

NOTE

A NEW SUPREME COURT SECURITIES JURISPRUDENCE?*

HOW *CREDIT SUISSE SECURITIES (USA) LLC v. BILLING*¹
EVISCERATES THE ROLE OF ANTITRUST IN SECURITIES LAW,
RESURRECTS THE PRIMARY JURISDICTION DOCTRINE, AND LEAVES
RETAIL INVESTORS OUT IN THE COLD

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1. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497 (S.D.N.Y. 2003), *vacated sub nom.*, *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *rev'd sub nom.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

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I. INTRODUCTION

In light of recent corporate scandals that have rocked this country's faith in big business, ordinary investors could not be faulted for assuming the legal system would respond with increased investor safeguards.² Sadly, the opposite is true—thanks in large part to the U.S. Supreme Court. The staunch pro-business voice of the nation's highest court could be heard loud and clear in its 2006–2007 term dispositions.³ Or perhaps the Court had an ulterior motive, less concerned with sound doctrine than with federal courts' dockets. After all, Chief Justice Roberts made no secret of his belief that the federal judiciary is both overworked and underpaid. While not contributing to a raise in judges' salaries, it most certainly will reduce the workload of the judiciary.⁴ Whatever the reason, the

2. See generally ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (analyzing the Enron demise within a legal, business, and ethical framework).

3. See, e.g., *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (curbing perceived discovery abuse by tightening the federal notice pleading standard for antitrust cases); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504–05 (2007) (heightening the 'strong inference' prong of the scienter requirement for private securities fraud litigation, which "must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent"); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169–72 (2007) (holding that the Title VII 180-day filing requirement forecloses any employment discrimination claims outside this statutory period, such as the long-term pay disparity at issue).

4. See, e.g., Press Release, 2005 Year-End Report on the Federal Judiciary (Jan. 1, 2006), available at <http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf> (criticizing the low pay levels of federal judges and pointing to record levels

Court's recent decision in *Credit Suisse v. Billing* should further two objectives—helping big business while lightening the dockets of state and federal courts.⁵ *Billing* effectively bars investors from concurrently pursuing more favorable remedies under the nation's antitrust laws for securities law violations in the initial public offering (IPO) context.⁶

The U.S. legal system contains a number of overlapping sets of laws.⁷ An overlap oftentimes signals the coexistence of an overarching national economic policy with a distinct regulatory scheme.⁸ One such example is the confluence of antitrust laws and securities regulation.⁹ Ultimately, either Congress or the judiciary must settle who has jurisdiction in a controversy where causes of action from overlapping legal regimes are available.¹⁰ Courts allocate jurisdiction between two competing regimes with the aid of established legal doctrines.¹¹ Unfortunately, these doctrines are often arcane and difficult to interpret.¹²

of case filings at many levels of the federal bench).

5. See *infra* Part III (discussing the limitations on access to private securities litigation created by *Billing*).

6. *Billing*, 127 S. Ct. at 2387 (holding that, because the antitrust claims raised in *Billing* were incompatible with federal securities laws, the latter “implicitly preclud[e] the application of the antitrust laws to the conduct alleged”). Antitrust laws allow for triple monetary damages, which are not available under the securities laws. 15 U.S.C. § 15(a) (2000).

7. The interaction of the U.S. Constitution with individual state laws through the Supremacy and Commerce Clauses is a prime example. See U.S. CONST. art. I, § 8; U.S. CONST. art. VI, cl. 2.

8. Compare, e.g., Securities Exchange Act of 1934 (“1934 Act”), ch. 404, § 4(a), 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78 (2000)) (creating the Securities and Exchange Commission (SEC) to regulate securities markets), with Letter from R. Hewitt Pate, Assistant Attorney General, Antitrust Division, Department of Justice, to Roseann B. MacKechnie, Clerk, U.S. Court of Appeals for the Second Circuit, at n.1 (May 5, 2005), available at <http://www.usdoj.gov/atr/cases/f208800/208898.pdf> [hereinafter Pate Letter] (“The United States [Department of Justice] has primary responsibility for enforcing the federal antitrust laws, which express the Nation’s fundamental economic policy in favor of free competition.”).

9. See *supra* note 8 (illustrating the overlap between federal agencies and federal courts that shape economic policy through antitrust laws and securities regulation).

10. See *Billing*, 127 S. Ct. at 2389 (“Where regulatory statutes are silent in respect to antitrust, however, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws.”). For more background on this general principle, see Francis J. Facciolo & Richard L. Stone, *Avoiding the Inevitable: The Continuing Viability of State Law Claims in the Face of Primary Jurisdiction and Preemption Challenges Under the Securities Act of 1934*, 1995 COLUM. BUS. L. REV. 525, 527–30 (1995) (explaining the interaction between express and implied immunities, primary jurisdiction, and the supremacy clause in the securities law context).

11. See William L. McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 A.B.A. SEC. OF ANTITRUST L. 57, 57, 61 (1958) (commenting that legal practitioners have a tendency to fuse—and confuse—the doctrines governing antitrust and securities enforcement).

12. Many legal practitioners will admit to this. See generally Guyora Binder, *On*

When securities regulation overlaps with antitrust enforcement, courts have traditionally looked to the implied immunity doctrine¹³ and the primary jurisdiction doctrine¹⁴ to determine jurisdiction. Some legal scholars have depicted these doctrines as being full of dense, ill-defined principles, which can only be described as “judicial doubletalk.”¹⁵ The principles are so controversial that at least one SEC Commissioner feared they may trigger the end of Wall Street as we know it.¹⁶

Implied immunity and primary jurisdiction were originally conceived to handle ambiguities caused by overlapping statutory regimes.¹⁷ Now—as nebulous as the area of law they were conceived to illuminate—they stand at the epicenter of a

Critical Legal Studies as Guerrilla Warfare, 76 GEO. L.J. 1, 4–5 (1987) (analyzing the critical legal studies movement’s view on legal doctrine); Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law With a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 297–99 (1995) (suggesting certain arcane legal doctrines have outlived their usefulness in modern law).

13. Implied immunity is a legal sheltering device. Conduct which would be lawful under one set of laws (such as a federal regulatory scheme) and unlawful under another overlapping one (such as the antitrust laws) is immunized from the application of the latter in certain, limited circumstances. See John Kern, *Price Manipulation in the Commodity Futures Markets: A Reexamination of the Justifications for Simultaneous Causes of Action Under the CEA and the Sherman Act*, 34 UCLA L. REV. 1305, 1318 n.52 (1987) (suggesting implied immunity “has been employed primarily in situations where, even though there has been no express grant of immunity, the court feels that Congress intended that one exist” (quoting Jerome Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 20 (1976)); see also Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761, 762–63 (2006) (discussing the expansion of implied immunity). Implied immunity is a judge-made doctrine. Implied immunity, as utilized in this Note, refers to conduct in the securities markets, which is immunized from the reach of the antitrust laws. See *infra* Part III.A.1 (tracing the Supreme Court’s interpretation of this doctrine within the securities law context).

14. The primary jurisdiction doctrine allows a court to afford a regulatory agency the first cut at deciding a controversy or an issue when concurrent original jurisdiction between an agency and court exists. See BLACK’S LAW DICTIONARY 1229 (8th ed. 2004); see also *infra* Part III.A.2.

15. See McGovern, *supra* note 11, at 57, 58–59 (observing that “[t]he more we know of [primary jurisdiction], the less we know about it” and suggesting that the application of the doctrine owed more to the political leaning of the Court’s majority than legal analysis).

16. See Paul Atkins, Op-Ed., *A Serious Threat to Our Capital Markets*, WALL ST. J., June 10–11, 2006, at A12 (suggesting that if no implied immunity was found, *Billing* “could devastate America’s process of capital formation, wreak unprecedented havoc on the underwriting business, and accelerate the marginalization of our capital markets”). This Wall Street Journal op-ed is noteworthy because the *Billing* defendants filed a supplement to their petition for certiorari to the U.S. Supreme Court to incorporate the content of SEC Commissioner Atkins’s article into the official Court record. See generally Supplemental Brief for Petitioners, *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762, 762–63 (2006) (No. 05-1157), 2006 WL 1674308, *rev’d*, 127 S. Ct. 2383 (2007).

17. See *infra* Part III.A (tracing the purpose and history of the doctrines).

battle over the reach of antitrust liability into securities industry regulation.¹⁸ *Billing* implicates both doctrines.¹⁹

Billing arose from an “epic Wall Street conspiracy,” a “compelling” tale of price manipulation and commercial bribery in the marketplace for new securities—the IPO market—during the technology boom of the late 1990s.²⁰ The plaintiffs, a group of sixty investors, alleged that ten of the world’s most reputable investment banks had violated the nation’s antitrust laws.²¹ They accused the underwriters of defrauding them by using illegal “quid pro quo” or “tying” agreements, inflated commissions, and “laddering” contracts to manipulate the IPO markets.²² The alleged scheme also involved the Wall Street defendants’ colluding to issue “strong buy” or “outperform” recommendations, so-called “booster shots,” on the newly-placed securities.²³ These actions allegedly caused after-

18. See *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2387 (2007) (determining the relationship between antitrust liability and securities law). While the implied immunity doctrine dominates the case history, this Note will argue that the primary jurisdiction doctrine, while only touched on in oral argument before the Court, is in fact squarely implicated. See Transcript of Oral Argument at *8, 10–12, 30–31, 51–53, *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) (No. 05-1157), 2007 WL 967032 (Justices Breyer, Ginsburg, and Scalia questioning whether *Billing* perhaps implicates the primary jurisdiction doctrine).

19. See *Billing*, 127 S. Ct. at 2387 (concluding that securities laws must be read as implicitly blocking application of antitrust laws).

20. *Billing*, 426 F.3d at 136. Commonly referred to on Wall Street as an “IPO”, an initial public offering is simply a “company’s first public sale of [its] stock.” See BLACK’S LAW DICTIONARY 1114 (8th ed. 2004).

21. *Billing*, 127 S. Ct. at 2388.

22. *Id.* at 2387.

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.

See also BLACK’S LAW DICTIONARY 1557 (8th ed. 2004) (defining “tying arrangement”). The tying and laddering concepts derive from antitrust law. *Id.* Also referred to as “tie-in” arrangements or “tying” agreements, quid pro quo contracts refer to “a seller’s agreement to sell one product or service only if the buyer also buys a different product or service.” *Id.* Similarly, “laddering” agreements require an investor to purchase a particular security in the IPO aftermarket, but at escalating prices that are *above* the original issue price. *Billing*, 426 F.3d at 142–43. This results in an artificial run-up in the IPO aftermarket, as the aftermarket prices are effectively predetermined. *Id.* The SEC views these practices as “fraudulent and manipulative.” *Id.*

23. See *Billing*, 426 F.3d at 144–45 (suggesting that underwriters “precommit[ed] their analysts to issue positive reports following the offering”).

market prices for IPO shares to inflate abnormally—a result commonly described as market distortion.²⁴

The case originated in the Southern District of New York, in which the court applied the implied immunity doctrine and found that the SEC's pervasive regulatory scheme over the securities markets “immunized” the actions of the underwriters from antitrust prosecution.²⁵ The Second Circuit, the nation's leading venue for securities-related litigation,²⁶ reversed the lower court, holding there was no evidence Congress intended to completely shelter the alleged practices from antitrust liability.²⁷ In June 2007, the Supreme Court reversed the Second Circuit by ruling that the antitrust and securities laws were in direct conflict vis-à-vis the practices at issue.²⁸ Consequently, these practices were immune from the reach of antitrust liability.²⁹

As pro-market advocates, many amici had argued that affirming the Second Circuit would have not only wrought devastating financial consequences for the defendants,³⁰ but also would have imperiled the United States' position as one of the

24. See Rajesh K. Aggarwal & Guojun Wu, *Stock Market Manipulations*, 79 J. BUS. 1915, 1938, 1942 (2006) (positing that underwriters' use of illegal laddering and tie-in agreements and dissemination of false booster-shot-type information via the internet during the technology boom of the late 1990s significantly contributed to market distortions).

25. See *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 499 (S.D.N.Y. 2003) (“[T]he conduct alleged by the [plaintiffs] is impliedly immune from antitrust scrutiny. Any other result would force the defendants to navigate the Scylla of securities regulation and Charybdis of antitrust law.”).

