and the democratic system under which laws are enacted and repealed by elected and accountable officials. In its most recent articulation of the doctrine, the Supreme Court has ventured far from this traditional course, taking upon itself essentially a function of evaluating the wisdom of legislative enactments in their particular applications, and partially repealing statutes on that basis.”).

¹³³ This is not to say that *Billing* should not be characterized as a threat to legislative decision-making (especially in light of what authors such as Markham perceive as the Court’s usurpation of a role reserved for Congress), but only that this characterization should not be the only perception of the decision.

¹³⁴ See Brunell, *supra* note 130, at 299 (“One might think that the financial crisis of 2008 would call into question whether greater faith in regulators is warranted, but the ‘regulatory’ response to the crisis may suggest otherwise.”).

¹³⁵ See Historical Quote for Dow Jones Industrial Average, MARKETWATCH, <http://www.marketwatch.com/investing/index/djia/historical>, archived at <http://perma.cc/DW8U-LVY2> (search “06/18/2007”; then follow “Set” hyperlink).

within months of its pre-financial crisis peak. Thus, compared to the current skepticism of market regulators, *Billing* was written at a time when it was easy to believe that the markets were sufficiently regulated.¹³⁶ The second event that possibly undermines *Billing*'s faith in regulation is the LIBOR bidding rigging scandal in which several banks were accused of "manipulat[ing] interest rates before and after the financial crisis to improve their profits and deflect scrutiny about their health."¹³⁷ Even though LIBOR is regulated in part by the Commodity Futures Trading Commission, and not the SEC, the manipulation scandal raises questions about the ability of specialized market regulators to contain anticompetitive activities. Yet while these events might challenge the Court's faith in the competency of sector-specific regulators, they are not enough to fundamentally undermine the role of industry-specific regulations or the framework used in *Billing*.¹³⁸

¹³⁶ The apparent confidence of the *Billing* Court in federal securities regulation is not new. As early as *Philadelphia National Bank*, the Court expressed confidence that securities regulators were well equipped to patrol the industry they were charged with supervising. *U.S. v. Phila. Nat. Bank*, 374 U.S. 321, 330 (1963) ("Federal supervision of banking has been called '[p]robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision. [. . .] The system may be one of the most successful (systems of economic regulation), if not the most successful.'").

¹³⁷ Ben Protess & Mark Scott, *U.S. Is Building Criminal Cases in Rate-Fixing*, N.Y. TIMES (July 14, 2012), <http://dealbook.nytimes.com/2012/07/14/u-s-is-building-criminal-cases-in-rate-fixing>, archived at <http://perma.cc/CN86-NTG9>.

¹³⁸ Support can be found for the continued reliance of securities-specific regulations in light of the passage of Dodd-Frank. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o (2012)).

IV. APPLYING THE IMPLIED IMMUNITY TEST TO MASSACHUSETTS INSURANCE REGULATION

Signed into law in 2010, the Affordable Care Act sought to reduce the number of uninsured and underinsured Americans while addressing the increasing costs of health care services and improving the quality of care.¹³⁹ It is well established that the ACA is modeled after the Massachusetts health insurance reforms of 2006.¹⁴⁰ Yet by using Massachusetts as a model, this Note does not claim that Massachusetts' regulations are perfect proxies for the policy goals encouraged by the ACA or the current insurance regulations of the other forty-nine states. However, because Massachusetts has been recognized as a model for innovative state-based solutions to rising health care costs,¹⁴¹ it is

¹³⁹ See Harold Pollack, *Health Reform and Public Health: Will Good Policies but Bad Politics Combine to Produce Bad Policy?* 159 U. PA. L. REV. 2061 (2011) (discussing how the ACA aims to improve public health); Strategic Goal One: Strengthen Health Care, U.S. DEPT. OF HEALTH & HUM. SERVS., <http://www.hhs.gov/strategic-plan/goal1.html>, archived at <http://perma.cc/5PDP-RSTM> (“The Affordable Care Act increases access to care, makes health insurance more affordable, strengthens Medicare, and ensures that American have more rights and protections—and more security that health insurance coverage will be available when it is needed.”).