26. See Brief for NYSE Group, Inc. as Amicus Curiae Supporting Petitioners, at 3, *Credit Suisse First Boston v. Billing*, 127 S. Ct. 762 (2006) (No. 05-1157) (emphasizing the preeminent role played by the Second Circuit in securities litigation). Of a total of 1,892 securities, commodities, or exchange-related cases reviewed by the circuit courts between 2000 and 2006, the Second Circuit handled 23.7% of the volume, followed by the Ninth Circuit with 20.4%, and the Eleventh Circuit with 14.7%. LexisNexis Total Litigator Courtlink, <http://www.lexis.com/research/totalLit/proc> (follow “CourtLink” hyperlink; then click “Strategic Profiles” tab; then “Nature of Suit” tab; select “United States Circuit Court of Appeals - All Courts” under “Courts,” and “OTHER STATUTES - Securities/Commodities/Exchanges (850)” under “Nature of Suit”; restrict dates to 1/1/2000 – 12/31/2006; click “Create Profile”).

27. *Billing*, 426 F.3d at 172 (“[T]here is no indication that Congress contemplated repealing the antitrust laws to protect [tie-in arrangements.]”).

28. *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2389 (2007).

29. See *id.* (explaining that securities regulations implicitly preclude the application of antitrust laws).

30. The treble damage and attorney's fees provisions in antitrust law can decimate even the deepest pockets. See 15 U.S.C. § 15(a) (2000) (providing that victims of antitrust violations may “recover threefold the damages . . . sustained, and the cost of suit, including a reasonable attorney's fee”).

world's premier financial centers.³¹ Why did the Second Circuit and the district and Supreme Court—each consisting of judges who ostensibly share these same pro-market views and apply the same legal principles—arrive at mutually exclusive conclusions?³²

Billing, on its face, revolved around the question of whether IPO practices are immune from antitrust liability.³³ This Note looks deeper into what really drives *Billing*. It will argue that by reversing the Second Circuit and broadly immunizing the IPO-related conduct in *Billing* from the reach of the antitrust laws, the Supreme Court has effectively created a regulatory, super-primary jurisdiction.³⁴ This Note will demonstrate that this result is not accidental.

This Note will further argue that the Second Circuit had it right because absent a conflict between the antitrust and securities schemes—which in the eyes of the Second Circuit did not exist—there was no reason to immunize the *Billing* conduct.³⁵ The Supreme Court's finding of such a conflict or "incompatibility" is questionable at best.³⁶ The Roberts Court could have used *Billing* to stop the potential for further misapplications of the implied immunity and primary jurisdiction doctrines.³⁷ Instead, the Court chose to do away with the two distinct doctrines and merge them in the analysis

31. See *supra* note 16 and accompanying text (describing the threat to the American economy in the form of frivolous antitrust lawsuits if the Supreme Court upheld the Second Circuit's ruling).

32. Circuit Judge Richard Wesley, the author of the Second Circuit's opinion, like Chief Justice Roberts and Associate Justice Alito, was appointed to the bench by President George W. Bush; District Court Judge William H. Pauley, meanwhile is a 1998 Clinton appointee. See The Federal Judiciary Center, Biographical Directory of Federal Judges, available at <http://www.fjc.gov/public/home.nsf/hisj> (providing biographies of all federal judges since 1789) (last visited Oct. 24, 2007).

33. See *Credit Suisse First Boston v. Billing*, Questions Presented, <http://www.supremecourtus.gov/pp/05-01157qp.pdf> (last visited Oct. 21, 2007) (asking only if implied immunity applies, and not acknowledging the primary jurisdiction doctrine).

34. See, e.g., Bush, *supra* note 13, at 792 (arguing that this is precisely what happened in *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)); Francis J. Facciolo, *When Deference Becomes Abdication: Immunizing Widespread Broker-Dealer Practices from Judicial Review Through the Possibility of SEC Oversight*, 73 *MISS. L.J.* 1, 86–87 (2003) (arguing that when dealing with broker-dealer practices, the "[c]ourts are . . . deferring to [the SEC,] an administrative agency in an area of traditional judicial competence").

35. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 169 (2d Cir. 2005).

36. See *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2397 (2007) (concluding securities regulations were incompatible with antitrust liability); see also *infra* Part III (discussing the doctrinal underpinnings of such a conflict classification).

37. Cf. Bush, *supra* note 13, at 809 (advocating that a "rethink[ing of] the doctrines as a unified whole" is in order).

of the *Gordon* five-factor test, which the Court has now recast as a four-element bright-line rule.³⁸ Whether this will actually lighten the workload of the lower courts by reducing the frequency of antitrust claims in the securities area is uncertain.

Part II of this Note will discuss the procedural and historical background of *Billing v. Credit Suisse*, including the opinions of the district court, the Second Circuit, and the Supreme Court. In Part III, this Note will focus on the evolution of the legal framework that led to *Billing* and then argue why the Supreme Court continued on its path to “judicial self-sterilization”³⁹ first signaled in *Verizon Communications, Inc. v. Trinko*.⁴⁰ The discussion will show how the indirect application by the Court of primary jurisdiction, a one hundred year-old doctrine, put yet another nail into the coffin of the courts’ concurrent antitrust jurisdiction and actively rewrote decade-old precedent.

This Note will conclude that the *Billing* Court’s reversal of the Second Circuit is accompanied by another huge cost. The new bright-line *Billing* rule fails to acknowledge fundamental doctrinal differences which will perpetuate the continued guesswork in the circuits; but perhaps more importantly, the Supreme Court, in its 2006–2007 rulings, has continued the stealth attack on investor access to the courts that the SEC and Wall Street have been leading since the 1990s.⁴¹

The *Billing* Court has succeeded in leaving unprotected those whose only realistic access to the justice system in IPO-related securities violations was through precisely the kind of antitrust class-action *Billing* represented.⁴² This begs but one

38. See *Billing*, 127 S. Ct. at 2397 (using the recast *Gordon* four-element rule to determine securities laws were “clearly incompatible” with the antitrust laws in question); see also *infra* Part II and III (summarizing and reviewing the *Billing* Court’s reinterpretation of *Silver*, *Gordon*, and *NASD*).

39. See Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 469 (1954) (explaining how intervention by a regulatory agency can foreclose judicial action).

40. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko* (“*Trinko*”), 540 U.S. 398 (2004). In *Trinko*, Justice Scalia, writing for the Court, essentially read implied immunity as being coterminous with primary jurisdiction. See *id.* at 406. Justice Breyer’s analysis and new test mirror the *Trinko* reasoning. See *infra* Part III (discussing the doctrinal differences and demonstrating that the new test in its application requires a primary jurisdiction-type analysis). For more on this theory, see Bush, *supra* note 13, at 792 (“[Scalia’s] consideration is not a component of any implied immunity analysis [but rather] what Scalia really sought was some type of ‘primary jurisdiction plus.’”).

41. See *infra* Part III.D.1 (discussing the amendments to the securities laws passed by Congress in the 1990s).

42. See *id.* (noting the limitations imposed on securities litigation by the 1990s amendments).

question: Who will be left to look after the ordinary retail investors on Wall Street?

II. CASE RECITATION

A. *Background*

The *Billing* litigation is the final ripple of the wave of dot.com exuberance that flooded world markets over a decade ago.⁴³ This section provides an overview of both the historical context that brought about this lawsuit, and its path through the legal system leading all the way to the Supreme Court.

The technology boom of the 1990s saw an unprecedented number of new companies coming into existence and subsequently going public.⁴⁴ Many of the IPOs then reaching the market were deemed “hot issues”—investor demand for these stocks tended to exceed the supply of the offered security.⁴⁵ With the bursting of the dot.com bubble in 2000, allegations of fraudulent practices, and even market manipulation, by the underwriters of such technology-related IPOs began to surface.⁴⁶ Investors initiated law suits against ten of the largest underwriters in the high-tech markets,⁴⁷ and many of Wall Street’s brightest high-tech stars found themselves fighting to stay out of jail.⁴⁸

1. *The Facts.* In their complaints, investors alleged that the underwriters had violated the nation’s antitrust laws.⁴⁹ The investors also filed parallel lawsuits under the securities laws.⁵⁰

43. See Thomas E. Weber, *Reality Check: Life After the Dot-Com Crash*, WALL ST. J., July 18, 2000, at B1 (reviewing the dot.com mania and its aftermath).

44. See *id.* (recalling the issuance of “one mega-IPO after another”).

45. See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 139 & 139 n.7 (2d Cir. 2005) (citing 2 THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION*, § 6.0, at 1–2 (5th ed. 2005) (defining “hot issue”)), *rev’d*, 127 S. Ct. 2383 (2007); see also THOMAS LEE HAZEN, *PRINCIPLES OF SECURITIES REGULATION* § 50, at 142–43 (2005) (same).

46. See *Billing*, 426 F.3d at 136, 136 nn.1–2 (discussing the various lawsuits, investigations and enforcement actions that resulted from the collapse of the market for technology-related IPOs).

47. *Id.* at 143 & n.15.

48. See Randall Smith, *Next for Quattrone: Dealing With the NASD*, WALL ST. J., May 5, 2004, at C1 (discussing the fate of former Wall Street “titan” and dot.com guru Frank Quattrone). The rise and fall of Quattrone—Credit Suisse First Boston’s ex-chief technology banker—is probably the most famous case directly related to *Billing*.

49. *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 499, (2003), *vacated sub nom.*, *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *rev’d sub nom.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

50. *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65 (S.D.N.Y. 2004), *vacated*, 471 F.3d 24 (2d Cir. 2006). These lawsuits are not the focus of this Note. See also *infra* note 322.

The plaintiffs claimed that some of the largest institutions on Wall Street had conspired to force investors into illegal tie-in and laddering agreements in conjunction with their allocation of hot IPO stocks, while also abusing the IPO syndicate and road-show process.⁵¹ In addition, plaintiffs accused the underwriters of agreeing to have the banks' own research departments issue booster-shots on the securities, thereby further creating artificial market demand.⁵² The investor-plaintiffs asserted these collusive actions led to severe price manipulation in the aftermarket for new issues.⁵³ As a result, the investors claimed to have suffered losses from paying both excessive commissions and artificially inflated prices for the tech-related securities they purchased.⁵⁴

2. *Procedural History.* In 2001, the Southern District of New York grouped the individual plaintiffs into two distinct classes.⁵⁵ The court first consolidated nine separate actions before the court under the Sherman Act⁵⁶ into one proceeding entitled *In re Initial Public Offering Antitrust Litigation*,⁵⁷ and then merged a second investor group, who alleged violations of the Robinson-Patman Act,⁵⁸ under *Pfeiffer v. Credit Suisse First Boston Corp.*⁵⁹

In 2003, the district court granted the defendants' motions to dismiss both cases in a single judgment.⁶⁰ The court ruled that the alleged actions were immune from antitrust liability because the SEC supervises the IPO markets through a pervasive regulatory scheme.⁶¹ Plaintiffs appealed, and the Second Circuit held in their favor.⁶² The appeals court determined it could not find an implied repeal of the antitrust laws for the conduct in question.⁶³ A unified panel concluded the SEC had specifically disallowed the practices at issue, and Congress had not provided

51. *Initial Pub. Offering*, 287 F. Supp. 2d at 499–500.

52. *Billing*, 426 F.3d at 144.

53. *Id.* at 136.

54. *Id.* at 143–45.

55. *Initial Pub. Offering*, 287 F. Supp. 2d at 499.

56. The Sherman Act is codified as amended at 15 U.S.C. § 1 *et seq.* and renders illegal any “conspiracy . . . in restraint of trade.” Sherman Act of 1890, 15 U.S.C. § 1 (2000).

57. *Initial Pub. Offering*, 287 F. Supp. 2d at 497 (S.D.N.Y. 2003).

58. The Robinson-Patman Act makes price discrimination for brokerage commissions illegal and is codified at 15 U.S.C. §§ 13–13b, 21a (2000).

59. *Billing*, 426 F.3d at 143.

60. *Initial Pub. Offering*, 287 F. Supp. 2d at 506, 524 (holding the SEC's broad regulatory scope requires a finding of implied immunity).

61. *Id.* at 523–24.

62. *Billing*, 426 F.3d at 172.

63. *Id.* at 168–70.

any indication it intended to grant a blanket *implied* immunity to anyone simply by virtue of transacting under the SEC's regulatory scheme.⁶⁴ The defendants petitioned for a writ of certiorari, which the Supreme Court granted in December 2006.⁶⁵ In June 2007, with only Justice Thomas dissenting, the Court reversed the Second Circuit.⁶⁶

This Part will examine the analysis of the district court and summarize the opinions of the Second Circuit and Supreme Court.

B. *The District Court's Opinion*

*The existence of a pervasive regulatory scheme mandates a finding of implied immunity.*⁶⁷

The two “putative” class-action suits, consolidated by the district court, alternately charged violations of section 1 of the Sherman Act and section 2(c) of the Robinson-Patman Act.⁶⁸ The district court inferred that “the doctrine of implied immunity provides that federal securities laws impliedly repeal the Sherman Act with respect to certain conduct, and confer immunity from liability under the antitrust laws for that conduct.”⁶⁹

The court based its reasoning, *inter alia*, on *Silver v. New York Stock Exchange* and *United States v. National Ass'n of Securities Dealers, Inc. (NASD)*.⁷⁰ Judge William H. Pauley reasoned that *Silver* suggested mere agency power to review or approve conduct within its regulatory sphere immunizes such actions.⁷¹ Referring to *Silver*, *NASD*, and *Gordon v. New York Stock Exchange*,⁷² he extracted two “narrowly-defined situations”

64. *Id.*

65. *Credit Suisse First Boston Ltd. v. Billing*, 127 S. Ct. 762 (2006) (No. 05-1157).

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

67. *See In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 499 (2003) (granting defendants' 12(b)(6) motion and stating because the SEC exercises a pervasive oversight function the alleged “conduct . . . is impliedly immune from antitrust scrutiny. Any other result would force the defendants to navigate the Scylla of securities regulation and Charybdis of antitrust law”).

68. *Id.*; Sherman Act, 15 U.S.C. § 1 (2000) (disallowing any conspiracy in restraint of trade); Robinson-Patman Act, 15 U.S.C. §§ 13–13b, 21a (2000) (prohibiting price-discrimination when charging brokerage commissions).

69. *Initial Pub. Offering*, 287 F. Supp. 2d at 502.

70. *Id.* at 502–04 (analyzing *Silver v. N.Y. Stock Exchange*, 373 U.S. 341 (1963), and *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975)). In *Silver*, the Supreme Court found no implied immunity because the SEC did not have direct regulatory control over the self-governing NYSE. *Silver*, 373 U.S. at 358–60.

71. *Initial Pub. Offering*, 287 F. Supp. 2d at 502.

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

in which implied immunity should be granted: (1) “when the agency . . . actively regulates the particular conduct challenged” and (2) “when the regulatory scheme is so pervasive” that Congress must have intended to “foresw[ear] the paradigm of competition.”⁷³ In addition, the court added that the SEC could, at any time, choose to impose rules that limited the actions at bar.⁷⁴ Even more importantly, however, the court observed the SEC does not have to actively regulate an action.⁷⁵ The court found the mere fact the SEC *could* regulate the tie-in and laddering arrangements utilized by the underwriting firms warranted a finding of implied immunity.⁷⁶ Accordingly, “the ‘plain repugnancy’ . . . between the antitrust laws and securities regulation [must be read to] ‘extend[] to potential as well as actual conflicts.’”⁷⁷

Judge Pauley reinforced his argument by reasoning “[t]he doctrine of implied immunity is grounded in the shibboleth that Congress does not intentionally vitiate its own regulatory mandates.”⁷⁸ To further bolster his proposition he cited the Second Circuit’s own antitrust and securities jurisprudence—namely, that courts should refrain from “conduct[ing] their own antitrust proceedings” and thus stepping on the toes of an agency already charged by Congress with precisely this same oversight authority.⁷⁹ The district court substantiated this by pointing to the Supreme Court’s *NASD* holding that Congress had equipped the SEC with regulatory might “sufficiently persuasive” to monitor and regulate the conduct at issue.⁸⁰ The court then dismissed the claim as what it perceived to be not only conduct immunized as a matter of law, but also as a meritless attack on the IPO syndicate system.⁸¹ The plaintiffs appealed the district court’s ruling to the Second Circuit.

73. *Initial Pub. Offering*, 287 F. Supp. 2d at 503–04 (citing *In re Stock Exch. Options Trading Antitrust Litig.*, 317 F.3d 134, 147 (2d Cir. 2003) (quoting *Ne. Tel. Co. v. AT&T*, 651 F.2d 76, 82 (2d Cir. 1981))) (utilizing the two-prong test the Second Circuit has synthesized from Supreme Court precedent).

74. *Id.* at 504–05 (citing *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799–802 (2d Cir. 2002)).

75. *Id.* at 506 (“[T]he power to regulate is tantamount to regulation.”).

76. *Id.*

77. *Id.* at 799 (citing *Friedman*, 313 F.3d at 799).

78. *Id.* at 502.

79. *Id.* at 505–06 (quoting *In re Stock Exch. Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003)).

80. *Id.* at 503 (quoting *United States v. Nat’l Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694, 732 (1975)).

81. *Id.* at 506–07, 509–10 (“Plaintiffs ignore the fact that the SEC . . . requires that broker–dealers be members of, or employ, one of these [self-regulatory organizations].”).

C. The Second Circuit's Opinion

Congress did not intend to impliedly immunize the alleged actions.

In a unanimous opinion the Second Circuit pointed to the SEC's and self-regulatory organizations' (SROs)⁸² own investigations, some companion securities litigation, and certain SEC settlements and corrective measures taken to tighten the rules governing IPOs, as evidence lending support to the plaintiffs' argument.⁸³ According to the three-judge panel, "[t]he heart of the alleged anticompetitive behavior finds no shelter in the securities laws."⁸⁴ Observing that securities regulation does not disallow all market manipulations,⁸⁵ the court conceded certain laddering-type arrangements could serve as legitimate market stabilization measures.⁸⁶ The Second Circuit cautioned, however, that even under the right conditions the SEC had limited the "permissible forms of stabilization . . . to those attempts [maintaining] price levels of a security" and should not extend beyond.⁸⁷ Conversely, the panel emphasized that quid pro quo, or tie-in, agreements, which require investors to pay additional consideration in excess of a stock's issue price in return for favorable IPO allocations, are expressly prohibited.⁸⁸ The panel, however, took issue with the district court's contention that *Silver* stands for "the general principle that agency power to review [or approve] private conduct immunizes that conduct,"⁸⁹ pointing to its own adjudication of *Gordon*, which was subsequently affirmed by the Supreme Court.⁹⁰

The SEC acts in both a direct and indirect oversight capacity. THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* §§ 14.3[1]–[3] (4th ed. 2002). The majority of its interaction with broker-dealers falls under the SEC's jurisdiction over self-regulatory organizations (SROs). *Id.* Under the 1934 Act, all broker-dealers engaged in interstate securities business must register with the SEC. *Id.* The National Association of Securities Dealers (NASD) is the largest SRO. *Id.*

82. See *supra* note 81 (describing the function of SROs).

83. See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 136 (2d Cir. 2005) ("Plaintiffs tell a compelling story and are not the first to tell it.").

84. *Id.* at 137.

85. *Id.* at 139 ("[T]he securities regime tolerates 'a little price manipulation.'" (quoting *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 28 (2d Cir. 1985))).

86. *Id.* at 139–40.

87. *Id.* at 140.

88. *Id.* at 141.

89. *Id.* at 148.

90. *Gordon v. N.Y. Stock Exch., Inc.*, 498 F.2d 1303, 1309–11 (2d Cir. 1974), *aff'd*, 422 U.S. 659 (1975).

In *Billing*, as they had in *Gordon*, the Second Circuit specifically “declined to rely on the existence of the SEC’s review power alone” as sufficient to establish the implied immunity defense.⁹¹ In order to evaluate whether the conduct of the *Billing* defendants was impliedly immune from the antitrust laws, the court turned to the test the Supreme Court had laid out in *Gordon*.⁹² The court reasoned that the linchpin of a *Gordon* analysis is Congress’s intent behind the legislation that enabled the SEC in the first place, and the interaction of those laws with the agency’s regulatory framework.⁹³ The basic premise for the *Gordon* test is, unless the securities laws expressly provide for it, antitrust immunity may *not* be implied simply as a matter of law. Instead, the Second Circuit read *Gordon* to mandate such an exemption must be a function of congressional intent.⁹⁴ The panel found no evidence suggesting Congress intended to immunize quid pro quo agreements.⁹⁵ In fact, it went even further by suggesting the district court’s reading of *NASD* was incorrect.⁹⁶ While the SEC has a long history of accepting the anticompetitive practices by the mutual fund industry found in *NASD*, the court opined that the agency has never condoned the kind of tie-in and laddering agreements utilized by the *Billing* defendants.⁹⁷ In fact, the SEC on multiple occasions has affirmed that such arrangements are fraudulent and manipulative and, as such, violate the securities laws and regulations.⁹⁸ Analogously, the laddering and tie-in agreements at issue in *Billing* were also illegal under the antitrust laws.⁹⁹

91. *Billing*, 426 F.3d at 151.

92. *Id.* at 152.

93. *Id.* The five *Gordon* factors—as summarized by the Second Circuit in *Billing*—are: (1) legislative history and structure of the 1934 Act; (2) the likelihood of creating conflicting mandates between antitrust and securities regulation; (3) the possibility of a regulatory decision being “rendered nugatory” by the antitrust laws; (4) the SEC’s own track-record of regulating anticompetitive conduct; and (5) any other evidence that might suggest that Congress intended to impliedly repeal the reach of antitrust in a specific matter. *Id.* at 164–65.

94. *See id.* at 152 (noting that the *Gordon* conclusion was informed by congressional intent).

95. *Id.* at 141, 172 (concluding that “there is no indication that Congress contemplated repealing the antitrust laws to protect” quid pro quo arrangements—also known as tie-in agreements).

96. *See id.* at 170 (refusing as the defendants urged, to adopt the district court’s interpretation of *NASD*).

97. *Id.* at 169.

98. *Id.* at 169–70.

99. *Id.* at 170.

Accordingly, the Second Circuit held there was no conflict between SEC regulation and the antitrust laws.¹⁰⁰ Precisely because SEC enforcement in the *Billing* matter was entirely in lock-step with the antitrust laws, the Second Circuit could find no reason to imply antitrust immunity for the defendants' actions.¹⁰¹ On March 19, 2007, the U.S. Supreme Court granted the defendants' writ of certiorari.¹⁰²

D. The Supreme Court's Opinion

1. Justice Breyer's Majority Opinion.

The two regulatory schemes are incompatible in the IPO context.

A seven-member majority of the Court reversed the Second Circuit and recast the five *Gordon* factors into a four-element bright-line test that now governs all securities–antitrust threshold claims.¹⁰³ Writing for the majority, Justice Breyer held the IPO-related antitrust claims in *Billing* incompatible with the securities laws, and therefore, the securities laws “implicitly preclude[d] the application of the antitrust laws.”¹⁰⁴ The Court first turned its attention to *Billing*'s historical progeny, *Silver*, *Gordon*, and *NASD*.¹⁰⁵ It then proceeded to apply the “*Gordon* factors” to the case.¹⁰⁶

According to the majority, it was not an anticompetitive collective showing of market power that gave rise to the denial of antitrust immunity but rather the NYSE's denial of due process to

100. *Id.*

101. *Id.*

102. *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 1867, 1867–68 (2007) (mem.). Certiorari was initially granted on December 7, 2006, but that order was vacated to allow for Justice Kennedy's recusal. *Id.*; *Credit Suisse First Boston Ltd. v. Billing*, 127 S. Ct. 762, 762–63 (2006).

103. *See Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2386, 2397 (2007) (noting seven justices agreed with the outcome, which reversed the Second Circuit and set out the current four-pronged test). Justice Stevens concurred in the outcome but not its reasoning. *Id.* at 2397 (Stevens, J., concurring). Justice Thomas dissented. *Id.* at 2398 (Thomas, J., dissenting). Justice Kennedy recused himself from the case in March 2007, because his son was employed as a managing director by the lead defendant, Credit Suisse. *See Tony Mauro, Kennedy Recuses From Antitrust Case Involving Son's Company*, LEGAL TIMES, (Mar. 21, 2007), available at <http://www.law.com/jsp/article.jsp?id=1174381423153>. Upon Justice Kennedy's recusal, the Chief Justice, who at first declined participation in the case, rejoined the panel without explanation. *See Docket for 05-1157*, available at <http://www.supremecourtus.gov/docket/05-1157.htm>.