¹⁴⁰ See Sharon K. Long et al., *Massachusetts Health Reforms: Uninsurance Remains Low, Self-Reported Health Status Improves As State Prepares To Tackle Costs*, 31 HEALTH AFF. 444, 444 (2012) (“Just as Massachusetts’s 2006 health reform legislation provided the template for the Affordable Care Act, so the state’s experience under that legislation provides an example of the potential gains under federal health reform.”); Editorial, *Obama’s Running Mate*, WALL ST. J. (May 12, 2011), <http://www.wsj.com/news/articles/SB10001424052748703864204576317413439329644>, archived at <http://perma.cc/C89D-5RBE> (“As everyone knows, the health reform Mr. Romney passed in 2006 as Massachusetts Governor was the prototype for President Obama’s version and gave national health care a huge political boost.”).

¹⁴¹ See Stan Dorn et al., *The Secrets of Massachusetts’ Success: Why 97 Percent of State Residents Have Health Coverage*, STATE HEALTH ACCESS REFORM EVALUATION (State Health Access Data Assistance Center, Minneapolis), Nov. 2009, at iii (“As health reform is considered at the federal and state levels, policymakers wishing to enroll large proportions

foreseeable that some states will look to Massachusetts when utilizing the discretion¹⁴² the ACA conferred on the states to determine the standards that covered plans need to meet.¹⁴³ In fact, the use of Massachusetts as a bellwether for the ACA is not a new means of projecting the future of national health insurance reform in America.¹⁴⁴ Thus, in utilizing *Billing's* implied immunity test to evaluate the implications of applying federal antitrust laws to the “business of insurance,” this Note will look to Massachusetts’ health insurance reforms.

A. Massachusetts: From Market Regulation to Increasing State Price Controls

Initially, Massachusetts’ health reform efforts focused on expanding the percentage of the population covered by insurance rather than containing the costs of healthcare.¹⁴⁵

of the low-income uninsured into subsidized coverage may wish to consider policies like those used by Massachusetts . . .”).

¹⁴² See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 589–90 (2011) (“The ACA appears designed to remedy the dearth of successful experimentation. The statute’s explicit reference to state flexibility in implementation offers one example of the way in which the statute seems aimed at promoting interstate variation. Another is evident in the ACA’s large number of pilot and demonstration projects, some of which are to be run by states and others by private actors.”).

¹⁴³ See SABRINA CORLETTE ET AL., IMPLEMENTING THE AFFORDABLE CARE ACT: CHOOSING AN ESSENTIAL HEALTH BENEFITS BENCHMARK PLAN 3 (2013), available at http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2013/Mar/1677_Corlette_implementing_ACA_choosing_essential_hlt_benefits_reform_brief.pdf, archived at <http://perma.cc/G7FQ-P4MR> (“These findings also suggest that states had significant flexibility in the process by which they selected their benchmark plan—as evidenced by the variety of approaches that states adopted.”).

¹⁴⁴ See Richard A. Epstein, *Bleak Prospects: How Health Care Reform Has Failed in the United States*, 15 TEX. REV. L. & POL. 1, 20–23 (2010).

¹⁴⁵ KAISER FAMILY FOUNDATION, MASSACHUSETTS HEALTH CARE REFORM: SIX YEARS LATER (2012), <http://kff.org/health-costs/issue->

Yet even with an emphasis on expanding coverage, the original law created the “Health Care Quality and Cost Council,” tasked with setting goals that effectively lowered or contained “the growth in health care costs while improving the quality of care.”¹⁴⁶ Furthermore, the original law required¹⁴⁷ health insurers and providers to submit data that the Council requested in order to implement those cost control and quality improvement goals.¹⁴⁸ With respect to its signature insurance exchange, formally called the “Connector,”¹⁴⁹ the law freed listed plans from some preexisting network design regulations with the aim of promoting the existence of “lower cost, high quality health benefit plans.”¹⁵⁰ Despite this language, the purpose behind the Connector’s authority confirms that the primary goal of reform was not cost but access. The law states that the Connector should “facilitate the availability, choice and adoption of private health insurance plans to eligible individuals and groups.”¹⁵¹

Facing increasing premium costs due to unexpectedly large enrollment,¹⁵² the Massachusetts legislature responded in 2008 by passing a follow-up law that specifically dealt

brief/massachusetts-health-care-reform-six-years-later/, *archived at* <http://perma.cc/CBY3-8C8H>.