104. *Billing*, 127 S. Ct. at 2387 (finding a “plain repugnancy” between the antitrust and securities laws in the IPO context challenged in *Billing*).

105. *Id.* at 2388–94.

106. *Id.* at 2392–93.

Silver, coupled with the lack of SEC jurisdiction in that area.¹⁰⁷ Conversely, in *Gordon*, the SEC had specifically provided for the fixing of commission rates in its regulations.¹⁰⁸ Therefore, commission-fixing was expressly allowed under the securities laws and, rightfully, sheltered from antitrust liability.¹⁰⁹ Breyer reasoned that the *Gordon* Court's opinion was predicated on "the SEC[s] direct regulatory power over exchange rules and practices," its "active role in review of proposed rate changes during [the 15 years prior to *Gordon*]," and its continuing involvement with the commission rates question.¹¹⁰ Furthermore, Breyer emphasized potential exposure to "conflicting [legal] standards" for the exchanges and their members further justified the *Gordon* result.¹¹¹ At the time the case was before the Court, the SEC recently had been authorized to police the type of "ratefixing" alleged by the *Gordon* plaintiffs.¹¹² The *Gordon* Court, therefore, found conflict between the two legal schemes simply by virtue of the SEC's express right to reintroduce fixed rates in certain circumstances.¹¹³ Thus, "in light of potential future conflict, . . . the securities laws precluded antitrust liability even in respect to a practice that both antitrust law and securities law might forbid."¹¹⁴

Finally, the *Billing* Court noted the *NASD* Court had also found a direct conflict between the two legal frameworks because, unlike the securities regulations, the antitrust laws did not permit the "maintenance" of resale prices, also referred to as price stabilization.¹¹⁵ Quoting *NASD*, Breyer emphasized that securities regulations had empowered the SEC to monitor such activities, at no time had the Commission been lax in exercising its authority, and to allow plaintiffs to reach antitrust remedies would "present a substantial danger that broker-dealers and other defendants would be subjected to duplicative and inconsistent standards."¹¹⁶

From this precedent, the majority extracted a four-element implied immunity test based heavily on their interpretation of

107. *Id.* at 2390 ("[T]he securities laws [do] not preclude application of the antitrust laws to the claimed boycott *insofar as the Exchange denied the expelled dealer a right to fair procedures.*").

108. *Id.*

109. *Id.* at 2390–91.

110. *Id.* at 2390 (citing *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 689 (1975)).

111. *Id.* at 2390–91 (quoting *Gordon*, 422 U.S. at 689).

112. *Id.*

113. *Id.* at 2391.

114. *Id.*

115. *Id.*

116. *Id.* (internal quotation marks omitted).

the five *Gordon* factors and *NASD*.¹¹⁷ It found that conduct in the securities markets that would *potentially* violate antitrust laws in the future is immune from antitrust liability when the following four factors—which in fact resemble elements—are present: (1) a legal regulatory authority charged with supervising the conduct in question exists under the securities law; (2) that regulatory body exercises its authority; (3) where applying both applicable legal schemes would result in “conflicting guidance, requirements, duties, privileges, or standards of conduct;” and (4) the conduct at issue “lie[s] squarely within an area of financial market activity that securities law seeks to regulate.”¹¹⁸ Applying the elements to the *Billing* facts, Breyer noted the SEC possesses broad authority to supervise all the activities in question in *Billing*; in addition, the SEC had never ceased to “exercise[] its legal authority.”¹¹⁹ In fact, Breyer assured us, even private litigants with similar complaints to those in *Billing* have successfully obtained damages under the umbrella of the securities laws.¹²⁰

It is important to note that Breyer dedicated the main focus of his analysis to the fourth element of the *Gordon-NASD-Billing* test, the “serious conflict between the antitrust and regulatory regimes.”¹²¹ He rejected outright the *Billing* plaintiffs’ contention that, because the SEC had “disapproved” of the alleged conduct, the two legal regimes were not in conflict and thus compatible with each other.¹²² According to the majority only a very “fine, complex, detailed line separates activity that the SEC permits . . . from activity that the SEC must . . . forbid.”¹²³ Therefore, only an expert familiar with the practices at issue could determine with confidence on which side of this fine line certain conduct would fall and, moreover, whether the questioned practices would be “permanently forbidden” or whether the SEC retained the flexibility to sanction them in the future.¹²⁴ The Court noted the specter of “nonexpert judges” and “nonexpert juries” passing judgment on such “nuanced” issues poses an

117. *Id.* at 2393, 2397.

118. *Id.* at 2392.

119. *Id.* at 2392–93 (pointing to mechanisms empowering the SEC to regulate the IPO book-building process, enact rules to prevent manipulative practices, and generally granting “considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage”).

120. *Id.* at 2393.

121. *See id.* at 2394–97.

122. *Id.* at 2394.

123. *Id.*

124. *Id.* at 2395, 2397 (emphasis omitted).

unusually great risk of “inconsistent court results”.¹²⁵ Moreover, “any enforcement-related need for an antitrust lawsuit is unusually small” because harmed investors can always bring a lawsuit and obtain damages under the securities laws.¹²⁶ To “weed out unmeritorious securities lawsuits,” Breyer noted Congress had sufficiently “tightened the procedural requirements that plaintiffs must satisfy.”¹²⁷ According to the Court, any antitrust lawsuits involving securities law violations could only achieve one thing—destabilizing the nation’s financial markets; a risk the Court avoided at the expense of reduced access to antitrust causes of action in such instances.¹²⁸ Because of the complexity of the subject matter involved, the majority concluded, “the securities laws are ‘clearly incompatible’ with the application of the antitrust laws in this context.”¹²⁹

2. *Justice Stevens’s Concurrence.* Suggesting any IPO-related agreements amongst underwriters should be viewed as “procompetitive joint ventures for purposes of antitrust analysis” as a matter of law, Justice Stevens outright rejected as “frivolous” the suggestion that an underwriting syndicate could ever restrain trade in a free market.¹³⁰ Stevens based his argument on the fact, given the “magnitude of the market,” the alleged conduct could not have had any conceivable impact.¹³¹ Rationalizing that the plaintiffs had suffered no injury, he argued the plaintiffs therefore lacked a viable cause of action.¹³² Stevens, however, declined to follow the majority’s reasoning, rejecting the argument that “either the burdens of antitrust litigation or the risk ‘that antitrust courts are likely to make unusually serious mistakes’ should play any role in the analysis of the question of law presented in a case such as this.”¹³³ Instead of broadly immunizing the defendants’ conduct, Stevens noted he would have preferred to hold that the *Billing* defendants’ conduct did not in fact violate the nation’s antitrust laws.¹³⁴

125. *Id.* at 2395 (citing Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 629 (2003)); see also *infra* note 262 (discussing Hovenkamp’s article).

126. *Billing*, 127 S. Ct. at 2386.

127. *Id.* at 2396–97.

128. *Id.* at 2397.

129. *Id.*

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

131. *Id.*

132. *Id.*

133. *Id.* (quoting Breyer, J., at 2396) (citation omitted).

134. *Id.*

3. *Justice Thomas's Dissent.* In response to the majority, Justice Thomas suggested that what *Billing* really reflected was the Court's "belief that] it must decide whether the securities laws implicitly preclude application of the antitrust laws because the securities statutes 'are silent in respect to antitrust.'"¹³⁵ Pointing to the broad saving clauses in both the 1933 and 1934 acts, Thomas vigorously rejected the *Billing* majority's holding.¹³⁶ He also attacked as misguided the Court's reasoning that because the *Billing* plaintiffs had not preserved the saving clause argument in the lower courts, it could not now be considered.¹³⁷ Nor, Thomas cautioned, should the Court read too much into other courts' silence on the role of the saving clauses in *Silver*, *Gordon*, and *NASD*.¹³⁸ Thomas concluded a "straightforward application of the saving clauses to this case [requires] that [the *Billing* plaintiffs'] antitrust suits must proceed," and therefore it was unnecessary to reconcile any perceived incompatibility between the two schemes.¹³⁹

III. ANALYSIS

The district court based its decision to grant implied immunity on its interpretation of *Silver*, *Gordon*, and *NASD*.¹⁴⁰ The Second Circuit's decision to vacate relied on its own interpretation of *Gordon*, specifically with regard to congressional intent in the establishment of the SEC.¹⁴¹ The Supreme Court, like the Second Circuit, also relied heavily on *Gordon* and *NASD*—but, unlike the Second Circuit, sided with the district court.¹⁴² What caused this very disparate reading of long-established precedent?

This Part will provide an overview of (1) the implied immunity doctrine and the three original cases, *Silver*, *Gordon* and *NASD*; and (2) the primary jurisdiction doctrine and the *Trinko* case. It will then revisit the congressional intent and history behind the SEC to provide context to the decisions and, in particular, the Second Circuit's and Justice Thomas's reasoning.

135. *Id.* at 2398–99 (Thomas, J., dissenting).

136. *Id.* ("I disagree with that basic premise. The securities statutes are not silent. Both the Securities Act and the Securities Exchange Act contain broad saving clauses that preserve rights and remedies existing outside of the securities laws.")

137. *Id.* at 2399 n.1.

138. *Id.* at 2399–2400 ("Omitted reasoning has little claim to precedential value.")

139. *Id.* at 2400.

140. *See supra* Part II.B.

141. *See supra* Part II.C.

142. *See supra* Part II.D.

This Part will argue that while *Billing* is ostensibly an implied immunity holding, it is the Court's indirect application of primary jurisdiction that underlies the case. Finally, this Part suggests why the outcome of *Billing* should matter to all of us.

A. *An Anthology of Doctrinally Crossed Wires*

The creation of an overlapping system of law is usually by congressional design.¹⁴³ Policy reasons oftentimes serve to justify the existence of the concurrent jurisdiction of independent statutory regimes.¹⁴⁴ Congress also has the power to expressly immunize a regulatory regime from the interference of another coexisting set of laws.¹⁴⁵ Historically, such exemptions have rarely been granted or revoked.¹⁴⁶

Within its constitutional power to pass regulation-enabling legislation, Congress has the prerogative to define if and when a regulated industry is expressly sheltered from the application of the antitrust laws.¹⁴⁷ Unfortunately, Congress has only rarely chosen to provide such a bright-line rule.¹⁴⁸ One example of when Congress did explicitly shelter an industry from the mandate of competition and thus antitrust liability is the insurance sector.¹⁴⁹

143. See U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 505 (1993) (observing the McCarran-Ferguson Act was intended to "grant[] States broad regulatory authority over" the insurance industry, while leaving all but a narrow exception to the antitrust laws intact). See generally Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect Against Market Power When the Market Rules Encourage Its Use)*, 83 OR. L. REV. 207 (2004) (discussing the necessity for overlap of regulation and antitrust, as illustrated by deregulated electricity markets).

144. Bush & Mayne, *supra* note 143, at 284 ("[T]he promotion of competition in 'regulated' markets requires . . . vigorous antitrust enforcement.").

145. Compare Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 860 & n.536 (2004) (lamenting the rarity of Congressional endeavors to explicitly immunize certain regulatory action), with Telecommunications Act of 1996, 47 U.S.C. § 152 (2000 & Supp. III 2004) (limiting the jurisdiction and regulatory power of the FCC), and Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406 (2004) (stating Congress intentionally precluded immunization to antitrust claims via a savings clause in the 1996 Act).

146. Cf. Antitrust Modernization Commission, Hearings on Statutory Immunities and Exemptions, at 4 (Dec. 1, 2005) (statement of Darren Bush) (on file with the *Houston Law Review*) [hereinafter Antitrust Hearing] ("Historically, courts have viewed implied immunities with extreme skepticism.").

147. See generally U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress.").

148. See Dibadj, *supra* note 145, at 860 & n.536 (criticizing Congress for its reluctance to provide clarity where regulation overlaps with antitrust through grants of express immunity).

149. See McCarran-Ferguson Act, 15 U.S.C. §§ 1012-13 (2000) (declaring that to the extent that States regulate the insurance industry, antitrust laws "shall not apply to the business of insurance"). In the first section of this Act, Congress specifically expresses its

During a recent hearing on the insurance exemption the Senate Judiciary committee debated the implications of a limitation or repeal of the insurance antitrust exemption.¹⁵⁰

Congress has granted outright antitrust exemptions sparingly.¹⁵¹ Policy factors weigh heavily in deciding when and if to immunize one sector versus another.¹⁵² For example, the telecommunications and the securities sector have not been granted such express immunities.¹⁵³ Absent legislative specificity, the judiciary must imply such immunities.¹⁵⁴

In the securities sector, the Supreme Court's ambiguous jurisprudence on the implied immunity and primary jurisdiction doctrines has resulted in confusion and misinterpretation.¹⁵⁵ Courts have tended to fuse these two distinct concepts into a single overarching principle.¹⁵⁶ The *Billing* Court was, therefore, at a unique fork in the road. It could have chosen to delineate the

intended policy—to grant regulatory power to the states without interference from federal antitrust law. 15 U.S.C. § 1011 (2000) (“Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”).

150. *The McCarran-Ferguson Act: Implications of Repealing the Insurers' Antitrust Exemption: Hearing Before the Committee on the Judiciary*, 109th Cong. 1 (2006) (opening statement of Sen. Arlen Specter) (introducing the issue of the hearing, “whether there ought to be antitrust coverage for the insurance industry”). The committee focused on the lack of state action vis-à-vis behavior violative of antitrust principles as an indication that the federal government perhaps should revoke the exemption. *Id.* at 25 (statement by Sen. Arlen Specter) (“If you have the failure of States to act where there were antitrust charges that ought to have been brought, that would be probative for Federal action and the repeal of McCarran-Ferguson.”).

151. *See supra* notes 148–149 and accompanying text. The McCarran-Ferguson Act remains one of the very few congressionally enacted express antitrust exemptions.

152. *Cf.* *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 68 (1985) (Stevens, J., dissenting) (“These ‘canon[s] of construction . . . reflect the felt indispensable role of antitrust policy in the maintenance of a free economy.” (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963))).

153. *See supra* note 145 (discussing savings clause in the Telecommunications Act of 1996, 47 U.S.C. § 152(b) (2000)); *see also infra* note 293 (discussing the saving clauses in the Securities Act of 1933 and the Securities Exchange Act of 1934).

154. *See* *Murdock v. Memphis*, 87 U.S. 590, 616 (1875) (asserting that if an “act . . . has no repealing clause nor any express words of repeal,” the only possible repeal is “one of implication”).

155. The contradictory treatment the Second Circuit and Supreme Court give this issue illustrates this point perfectly. *Compare* *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 165 (2d Cir. 2006) (“The mere power to ‘permit’ an act as not violating a regulatory mandate does not alone immunize the act.”), *rev'd sub nom.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007), *with* *Billing*, 127 S. Ct. at 2397 (concluding that because, *inter alia*, the SEC has “clear and adequate . . . authority to regulate . . . the securities laws are ‘clearly incompatible’ with the application of the antitrust laws in this context”).

156. *See* *Bush*, *supra* note 13, at 785–86 (“The doctrine of ‘primary jurisdiction’ is not, as is sometimes thought, an implied immunity.”).

blurred line between the two doctrines caused by the Court's own jurisprudence.¹⁵⁷ Alternatively, it could have affirmed a role for antitrust in the securities arena whenever the two regimes were compatible.¹⁵⁸ Instead, the Court not only chose to fuse the two doctrines into what functionally appears to be a single, new bright-line test,¹⁵⁹ but it also recast precedent to fit the current political views of the Court's majority.¹⁶⁰ As discussed below, the result is tantamount to a broad, judicially-created exemption.¹⁶¹

1. *The Implied Immunity Doctrine.* Absent a mandate from the Legislature, until *Billing*, courts had generally been reluctant to find implied immunities.¹⁶² It is a basic tenet of statutory construction that "repeal[s] by implication [are] not favored."¹⁶³ Typically, immunizing actions which otherwise would be subject to antitrust liability are based on a specific policy objective or legislative intent.¹⁶⁴ In addition, in order for a law "by necessary implication" to repeal another, "there must be a positive repugnancy between the provisions of the [laws,] . . . and even then the [one] law is repealed by implication only pro tanto, to the extent of the repugnancy."¹⁶⁵ In regulated industries,

conduct is . . . deemed to be immune by implication from the antitrust laws in two relatively *narrow* instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation . . . and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined

157. See *infra* Parts III.A.1 and III.A.2 (discussing the confusing and ambiguous jurisprudence on the implied immunity and primary jurisdiction doctrines and the *Billing* Court's failure to resolve the confusion).

158. See *id.* (arguing that *Billing* essentially eliminates access to federal courts and gives the SEC exclusive jurisdiction).

159. See *supra* notes 103–129 and accompanying text (discussing Justice Breyer's majority opinion).

160. See *supra* note 15 and accompanying text (contending the politics of the justices played a role in the utilization of the primary jurisdiction doctrine).

161. See *infra* Part III.A.2.

162. For the classic treatise on the principles of the statutory construction of implied immunities, see PLATT POTTER, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 155–57 (Platt Potter, ed., Albany, William Gould & Son 1878).

163. *Id.* at 155 (quoting *McCool v. Smith*, 66 U.S. (1 Black) 459, 470 (1861)).

164. See *id.* (describing the implied immunity inquiry as one of legislative intent).

165. *Wood v. United States*, 41 U.S. 342, 362–63 (1842).

competition to be an inadequate means of vindicating the public interest.¹⁶⁶

Therefore, any implied immunity from antitrust jurisdiction in a regulated industry would have to fit squarely into one of these two categories: (1) the repugnancy prong, or (2) the pervasiveness (of the regulatory scheme) prong.¹⁶⁷ This suggests implied immunity should be very narrowly construed.¹⁶⁸ Given the extreme breadth of the *Billing* test, which incorporates any and all future SEC regulatory revisions, a repugnancy can and *will* always be found. Therefore, *Billing* appears to have dispensed with the traditionally narrow construction.

The “repugnancy” principle requires the antitrust and securities provisions to actually contradict each other.¹⁶⁹ Thus, a concurrent application of these two sets of rules would inevitably lead to divergent legal outcomes.¹⁷⁰ This conflict is precisely the result the implied immunity doctrine aims to avoid.¹⁷¹ On the other hand, absent such a conflict, no rationale for granting implied immunity exists.¹⁷² The pervasiveness prong, on the other hand, is predicated on Congress’s intent to immunize a sector of activity from the forces of competition, thus insulating it from the reach of antitrust, by use of a pervasive regulatory regime.¹⁷³ In a trilogy of cases between 1963 and 1975, only one of which allowed access to the antitrust remedy, the Supreme Court applied the implied immunity doctrine to the securities markets.¹⁷⁴

166. United States v. AT&T, 461 F. Supp. 1314, 1322–23 (D.D.C. 1978).

167. See *id.*

168. Antitrust Hearing, *supra* note 146, at 5 (agreeing that implied immunity should be found “only under the relatively narrow circumstances set forth by Judge Greene” in *United States v. AT&T*, 461 F. Supp. at 1322–23).

169. But see *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497, 506 (S.D.N.Y. 2003) (asserting the plain repugnancy principle extends to potential as well as actual conflicts).

170. See, e.g., *id.* at 499 (intimating precisely this contradictory result by suggesting “the defendants [would have] to navigate the Scylla of securities regulation and Charybdis of antitrust law”).

171. See *id.* (finding implied immunity as the only solution to the conflict between securities regulation and antitrust laws).

172. See *infra* notes 189–190 and accompanying text (discussing express immunity—saving clauses in the securities acts—and implied immunity as the only methods of exemption from antitrust). To allow for concurrent application of statutes that are not contradictory is precisely the reason for the existence of the saving clauses.

173. See *supra* note 166 and accompanying text (quoting Greene’s interpretation of the second prong of the implied immunity test).

174. *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659 (1975); *United States v. Nat’l Ass’n of Sec. Dealers, Inc. (NASD)*, 422 U.S. 694 (1975); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963). In *Silver* the Court allowed an antitrust suit to proceed. *Silver*, 373 U.S. at 362. In *Gordon* and *NASD*, the existence of the SEC’s regulatory regime, either because its regulation was directly on point (*Gordon*) or because of its pervasive nature and

In the first case, *Silver v. New York Stock Exchange*, the Court grappled with the question “whether and to what extent the federal antitrust laws apply to securities exchanges regulated by the Securities Exchange Act of 1934.”¹⁷⁵ Under the 1934 Act, the SEC had no direct jurisdiction over the actions of the self-regulating exchanges registered with it.¹⁷⁶ The New York Stock Exchange (NYSE) was one of these registrants.¹⁷⁷ As such, granting implied immunity based on the existence of a pervasive regulatory scheme was not feasible.¹⁷⁸

In 1959, the NYSE had instructed its members, in a “collective action”, to disconnect wire and telephone lines they maintained with certain nonmember securities brokers.¹⁷⁹ These included Harold J. Silver, a municipal bond dealer from Dallas.¹⁸⁰ When Silver tried to find out why the lines had been cut, he was told that the NYSE, as a matter of policy, did not disclose any reasons for its actions.¹⁸¹ Furthermore, Silver’s attempts at obtaining an administrative hearing led nowhere.¹⁸² The resulting lack of access to timely trading volumes caused Silver’s business to fail.¹⁸³

The Supreme Court found “[t]he concerted action of the Exchange and its members here was . . . a group boycott depriving [Silver] of a valuable business service . . . needed in order to compete effectively as [a] broker-dealer[] in the over-the-counter securities market.”¹⁸⁴ Because, at that time, phone

purposeful inaction with regard to the specific anticompetitive conduct at issue (*NASD*), obviated the need for such access. *Gordon*, 422 U.S. at 685–86; *NASD*, 422 U.S. at 735.

175. *Silver*, 373 U.S. at 342; see also Securities Exchange Act of 1934 (1934 Act), Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a *et seq.* (2000)). The 1934 Act provides the SEC with the power to directly or indirectly regulate the securities markets and prohibit or sanction certain market activities. See generally Securities Exchange Act of 1934, ch. 404, § 2, 48 Stat. 881, 881 (describing the necessity for securities regulation); see also *Silver*, 373 U.S. at 353 n.7 (describing matters within the SEC’s regulatory authority).

176. See *Silver*, 373 U.S. at 352 (describing the exchanges’ self-regulatory role as primary and the SEC’s role as secondary—only to be used in case the exchanges failed to protect investors, such that the SEC “would keep the shotgun . . . ready for use but with the hope that it would never have to be used”).

177. *Id.* at 350.

178. See *id.* at 358–59 (suggesting that because the SEC had no direct regulatory control over the NYSE, “[t]here is nothing built into the regulatory scheme which performs the antitrust function”).

179. *Id.* at 344, 347.

180. *Id.* at 343–44.

181. *Id.* at 344.

182. See *id.* at 361 (noting Silver was not given “an appropriate opportunity to explain or refute the charges against” him).

183. *Id.* at 344–45.

184. *Id.* at 347.

and wire connections were the only means to conduct the securities trading business in a timely fashion, the NYSE had essentially engaged in restraint of trade.¹⁸⁵ Absent a policy or statutory consideration to suggest a finding of implied immunity, the NYSE's actions would be considered a collusion in restraint of trade, and in violation of section 1 of the Sherman Act.¹⁸⁶

The Court stated “the proper approach to [cases that arise at the intersection of securities and antitrust laws] is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.”¹⁸⁷ In fact, the Court found the 1934 Act contained no express language that would exempt the NYSE from antitrust regulation.¹⁸⁸ The 1934 Act's saving clause explicitly guarantees “the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity.”¹⁸⁹ As such, any repeal of the antitrust laws would have to be implied.¹⁹⁰ Importantly, the Court warned that immunity by implication was a rather limited tool.¹⁹¹ Such a repeal of the antitrust laws should only be granted when absolutely critical to the proper functioning of the 1934 Act.¹⁹²

Neither prongs of the implied immunity test applied to the SEC–NYSE relationship.¹⁹³ Accordingly, the *Silver* Court could imply no antitrust immunity for the NYSE.¹⁹⁴ Instead, the panel noted the NYSE's market power as the largest of the SROs,¹⁹⁵ as well as the blatant lack of due process it had afforded Silver, was clear evidence of an anticompetitive abuse of its position.¹⁹⁶

185. *See id.* at 348 (describing the necessity of instantaneous communication and concluding conduct such as the NYSE's concerted effort to prevent that communication “have long been held to be in the forbidden category of restraints” (citation and internal quotation marks omitted)).