¹⁴⁶ An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts § 16L(a).

¹⁴⁷ *Id.* at §16L(d).

¹⁴⁸ *Id.* at §16L(e).

¹⁴⁹ The Commonwealth Health Insurance Connector Authority (Connector) “facilitate[s] the purchase of health insurance by non-elderly adults who lack access to employer-sponsored coverage and by companies with up to 50 employees.” Alan G. Raymond, *Massachusetts Health Reform: A Five-Year Progress Report* (The Blue Cross Blue Shield of Mass. Found., Boston, M.A.), Nov. 2011, at 17, <http://bluecrossfoundation.org/publication/massachusetts-health-reform-five-year-progress-report>, *archived at* <http://perma.cc/Z6G8-M6TJ>.

¹⁵⁰ MASS. GEN. LAWS ch. 176Q, § 5(d) (2012).

¹⁵¹ *Id.* at § 2(a).

¹⁵² Doug Trapp, *Massachusetts Health System Reform Feeling the Pinch*, AM. MED. NEWS, Feb. 11, 2008, <http://www.amednews.com/article/20080211/government/302119983/6/>, *archived at* <http://perma.cc/S93S-2EQF>.

with cost containment measures.¹⁵³ Most significantly, these measures empowered the Health Care Cost and Quality Council to evaluate the practices of health care providers and insurers by collecting detailed information from providers and reviewing their contracts with insurance companies.¹⁵⁴ Additionally, the law established a consumer health website to provide comparative information about facilities, clinicians, and physician groups with respect to price, quality of care, patient satisfaction, and the occurrence of healthcare-acquired infections.¹⁵⁵ It also required the Attorney General to produce a report examining health care cost trends and drivers. The report's conclusion served as the impetus for the most recent reform measure. The report concluded that variations in the price paid by insurers to providers was correlated with providers' market leverage instead of the quality of care or overall health of the population being treated.¹⁵⁶

Building on a 2010 legislative enactment that required insurance companies to obtain approval from the Department of Insurance before raising premium rates,¹⁵⁷ the 2012 reform legislation¹⁵⁸ established health care cost

¹⁵³ An Act to Promote Cost Containment, Transparency and Efficiency in the Delivery of Quality Health Care, ch. 305, 2008 Mass. Acts 1322 (codified as amended in scattered sections of MASS. GEN. LAWS (2008)).

¹⁵⁴ Robert E. Mechanic et al., *The New Era of Payment Reform, Spending Targets, and Cost Containment in Massachusetts: Early Lessons for the Nation*, HEALTH AFF. 2334, 2336 (2012).

¹⁵⁵ The Healthcare Transparency Act, S.B. 2863, 2007 Mass. Leg., 4 (Mass. 2007); ch. 305, 2008 Mass. Acts 1324–35.

¹⁵⁶ Michele Garvin & Benjamin Wilson, *Massachusetts Health Care Reform: The Next Stage*, BLOOMBERG BNA, Jan. 28, 2013, http://www.ropesgray.com/files/upload/20130128_BNA_GarvinandWilson.pdf, archived at <http://perma.cc/3F65-CETS>.

¹⁵⁷ An Act to Promote Cost Containment, Transparency and Efficiency in the Provision of Quality Health Insurance for Individuals and Small Businesses, ch. 288, 2010 Mass. Acts 1164–66.