186. *Id.* at 363–64.

187. *Id.* at 357.

188. *Id.*

189. 15 U.S.C. § 78bb(a) (2000).

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

191. *Id.* (“It is a cardinal principle of construction that repeals by implication are not favored.” (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939))).

192. *Id.* (“Repeal is to be regarded as implied only if necessary to make the [1934] Act work, and even then only to the minimum extent necessary.”); *see also supra* notes 162–164 and accompanying text.

193. *Silver*, 373 at 362. The repugnancy and pervasiveness prongs were not met because, as the Court explains, the conduct in question is “wholly foreign to the purposes of,” and “fall[s] too far outside the scope of” the 1934 Act. *Id.*

194. *Id.* at 364.

195. *Id.* at 350 (noting the NYSE, in 1962, conducted 86% of the total dollar value on all exchanges registered with the SEC); *see also supra* note 81 (discussing SROs).

196. *Silver*, 373 U.S. at 361–62 (stating no valid policy of the 1934 Act is advanced

The *Silver* holding is also important for *Billing* because it suggests for the first time that as long as an administrative agency has (1) direct jurisdiction over alleged anti-competitive conduct and (2) a certain antitrust function built into its regulatory scheme, such conduct as a result may be impliedly immune from the reach of the antitrust laws.¹⁹⁷

The *Billing* Court cleverly re-framed the *Silver* holding as only being concerned with the lack of due process afforded *Silver*.¹⁹⁸ In fact, the true reason there was no grant of implied immunity in *Silver* was the restraint of trade by the NYSE and its members coupled with the exchange's market power.¹⁹⁹ *Silver* did not turn on the lack of due process as Justice Breyer would have us believe, but rather on a clear antitrust violation which found no shelter in Justice Green's immunity test.²⁰⁰

In the second in the line of antitrust–securities cases, *Gordon v. New York Stock Exchange*, a controversy involving the fixing of commission rates, the Supreme Court used the “repugnancy prong” of the implied immunity test.²⁰¹ The Court affirmed the general principle that an implied repeal of the antitrust laws could only be permitted “where there is a ‘plain repugnancy between the antitrust and regulatory provisions.’”²⁰² It then expanded on *Silver*, by concluding the SEC could also disapprove of practices, or amend or supplement the rules, to ensure the protection of investors.²⁰³ The 1934 Act gave the SEC specific discretion to fix commission rates.²⁰⁴ Affirming the *Silver* principle that repeal will be “implied only if necessary to make the [1934 Act] work,” the Court concluded “[t]o permit operation of the antitrust laws [in this context] would unduly interfere . . . with the operation of the [1934] Act.”²⁰⁵ The panel noted it was the role of the courts to determine whether an

“by denial of notice and an opportunity for hearing”).

197. See *id.* at 358 (justifying the Court's conclusion by reference to the SEC's “lack of jurisdiction” and the fact that “nothing built into the regulatory scheme . . . performs the antitrust function”).

198. *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2390 (suggesting that had the exchange and members followed fair procedures their actions would have been immune from antitrust liability).

199. *Silver*, 373 U.S. at 350, 361–62.

200. *Id.* at 364–65.

201. *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 682 (1975).

202. *Id.* (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350–51 (1963)).

203. See *id.* at 685 (explaining that *Silver* had left open the question of immunity in a case where the SEC had “direct regulatory power”—and suggesting that *Gordon* was such a case).

204. *Id.*

205. *Id.* at 685–86 (quoting *Silver*, 373 U.S. at 357).

implied repeal of the antitrust laws is required to make the securities regulation work.²⁰⁶ As a matter of law, therefore, an implied repeal of the antitrust laws had to apply in this narrow context.²⁰⁷ Importantly, the court added, “[i]n some cases . . . the courts may defer to the regulatory agency involved, in order to take advantage of its special expertise.”²⁰⁸ The latter is the first acknowledgement, in this context, of the relevance of the primary jurisdiction doctrine, and echoes throughout Justice Breyer’s analysis in *Billing*.²⁰⁹ *Gordon* was the logical extension of *Silver*; while in *Silver* the SEC did not have the authority to directly control the SROs, in *Gordon*, the Commission was authorized to regulate and supervise the fixing of commission rates.²¹⁰ In fact, this was Congress’s intent under the 1934 Act.²¹¹ The Court therefore concluded “failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.”²¹²

The *Billing* Court’s analysis relies heavily on *Gordon*.²¹³ But without mention, it draws heavily on the primary jurisdiction doctrine in its analysis: the risk of incompetent judges and juries who could not conceivably grapple with the complex intricacies and nuances of a securities and antitrust law analysis is precisely the kind of issue the primary jurisdiction doctrine was created to address.²¹⁴

The final case in this antitrust–securities trilogy was *United States v. NASD*.²¹⁵ In striking similarity to *Billing*, the plaintiff alleged violations of section 1 of the Sherman Act by a group of securities dealers in the pricing and redistribution of certain mutual fund securities.²¹⁶ The government suggested the SEC oversight of the broker–dealers had been inadequate and thereby allowed the broker–dealers to engage in horizontal and vertical restraints of trade.²¹⁷ The Commission, meanwhile, argued that

206. *Id.* at 686.

207. *Id.* at 685–86.

208. *Id.* at 686.

209. *See supra* notes 121–125 and accompanying text (reciting Breyer’s deferential treatment of the regulatory agency). Nonetheless, the *Gordon* Court limited primary jurisdiction’s reach by leaving the courts with a role to play in securities–antitrust matters. *See Gordon*, 422 U.S. at 686.

210. *Gordon*, 422 U.S. at 691; *see also supra* note 203 and accompanying text.

211. *Gordon*, 422 U.S. at 691.

212. *Id.*

213. *See Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2387–90 (2007).

214. *See infra* Part III.A.2 (discussing the primary jurisdiction doctrine).

215. *United States v. Nat’l Ass’n of Sec. Dealers, Inc. (NASD)*, 422 U.S. 694 (1975).

216. *See id.* at 700–01.

217. *Id.* at 702.

under the securities laws it was charged with regulating the very practices in question.²¹⁸ In addition, the SEC's mandate included the development of new regulations to remedy any perceived uncompetitive practices.²¹⁹ Inserting the antitrust laws into this mix would effectively gut the agency's powers.²²⁰ A majority of the Court agreed and, against a four-strong dissent,²²¹ sided with the SEC.²²² The Court held that access to the antitrust causes of action would only serve to undermine the SEC's pervasive authority.²²³ Under the SEC's regulations, the practices in question were deemed essential for the proper functioning of the broader statutory scheme.²²⁴ Precisely because the SEC's regulatory function was so pervasive, the Court denied antitrust remedies.²²⁵

The dissenters, which included Associate Justice Douglas—a former SEC Chairman,²²⁶ accused the Court of making a rarely granted exception—implied immunity—the default standard whenever a pervasive regulatory scheme existed.²²⁷ Noting the SEC itself had “requested that the NASD rules be amended to prohibit” the agreements at issue, the minority was surprised that the Court considered the “selling practices under scrutiny . . . essential to the working of the statutory scheme.”²²⁸ The dissenting justices suggested “equat[ing] agency power to approve conduct with an exemption under the antitrust laws” was contrary to the Court's own precedent.²²⁹ The majority

218. *Id.* at 704. In addition to the 1933 and 1934 Acts, the particular mandate at issue in *NASD* is governed by the Investment Company Act of 1940, 15 U.S.C. § 80a (2000), and the Maloney Act, codified at 15 U.S.C. § 78o-3 (2000).

219. *NASD*, 422 U.S. at 704-05.

220. *Id.* at 729-30.

221. *Id.* at 735.

222. *Id.* at 729, 734-36.

223. *Id.* at 734-35.

224. *Id.* at 734.

225. *Id.* at 735.

226. See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 133 (2003) (discussing Douglas's rise to the chairmanship of the SEC); U.S. Securities & Exchange Commission, <http://www.sec.gov/about/sechistoricalsummary.htm> (providing the SEC's official list of its past chairmen) (last visited Oct. 29, 2007).

227. *NASD*, 422 U.S. at 735-36 (White, J., dissenting) (commenting the majority's holding, that implied antitrust immunity is available whether or not the regulatory agency is directed to consider antitrust factors, overlooks the guiding principle that implied antitrust immunity should only be available where there is a convincing showing of clear repugnancy).

228. *Id.* at 747.

229. *Id.* at 744-45.

instead seemed “to reject the basic position . . . that ‘antitrust laws represent a fundamental national economic policy.’”²³⁰

Billing is consistent with *NASD*. In fact, the *Billing* majority takes the next logical step and includes *all* future eventualities in a rule so broad that the Court clearly was hoping to never have to deal with implied immunity issues in the securities arena again.²³¹ The *Billing* Court and the *NASD* majority share the same ambivalence to the fact that the SEC actually disapproved of the alleged conduct. Conversely, the Second Circuit voiced concerns identical to the *NASD* dissenters in its *Billing* disposition.²³² Breyer’s opinion in *Billing* suffers from the same logical flaws as did the *NASD* majority opinion. The tying agreements at issue in *Billing* were expressly disallowed by the regulator, as were the selling practices in *NASD*.²³³ To suggest otherwise is to ignore the nation’s fundamental legal framework for addressing competition and market power.

The implied immunity doctrine, as a matter of national policy intent, should be applied only in narrow circumstances.²³⁴ The doctrine is not a device for extending blanket immunities when neither one nor the other of the doctrine’s narrow two prongs is met.²³⁵ Once a prong is met, however, a controversy is effectively removed from the courts, and concurrent jurisdiction no longer exists. The primary jurisdiction doctrine, on the other hand, preserves concurrent jurisdiction.²³⁶

2. *The Primary Jurisdiction Doctrine.* The doctrine of primary jurisdiction is not synonymous with implied immunity.²³⁷

230. *Id.* at 748 (quoting *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966)).

231. *See supra* note 168 and accompanying text (stating implied immunity should be narrowly construed, and arguing the *Billing* test is overbroad because it incorporates any and all future eventualities of SEC rule revisions).

232. *See supra* notes 97–99 and accompanying text (setting forth the concerns of the Second Circuit in *Billing*).

233. *See supra* notes 98–99 (stating that the laddering and tie-in agreements at issue in *Billing* were illegal under the antitrust laws).

234. *See, e.g., NASD*, 422 U.S. at 735 (White, J., dissenting) (emphasizing the role of antitrust law in a free economy); *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 146 (2d Cir. 2005) (“The antitrust laws represent a ‘fundamental national economic policy.’” (quoting *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981))).

235. *Bush, supra* note 13, at 784 (quoting Judge Green’s opinion in *United States v. AT&T*, 461 F. Supp. 1314, 1322–23 (D.D.C. 1978), and inferring from it “the presumption should be against a finding of implied immunity”).

236. *Id.* at 785 (noting that the primary jurisdiction doctrine involves only a temporary suspension of the courts’ jurisdiction, allowing the regulatory agency a chance to decide on the issue first).

237. *Id.* at 785.

Instead, it is a mechanism for an antitrust court to “suspend the resolution of some questions of fact or law over which it has antitrust jurisdiction” until the regulatory body with jurisdiction over the subject matter at issue has reached its conclusions.²³⁸ In a primary jurisdiction regime, the administrative agency proposes the initial resolution of an issue in order to ensure uniformity in results.²³⁹

A simple railroad freight rate dispute gave rise to the primary jurisdiction doctrine one hundred years ago.²⁴⁰ The railroad had argued that the governing agency, the Interstate Commerce Commission (ICC), had been granted exclusive jurisdiction over freight rates by the Interstate Commerce Act.²⁴¹ The Court found the Act had not explicitly abrogated the court’s rights to provide relief under the common law and “repeals by implication are not favored.”²⁴² Further, any common law rights that predated the statute would remain unless explicitly revoked by the statute or “so repugnant to the statute that the survival of such right would in effect deprive the . . . statute of its efficacy [and] render its provisions nugatory.”²⁴³

The purpose of the Interstate Commerce Act had been to deal with all pricing related issues in interstate railway transport.²⁴⁴ Any federal court adjudicating the reasonableness of freight rates would directly interfere with the agency’s regulatory power.²⁴⁵ Instead of announcing a broad bar to judicial review altogether, the Court held that when a law enables an agency to fix the price or take similar regulatory action, individual redress

238. *Id.*; accord David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 358 (2000) (“Primary jurisdiction permits federal courts to grant administrative agencies original jurisdiction to adjudicate claims within their distinctive competence or where a need for national uniformity is present.”).

239. *See supra* note 238 and accompanying text.

240. *See* *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Plaintiff-shipper alleged it was being overcharged for shipments of cotton seed. *Id.* at 430. Defendant-railroad argued that it had followed all the procedures for filing and publishing tariffs with the interstate commerce commission (ICC) and that the ICC had not found the rates unreasonable. *Id.* at 430–31. In addition, the railroad contended the federal courts had no jurisdiction over the case because the railway was governed by the ICC itself, and a court’s adjudication of unreasonable charges would contradict the actions of the ICC and thereby the commerce clause. *Id.*

241. *Id.* at 430–31.

242. *Id.* at 436–37.

243. *Id.* at 437. Justice White’s pronouncements have become the defining pillars of the primary jurisdiction doctrine; at the same time, his use of the terminology similar to descriptions of the implied immunity doctrine (e.g., “repugnant”) foreshadows the ongoing confusion between the two doctrines. *See, e.g., supra* text accompanying notes 169–170 (using the term “repugnancy” in the context of an implied immunity analysis).

244. *Abilene Cotton Oil*, 204 U.S. at 439.

245. *Id.* at 448.

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must first be sought from that agency.²⁴⁶ The existence of a saving clause preserving existing common-law and statutory remedies signaled the existence of statutorily authorized dual jurisdiction.²⁴⁷ However, the Court recognized *direct* access to the courts only in matters in which the agency did not have “original” authority.²⁴⁸

In 1956, the Supreme Court further refined the doctrine in *United States v. Western Pacific Railroad Co.*²⁴⁹ The panel stated:

“Primary jurisdiction” . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.²⁵⁰

Thus the test asks “whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”²⁵¹ The policy reasons behind the existence of the doctrine translate into two components, namely (1) uniformity and (2) special expertise.²⁵² The effect of Breyer’s *Billing* test is to entirely subsume these two elements under the guise of an implied immunity test.²⁵³

In 2004, the Supreme Court, at least according to some legal observers, made its most recent and most relevant foray into primary jurisdiction.²⁵⁴ In *Verizon Communications Inc. v. Trinko*, another case on appeal from the Second Circuit, Justice Scalia distinguished the case at bar from *Silver*.²⁵⁵ Noting the existence of the Federal Communications

246. *Id.* (holding a plaintiff in a railroad freight dispute must “primarily invoke redress through the [ICC], which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule”).

247. *Id.*

248. *Id.*

249. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956).

250. *Id.* at 63–64.

251. *Id.* at 64.

252. McGovern, *supra* note 11, at 63.

253. *See supra* note 168 and accompanying text (observing the extreme breadth of the *Billing* test).

254. *See* Bush, *supra* note 13 at 785 (pointing out that *Trinko*, ostensibly a case about implied immunity, instead should be read as implicating the primary jurisdiction doctrine).

255. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

Commission (FCC) as a “regulatory structure designed to deter and remedy anticompetitive harm,” he suggested the added overlay and “benefit to competition provided by antitrust enforcement [would] tend to be small.”²⁵⁶ According to the *Trinko* majority,²⁵⁷ the FCC is an “effective steward of the antitrust function” in the telecommunications sector.²⁵⁸ Extending what Professor Bush calls “primary jurisdiction plus” to the regulator,²⁵⁹ the Court reasoned that “[j]udicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by” the various new entrants to the telecom market.²⁶⁰ Justice Scalia’s analytical approach in *Trinko* closely resembles Justice Breyer’s dire warning of the risks to the financial markets and the SEC posed by frivolous lawsuits and ill-equipped judges and juries.²⁶¹

Despite the Court’s overt and covert pronouncements on the doctrine, however, we still cannot agree on what primary jurisdiction means. Many legal commentators have taken sides in the debate over what the primary jurisdiction doctrine means, or should mean.²⁶² In the 1950s, Professor Schwartz, in his seminal discussion of the primary jurisdiction doctrine, decried the judiciary’s creeping, voluntary surrender to the regulatory bodies for adjudication of conduct violating antitrust principles.²⁶³ Advocating limitations on the doctrine,

256. *Id.*

257. Justice Scalia was joined in his majority opinion by then Chief Justice Rehnquist and Justices O’Connor, Kennedy, Ginsburg, and Breyer. *Id.* at 400. Justices Souter and Thomas joined a concurrence by Justice Stevens asserting that the case should have been rejected simply because *Trinko* lacked standing. *Id.* at 416–17 (Stevens, J., concurring).

258. *Id.* at 413.

259. See Bush, *supra* note 13, at 792 (“[O]ne could argue that what Scalia really sought was some type of ‘primary jurisdiction plus.’”).

260. *Trinko*, 540 U.S. at 414.

261. Compare *id.*, with *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2395 (2007).

262. See, e.g., Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 628 (2003) (advocating a Scalia-type “implied immunity” which equates to a greatly expanded “primary jurisdiction”); Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038 (1964) (equating primary jurisdiction with exclusive jurisdiction, because, “insofar as the agency has jurisdiction it excludes the courts”); Louis B. Schwartz, *supra* note 39, at 438 (criticizing the expansion of the primary jurisdiction as tantamount to an abdication of the judiciary’s role); John M. Stokes, *A Few Irreverent Comments about Antitrust, Agency Regulation, and Primary Jurisdiction*, 33 GEO. WASH. L. REV. 529, 555 (1964) (questioning the “vitality” of the primary jurisdiction doctrine in light of the Supreme Court’s decision in *Silver*).

263. See Schwartz, *supra* note 39, at 464. Professor Schwartz states, with regard to

Professor Schwartz suggested administrative expertise was not always what it was cracked up to be.²⁶⁴

There are a number of factors that may impact the capabilities, performance, and impartiality of a regulator. Regulators can be subject to the winds of politics and majority *du jour*, as well as dogmatic and “routinized” decisionmaking.²⁶⁵ The skills and expertise of the regulator can be drained through plain underfunding, which tends to lead to laissez-faire enforcement efforts as well as routine migration from public sector jobs to highly paid private practice opportunities; they can also be stymied by overwhelming political pressures.²⁶⁶ The latter has frequently been used to explain the (at times) lackadaisical enforcement actions by the SEC.²⁶⁷ Moreover, Congress’s failure to more precisely specify the confines or reach of the agency’s powers may leave the regulator unsure of its mandate.²⁶⁸ The *Billing* Court for one, it appears, seemed to be singularly untroubled by such concerns, bestowing upon the SEC what amounts to exclusive original jurisdiction in IPO securities matters.²⁶⁹

In Professor Schwartz’s opinion, the courts went too far to abdicate their responsibility because they are better equipped and provide a neutral, second eye to adjudicate antitrust matters.²⁷⁰

the primary jurisdiction doctrine,

judges will not give relief against an unlawful restraint of trade if there is a possibility that a subsequent administrative decision would approve the questioned activities. The . . . plaintiff is told to take his complaint to the administrative agency whose jurisdiction is “primary.” The agency may then decide whether to approve the activities. Judicial intervention will then take the form of appellate review . . . limited by the usual deference to administrative expertise.

See id. at 464.

264. *See id.* at 471–73.

265. *See id.* at 473.

266. *Id.*; *see also, e.g.*, Facciolo, *supra* note 34, at 6 (commenting that “the SEC is subject to heavy political pressures when it adopts a position unpopular with the financial services industry”); Dale A. Oesterle, *Regulation NMS: Has the SEC Exceeded its Congressional Mandate to Facilitate a “National Market System” in Securities Trading?*, 1 N.Y.U. J.L. & BUS. 613, 637, 669–70 (2005) (lamenting the SEC’s lack of intervention in anticompetitive practices and suggesting “[t]he SEC should have employed more robust antitrust principles long ago in its market regulations and enforcement”).

267. *See* Facciolo, *supra* note 34, at 7–8 (noting the strong opposition from accounting lobbyists that resulted in weaker rules passed by the SEC).

268. *See* Schwartz, *supra* note 39, at 473 (arguing when Congress has not clearly expressed its will, judges are better equipped than administrative agencies to define national policy).

269. *See* text accompanying *supra* note 168 (observing the potential ability of the SEC to alter rules to immunize otherwise prohibited conduct).

270. Schwartz, *supra* note 39, at 474 (pointing out that the judiciary’s “work is subject to much more effective public scrutiny”).

Others, such as Professor Jaffe, nevertheless advocated that the existence of a “pervasive regulatory” regime should in fact bestow a de facto absolute jurisdiction to the regulator.²⁷¹ The most vocal proponent currently advocating this position, albeit under the misnomer of “implied immunity”, is Herbert Hovenkamp, who believes the SEC “is a more efficient regulator [than the courts].”²⁷² Professor Hovenkamp has long advocated giving “a relatively broad scope [to] the doctrine of implied immunity, [so as to require] a federal court to dismiss an antitrust case or at least stay its hand in favor of a regulatory agency.”²⁷³ Curiously enough, this suggestion resembles more of a *Trinko*-esque “primary jurisdiction plus” than the rather narrow application implied immunity has historically been afforded by the courts.²⁷⁴ More importantly, the *Billing* majority clearly heeded Professor Hovenkamp’s advice—his voice resonates within Justice Breyer’s:²⁷⁵ Hovenkamp is not only alarmed by the potential for inconsistent parallel adjudications, but also with entrusting the regulation of an industry to a jury, which, in his view, could lead to disparate outcomes even in like antitrust matters.²⁷⁶ Accordingly the “regulatory agency has the clear comparative advantage over a court of general jurisdiction.”²⁷⁷ Thus, the jurisdiction of the courts in IPO-related antitrust–securities matters should evaporate, while the agency retains a Scalian, or now Breyer-esque über-jurisdiction.

It may appear obvious that the Court should have explained to us that it was applying two distinct doctrines, and distinguish where exactly in the analytical spectrum the two doctrines fall in the antitrust–securities law context.²⁷⁸ Sadly, the Second Circuit’s misguided focus on congressional intent may have given the Court a way to avoid cleaning up this doctrinal mess and instead, in line with *NASD* and *Trinko*, create a safe haven for anticompetitive

271. See Jaffe, *supra* note 262, at 1037–38 (equating primary jurisdiction with effective exclusive jurisdiction).

272. Emily Thornton, *Investment Banks Have a Bad Case of Immunity*, BUS. WK., Feb. 3, 2003, at 82. (quoting Professor Hovenkamp). Professor Hovenkamp served as an advisor to the *Billing* defendants. Stephen Taub, *High Court to Hear IPO Case*, CFO.com, Dec. 11, 2006, available at http://www.cfo.com/article.cfm/8400906/c_8401983.

273. Hovenkamp, *supra* note 262, at 628.

274. See *infra* Part III.C (discussing the implied immunity doctrine and Professor Bush’s theory on *Trinko*).

275. See *supra* note 125 and accompanying text (observing Justice Breyer’s reliance on Professor Hovenkamp’s work).

276. Hovenkamp, *supra* note 262, at 628–29.

277. *Id.* at 629.