¹⁵⁸ An Act Improving the Quality of Health Care and Reducing Costs through Increased Transparency, Efficiency and Innovation, ch. 224, 2012 Mass. Acts.

containment targets,¹⁵⁹ and increased the ability of the state to “monitor health spending and track the activities of providers and payers.”¹⁶⁰ As an enforcement mechanism, the law created the Health Policy Commission, which, in 2016, will require providers with cost growth exceeding a specified benchmark to file and implement performance improvement plans.¹⁶¹

Following the passage of the 2012 reform measure, the then-Attorney General of Massachusetts, Martha Coakley, described the law as “establish[ing] additional tools to scrutinize market behavior without impeding it, [and allowing the government] to monitor market activity in real time for potential negative impact and then to take necessary actions.”¹⁶² In contrast, critics of the legislation depict the Commission as policing the market and “supervis[ing] the behavior of any provider that exceeds some to-be-specified individual benchmark—that is, doctors and hospitals that are spending too much on patient care.”¹⁶³ Despite the differing characterizations, it is undisputed that this legislation provides regulators with increased authority to monitor the health insurance and provider markets.

B. *Billing* Test Applied to Massachusetts Insurance Regulations

In identifying the factors relevant to determining whether there is an implied immunity from the antitrust law, the Court in *Billing* does not phrase the factors in generally applicable terms. Instead, the Court uses the terms

¹⁵⁹ Garvin & Wilson, *supra* note 156, at 1–2 (“The law sets health care cost growth benchmarks, tying the growth in total state spending on health care to the potential growth rate of the state economy.”).

¹⁶⁰ Mechanic et al., *supra* note 154, at 2339.

¹⁶¹ Garvin & Wilson, *supra* note 156, at 2.

¹⁶² Martha Coakley, Letter to the Editor, *Massachusetts Health Care*, N.Y. TIMES, Aug. 9, 2012, at A22.

¹⁶³ Editorial, *RomneyCare 2.0*, WALL ST. J., Aug. 7, 2012, <http://online.wsj.com/articles/SB10000872396390443687504577563000563259044>, archived at <http://perma.cc/KGK2-6F5U>.

“financial market activity” and “securities law”¹⁶⁴ in articulating the four factors. At the same time, the Court does not explicitly state that its reasoning is confined to the securities context.¹⁶⁵ This silence is potentially significant in light of the dicta in *Trinko*, which suggests that the implied immunity doctrine can extend beyond securities law to telecommunications law.¹⁶⁶ In another ambiguous signal about the applicability of the test, the Court notes that the analysis used “may vary from statute to statute”¹⁶⁷ in describing the use of implied repeal. Finally, from an academic perspective, arguments exist both supporting and criticizing the application of the *Billing* test outside securities law to the federal regulatory frameworks for mortgage lending¹⁶⁸ and cable television.¹⁶⁹

¹⁶⁴ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 275–76 (2007).

¹⁶⁵ The lower courts have generally not attempted to expand the holding with some courts suggesting that the *Billing* court intended it to only apply to securities. See *Churchill Downs Inc. v. Thoroughbred Horsemen's Group, LLC*, 605 F. Supp. 2d 870, 881 (2009); *Cohen v. UBS Financial Services, Inc.*, No. 12 Civ. 2147(BSJ)(JLC), 2012 WL 6041634, at *3 (S.D.N.Y. Dec. 4, 2012); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07–05634 CRB, 2011 WL 1753738, at *17 (N.D. Cal. May 9, 2011). One exception to this rule was the decision to extend to the doctrine to the Tennessee Valley Authority. *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (2006).

¹⁶⁶ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004).

¹⁶⁷ *Billing*, 551 U.S. at 271. This variance is dependent on the relation between the antitrust laws and the regulatory program set forth in the particular statute and on “the relation of the specific conduct at issue to both sets of laws. *Id.*”

¹⁶⁸ See Bruce H. Schneider, *Credit Suisse v. Billing and a Case for Antitrust Immunity for Mortgage Lenders Subject to Federal Regulation*, 124 BANKING L.J. 833, 840–41 (2007) (applying the *Billing* test to the regulatory framework established by the Federal Home Loan Mortgage Corporation Act and Federal Housing Enterprises Financial Safety and Soundness Act of 1992).

¹⁶⁹ See Keith Klovers, Note, *Unfit for Prime Time: Why Cable Television Regulations Cannot Perform Trinko's "Antitrust Function,"* 110 MICH. L. REV. 489, 492 (2011) (arguing that “*Trinko* and its siblings [*Billing* and *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,

There are three reasons it is appropriate to apply a framework developed to assess the compatibility of two federal regimes to the evaluation of the potential for conflict between federal antitrust laws and state insurance regulations. First, the state regulation of insurance, which had been uncontested prior to *South-Eastern Underwriters Association*,¹⁷⁰ was reaffirmed by Congress through the MFA. While it is undoubtedly a broad delegation of power, it was the means Congress chose to regulate the business of insurance. Even though Congress did not decide to create a federal agency like the SEC to regulate the insurance industry, it did make a choice about how the industry would be regulated. Second, the ACA, and specifically its provisions that require states to meet certain insurance rate monitoring requirements, signals a trend towards greater national and state regulation of the business of insurance.¹⁷¹ Third and most important, at its core the *Billing* analysis is about the interaction of a regulatory framework and federal antitrust enforcement.

While the *Billing* test is rooted in federal securities regulation, this Note argues that the test is primarily a product of the comprehensive nature of federal securities regulation rather than any unique characteristics of the securities industry. As the Court hinted in both *Trinko*¹⁷² and *Silver*,¹⁷³ the comprehensiveness of the regime can be a factor in determining whether an implied immunity from the antitrust laws exists. While such comprehensiveness has rarely been found outside of securities regulation, this does

129 S. Ct. 1109 (2009)] should not be read to displace judicially enforced antitrust law in the cable industry”).

¹⁷⁰ *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533, 534 (1944).

¹⁷¹ *Rate Increase Disclosure and Review*, 76 Fed. Reg. 29,964, 29,967–69 (May 23, 2011) (codified at 45 C.F.R. pt. 154).

¹⁷² *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004) (“Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity.”).

¹⁷³ *See supra* Parts III.A, III.B.1.

not mean it cannot or does not exist elsewhere. The subsequent analysis will evaluate whether the state regulation of insurance is trending towards being such a comprehensive regulatory structure that is incompatible with the intervention of federal antitrust enforcement. This is not a question of whether Congress can permit such an intervention but instead a question of whether Congress *should* permit it.¹⁷⁴

Having concluded that it is reasonable to use the *Billing* test to evaluate the antitrust decisions of Congress, the next question is: Why use this test? This Note suggests that because federal antitrust legislation, embodied in the Sherman Act,¹⁷⁵ can be characterized as a common law statute,¹⁷⁶ the federal courts have an institutional advantage over Congress with respect to the interaction of antitrust regulation and regulatory regimes. Essentially, this Note contends that because Congress has historically entrusted the federal courts with developing antitrust tests and doctrines, which have the consequence of limiting¹⁷⁷ and

¹⁷⁴ Since the Supreme Court has broadly interpreted the reach of the antitrust laws to extend to matters that might appear confined to local commerce, the ability of Congress to reach to the business of insurance is not in question. As noted in Part II, the Court has specifically ruled that the business of insurance is subject to federal antitrust laws in *S.E. Underwriters*, 322 U.S. at 533.

¹⁷⁵ 15 U.S.C. §§1–7 (2012).

¹⁷⁶ The characterization of the Sherman Act as a common law statute is rooted in the expansive language used by Congress, which the Court has interpreted and in some instances confined in order to ensure that the antitrust laws work to complement, not hinder business development. See 15 U.S.C. §1 (2012) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”). See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”).

¹⁷⁷ See *Brooke Group v. Williamson Tobacco*, 509 U.S. 209 (1993) as an example of the Court reigning in the application of the antitrust laws by developing standards which make recovery difficult for an antitrust plaintiff. “These prerequisites to recovery are not easy to establish, but

expanding¹⁷⁸ the reach of the federal antitrust laws, the courts have developed a greater expertise in this area than Congress. This is not to say that Congress should completely defer to the judgment of the courts or that Congress is unable to make any policy judgments about antitrust.¹⁷⁹ Instead, given the historically dominant role the federal courts have played in the development of antitrust doctrine, the use of a test developed by the Supreme Court might be a beneficial means of evaluating proposed legislative alterations to the federal antitrust enforcement regime.

In evaluating whether the federal antitrust laws are compatible with growing state and federal regulation of the health insurance industry, similar to the Court's analysis in

they are not artificial obstacles to recovery; rather, they are essential components of real market injury." *Id.* at 226.

¹⁷⁸ Some of the merger enforcement cases from the 1960s are good examples of the Court expansively interpreting federal antitrust legislation. In these cases, the Court read § 7 of the Clayton Act, 15 U.S.C. §18 (2012), to permit government regulators to reach conduct of questionable anticompetitive effect. *See* *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The harsh standard now applied by the Court to horizontal mergers may prejudice irrevocably the already difficult choice faced by numerous successful small and medium-sized businessmen . . . whether to expand by buying or by building additional facilities.").

¹⁷⁹ A review of some of the congressional statements in support of repealing the MFA suggest that disbelief over a rarely granted antitrust exemption applying to the "business of insurance," a desire for lower rates, and a distrust of insurance companies are some of the motivating factors behind the drive to repeal. "The bill I introduce today is intended to root out unlawful activity in an industry that has grown complacent by decades of protection from antitrust oversight. In doing so, we aim to make health insurance more affordable to more Americans." 159 CONG. REC. E9 (daily ed. Jan. 3, 2013) (statement of Rep. Conyers). "[The health insurance's antitrust exemption] deserves a lot of the blame for the huge rise in premiums that has made health insurance so unaffordable. It is time to end this special status and bring true competition to the health insurance industry." Press Release, Senator Charles E. Schumer, Two Days after Health Insurance Lobby Tried to Sucker-Punch Health Care Reform Effort . . . Schumer: Revoke Health Insurance Industry's Antitrust Exemption as Part of Health Care Overhaul (Oct. 14, 2009), available at <http://www.schumer.senate.gov/Newsroom/record.cfm?id=318929&&year=2009&>, archived at <http://perma.cc/JS37-C6XN>.

Billing, the decisive factor is whether there is conflict between the regulatory regimes. Accordingly, the next section will combine the analysis of the first, second, and fourth factors, leaving the discussion of the third factor to the following section.

1. Evidence of Use of Authority, Activity at Heart of Activity Being Regulated, and Existence of Regulatory Authority by the Insurance Commissioner

Similar to the role of the IPO in the securities industry, ratemaking¹⁸⁰ is at the center of the “business of insurance.” In fact, the argument is perhaps stronger here. Without the ability to develop rates, insurance companies would be unable to accurately price their policies.¹⁸¹ In terms of the existence of a regulatory authority, the Massachusetts regulations require insurance companies to receive prior approval of premium increases. The state requires insurers and health care providers to supply regulators with information to allow them to monitor prices and costs.¹⁸² Thus, while insurers can set their rates, regulators hold information that can be used to undermine the basis for an insurer’s rate. Finally, it is clear that Massachusetts’ regulators are using their new monitoring authority: In 2010 the Massachusetts insurance commissioner denied 235 of the

¹⁸⁰ See *Regulation Modernization*, INS. INFO. INST., <http://www.iii.org/issue-update/regulation-modernization>, archived at <http://perma.cc/JP6L-TQZ8> (“Rate making is the process of calculating a price to cover the future cost of insurance claims and expenses, including a margin for profit. To establish rates, insurers look at past trends and changes in the current environment that may affect potential losses in the future.”).

¹⁸¹ See Staff Paper, *Selection of Materials Submitted to the National Commission for the Review of Antitrust Laws and Procedures: Part II*, 48 ANTITRUST L.J. 1245, 1249 (“A key feature of the insurance “product” is that its costs are unknown at the time of sale. Faced with this uncertainty, insurers need accurate information based on credible data to estimate future losses and to set premium rates.”).

¹⁸² See *supra* text accompanying note 160.

274 proposed rate increases submitted by insurance companies.¹⁸³

2. Potential for Conflict

In evaluating the potential for conflict between Massachusetts' insurance regulations and federal antitrust enforcement, it is important to note that state regulations prohibit the fixing of rates as an "unfair method of competition"¹⁸⁴ and that these regulations allow the insurance commissioner to investigate insurance companies.¹⁸⁵ While the state has directed the Massachusetts Attorney General to investigate the state's health care market,¹⁸⁶ it is noteworthy that the state has named the insurance commissioner as the investigative authority for anticompetitive behavior among insurance companies. Given the mandated disclosures and the aim of "monitor[ing] market activity in real time,"¹⁸⁷ the imposition of federal antitrust regulation could potentially subject insurance companies to enforcement actions by federal officials who do not fully understand the complex regulatory structure created by the Massachusetts legislation. Further, the fact that the rates are so vigorously vetted by the insurance commissioner might suggest, as the *Billing* Court also posited, that the "need for an antitrust lawsuit is unusually small."¹⁸⁸

¹⁸³ See Kevin Sack, *Massachusetts Insurance Regulators Reject Most Requests for Higher Rates*, N.Y. TIMES (Apr. 1, 2010), http://www.nytimes.com/2010/04/02/health/policy/02rates.html?_r=0, archived at <http://perma.cc/GGH9-CTC9>.

¹⁸⁴ MASS. GEN. LAWS ch. 176D, § 3A (2012).

¹⁸⁵ § 5 (2012).

¹⁸⁶ See Raymond, *supra* note 149, at 28.

¹⁸⁷ See Coakley, *supra* note 162.

¹⁸⁸ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 283 (2007).

V. CONCLUSION

Even though the original justification for the MFA exemption has been characterized as “arbitrary,”¹⁸⁹ such an exemption might be necessary in the future due to the trend towards pervasive state regulation of the “business of insurance.” Given the fact-intensive nature of this inquiry, Congress should avoid a repeal of the MFA authorizing the federal antitrust enforcers and private plaintiffs to treat all states alike. Because the MFA gives states discretion to decide how they regulate the “business of insurance,” it is difficult to determine whether the regimes established in each state create a potential conflict with federal antitrust law or whether the regimes are deficient and require the assistance of federal antitrust regulators. While analysis of the Massachusetts insurance regulations highlights a specific framework in which the addition of antitrust enforcement is potentially unnecessary and counterproductive, such regulations do not currently exist in all states.

One solution to the diversity of state insurance regimes would be to revise the MFA antitrust exemption and explicitly require the courts to consider more than the “mere presence”¹⁹⁰ of regulations when deciding whether to bar federal antitrust actions. Specifically, Congress could require state insurance or antitrust regulators to establish certain review programs in order for the MFA antitrust exemption to apply to a state. Such a standard might incentivize states to sufficiently regulate the “business of insurance” in order to avoid federal intervention. At the same time, if Congress truly wants to regulate the “business of insurance,” it can fully repeal the MFA and assume full regulatory responsibility for the industry. This Note argues that Congress should not pass legislation that treats all states in

¹⁸⁹ See Hale & Hale, *supra* note 76, at 53 (“While presenting delicate questions of interpretation, those exemptions [McCarran Ferguson and Reed-Bulwinkle] may be regarded for present purposes as largely arbitrary in character and not indicative of general principles.”).

¹⁹⁰ See *supra* note 57 and accompanying text.

the same way. Congress should not uniformly impose federal antitrust regulation of the “business of insurance” while continuing to provide states with the freedom to develop a wide spectrum of insurance regulations.¹⁹¹ The *Billing* test provides Congress a framework with which to evaluate the spectrum of state insurance regulations and determine how to best modify the MFA to accommodate the circumstances of each state.

¹⁹¹ The ACA and ERISA are steps in the direction of standardizing how the “business of insurance” is regulated, but more action is required if the goal is to create a national insurance standard. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).