278. *Contra* Credit Suisse First Boston v. *Billing*, *supra* note 33 (asking only if implied immunity applies and failing to acknowledge the relevance of the primary jurisdiction doctrine in *Billing*).

practices, even those violating securities regulation. The congressional intent, despite Justice Thomas's valiant attempt in the dissent, is not where the Second Circuit expected it to be.²⁷⁹

B. Congressional Intent, the SEC and the 1975 Securities Act Amendments

1. *Preservation of Competition or Efficient Functioning of the Markets?* The SEC has a congressional mandate to regulate the efficient functioning of the securities markets.²⁸⁰ The agency may approve practices that would be anticompetitive under antitrust laws, such as the tying arrangements at issue in *Billing*.²⁸¹ The SEC will absolve such conduct to promote market stability in the oftentimes volatile IPO markets.²⁸² When the SEC promulgates regulations to delineate acceptable practices, by application, it may shelter such practices from the reach of the antitrust laws.²⁸³ When a practice is not covered by a specific rule, or the SEC has not ruled on it, the question of which practices in the securities market are subject to antitrust scrutiny remains an open question for the courts.²⁸⁴

2. *What Role did Congress Intend for the SEC?* Since the founding days of the nation, the securities industry has been autonomous, preferring self-regulation to government intervention.²⁸⁵ The nation's exchanges were organized as SROs, policing themselves since their establishment.²⁸⁶ Moreover, such

279. See *supra* notes 135–139 and accompanying text (commenting on Justice Thomas's view of the majority's treatment of the saving clause).

280. See Securities Exchange Act of 1934, ch. 404, §§ 2, 4, 48 Stat. 881, 881–82, 885 (codified at 15 U.S.C. §§ 78b, 78d (2000)) (providing the SEC with the power to directly or indirectly regulate, prohibit, and sanction certain market activities).

281. See, e.g., 17 C.F.R. §§ 242.101–05 (2006) (describing several prohibited practices and transactions, but also providing for various exemptions that fall outside of the prohibited conduct); see also *supra* note 85–86 and accompanying text (noting securities laws afford a certain degree of flexibility toward tying agreements).

282. See Oesterle, *supra* note 266, at 654–55 (listing several examples of regulated practices aimed at promoting stability).

283. Such rules fall in the “plain repugnancy” category because the antitrust laws directly disallow a practice allowed by the SEC; in order to avoid negating the SEC's power in the matter, such conduct is automatically impliedly immune from the reach of antitrust laws. See, e.g., *United States v. AT&T*, 461 F. Supp. 1315, 1322–23 (D.D.C. 1978) (discussing the implied immunity doctrine).

284. See Hovenkamp, *supra* note 262, at 630–31 (discussing the Second Circuit's approach where the SEC had not prohibited certain conduct).

285. See Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. REV. 475, 479 (1984) (“[The] securities industry self-regulation started more than one hundred years before passage of the Sherman Antitrust Act.”).

286. The nation's first stock exchange was established in Philadelphia in 1790. See

self-governance was endorsed by the government, which itself was more concerned with economic growth than anticompetitive behavior in achieving this objective.²⁸⁷

In the aftermath of the 1929 stock market crash, these self-regulatory regimes were increasingly viewed as inadequate when it came to protecting the nation's stock market investors.²⁸⁸ In response, Congress passed the Securities Act of 1933 (1933 Act)²⁸⁹ and the Securities Exchange Act (1934 Act).²⁹⁰ Congress also created the SEC as the administrative agency tasked with overseeing and implementing federal securities laws and supervising the nation's securities markets and practices.²⁹¹ The SEC derives its regulatory authority primarily from the dual umbrellas of the 1933 and 1934 Acts.²⁹² Importantly, both Acts contain saving clauses, which preserve a plaintiff's legal remedies by not limiting the possible causes of action to securities law alone.²⁹³

Philadelphia Stock Exchange, <http://www.phlx.com/exchange/index.html> (last visited Oct. 11, 2007). The original NYSE was established by twenty-four prominent stockbrokers and merchants under a sycamore tree at 68 Wall Street in 1792, when they agreed to the trading of securities in return for commission in the so-called Buttonwood Agreement. See NYSE Euronext, About Us: Timeline, available at http://www.nyse.com/about/history/timeline_chronology_index.html (last visited Nov. 2, 2007). In 1817, the exchange officially formalized its self-regulatory status by enacting official rules of conduct for its members. *Id.*

287. See Smythe, *supra* note 285, at 479 (suggesting government recognition of SROs in the securities sector came "at a time when Congress was almost uniquely unconcerned with antitrust dogma").

288. See *id.* at 481.

289. The Securities Act of 1933, also referred to as the "Truth in Securities Act," governs the original issuance of securities. Securities Act of 1933 (Fletcher-Rayburn Securities Act of 1933), Pub. L. No. 73-22, ch. 38, 48 Stat. 74 (codified at 15 U.S.C. § 77 (2000)) (stating the Act's primary purpose is to force an issuer to fully disclose all material facts pertinent to this initial issuance and to prevent fraud in the distribution of these new securities).

290. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, § 2, 48 Stat. 881, 881-82 (codified as amended at 15 U.S.C. § 78b (2000)) (stating that the 1934 Act covers the secondary market for securities—the trading of previously issued securities on exchanges). One of the rules promulgated under the 1934 Act is Regulation M. See 17 C.F.R. § 242 (2005).

291. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, § 4, 48 Stat. at 885.

292. See generally HAZEN, *supra* note 81, §§ 1.2[3][A]–[B] (describing the 1933 and 1934 Acts and the creation of the SEC).

293. The 1933 Act states "[t]he rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity." Securities Act of 1933, Pub. L. No. 73-22, § 16, 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77p(a) (2000)). Similarly, the 1934 Act guarantees

[t]he rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of

At its inception, the SEC was far from being an all-powerful regulator.²⁹⁴ The original draft of the 1934 Act had been perceived as so intrusive by the securities industry, the agency's powers were significantly watered down in the final enactment.²⁹⁵ In addition, Congress enacted the Maloney Act in 1938, which amended the 1934 Act to provide for registration of broker-dealer SROs in the over-the-counter securities market, consistent with the traditional self-governance of the exchanges.²⁹⁶

It was not until the early 1970s that Congress paid another close look at Wall Street.²⁹⁷ Self-regulation came into question again when many brokerage houses' inadequate risk management techniques led to bankruptcies and investor losses.²⁹⁸ In response, Congress promulgated the Securities Act Amendments of 1975,²⁹⁹ which significantly broadened the scope of the SEC's powers.³⁰⁰ The new amendments imposed on the SEC the "explicit and pervasive obligation to eliminate all present and future competitive restraints that could not be justified by the purposes of the [1934] Act."³⁰¹ The Supreme Court's twin decisions in *Gordon* and *NASD*—extending the reach of SEC jurisdiction through the implied immunities granted in these cases—must be viewed in light of these congressional actions.³⁰² Nonetheless, had Congress truly wanted

judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

Securities Exchange Act of 1934, § 28(a), 48 Stat. at 903 (codified as amended at 15 U.S.C. § 78bb(a) (2000)).

294. See Smythe, *supra* note 285, at 481–83 (nothing although as originally drafted the 1934 Act would have given the SEC "detailed, indeed pervasive, authority," the final version of the Act granted more limited authority).

295. *Id.* at 482 ("[I]f governmental regulation attempts to do too much directly . . . it is in danger of breaking down under its own weight and proving ineffective.") (quoting *Stock Exchange Regulation: Hearings on H.R. 7852 and 8720 Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 513 (1934) (testimony of Assistant Secretary of Commerce John Dickinson)).

296. Maloney Act, Pub. L. No. 75-719, ch. 677, § 15A, 52 Stat. 1070, 1070 (1938) (codified at 15 U.S.C. § 78o-3 (2000)). NASD is a registered SRO under this Act. Douglas Shulman, NASD Vice Chairman, Remarks to Securities Traders Association (Jan. 26, 2007), available at <http://www.finra.org/PressRoom/SpeechesTestimony/DouglasShulman/p018435>.

297. Smythe, *supra* note 285, at 499–500.

298. See Oesterle, *supra* note 266, at 617 (describing the "Back Room Crisis" that had gripped Wall Street in the late 1960s and caused the collapse of a multitude of established investment houses).

299. Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified as amended at 15 U.S.C. § 78 (2000)).

300. Smythe, *supra* note 285, at 505.

301. COMMERCE CLEARING HOUSE, SECURITIES REFORM ACT OF 1975 ¶ 2003 (1975).

302. Smythe, *supra* note 285, at 509.

to bestow absolute primary jurisdiction onto the SEC, it either could have said so (as it did in *McCarran-Ferguson*) or repealed the securities acts' saving clauses.³⁰³ Congress chose to do neither, suggesting that it intended only one thing: a continued overlap in the policing of the securities industry by both the SEC and the Department of Justice's Antitrust Division.³⁰⁴

C. *Trinko Revisited: Another Indirect Application of Primary Jurisdiction?*

Despite its rather prompt legislative reaction to the 1960s "back room crisis" and the Court's extension of implied immunities in *Gordon* and *NASD*, legal observers have noted that Congress usually is "more immediately responsive [to] corporate antitrust defendant[s], [while] the Court, guided by canons against exceptions to . . . antitrust policy, has tended to interpret broadly phrased . . . antitrust statutes expansively."³⁰⁵ While such an analysis was clearly true of the Supreme Court's securities-antitrust jurisprudence from the 1960s (the age of *Silver*) to the 1980s, the Court's more recent "cases have considerably expanded each area of [antitrust] exemption and immunity beyond their original purposes."³⁰⁶ The creation in *Trinko* of what essentially amounts to a "primary jurisdiction plus" signaled a general shift in the Court's antitrust jurisprudence.³⁰⁷ While ostensibly a narrow implied immunity case, policy considerations driven by a cost-benefit analysis of antitrust led to the effective grant of primary jurisdiction to the FCC.³⁰⁸ Further, the Supreme Court fell back on "subsequent

303. See *supra* note 293 and accompanying text (quoting the saving clauses).

304. See Pate Letter, *supra* note 8, at n.1 ("The United States [Department of Justice] has primary responsibility for enforcing the federal antitrust laws.").

305. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 376 (1991) (citing *inter alia* *NASD* and *Gordon*). Professor Eskridge's insightful empirical study suggests the Court's statutory analysis relies heavily on dynamic statutory interpretation, a theory that implies the Court will not only consider "arguments based upon plain meaning" or original intent, but also will look to "horizontal and vertical coherence, and good policy." *Id.* at 390. Importantly, Professor Eskridge found "that *current* legislative expectations are usually more important to the Court than *original* legislative expectations." *Id.* at 415 (emphasis added). "The evolution of statutes [in the eyes of the Court] is influenced . . . by changing preferences in the political system." *Id.* Therefore "the Court does not and cannot tie its interpretive practice meaningfully to original legislative intent." *Id.*

306. Bush, *supra* note 13, at 800. For an example of another antitrust doctrine—the "state action" defense—that has been expanded beyond its original purpose see generally *id.* at 766–82.

307. *Id.* at 792 (explaining *Trinko*'s paradigm shift away from traditional implied immunity analysis towards a cost-benefit analysis).

308. See *id.* (arguing that Scalia employed "a cost-benefit analysis of antitrust law,

legislative history as evidence of statutory meaning,” as it often does “when it believes that [history] provide[s] reliable evidence of current congressional preferences regarding an issue of interpretation.”³⁰⁹

The Court in *Billing*—like its intellectual progenitor, *Trinko*—relied on both perceived legislative context and current policy trends to justify its decision.³¹⁰ With its finger on the pulse of the true current economic pendulum, as opposed to public rhetoric, the Court took the opportunity to free yet another regulatory agency from the shackles of concurrent antitrust jurisdiction.³¹¹

D. Why This Matters to You.

1. *Implications of Billing.* What the *Billing* majority was mindful of, but the Second Circuit failed to factor into its “congressional intent” analysis, is that Congress, joined by the SEC and its mighty Wall Street constituency, has been chipping away at private access to securities litigation for a while.³¹² In the mid-1990s Congress amended the 1933 and 1934 Acts to place limitations on securities class-action litigation.³¹³ Interestingly, both the Private Securities Litigation Reform Act of 1995 (“1995 Act”)³¹⁴ and the Securities Litigation Uniform Standards Act of 1998 (“1998 Act”)³¹⁵ significantly limit the saving clauses in the 1933 and 1934 Acts.³¹⁶ In fact, while the 1995 amendment

one that assumes that the costs of antitrust are high” and further noting that “[t]his consideration is not a component of any implied immunity analysis”).

309. Eskridge, *supra* note 305, at 397.

310. See *supra* notes 266–275 and accompanying text (discussing the *Trinko* reasoning and comparing its opinions to *Billing*).

311. See *supra* note 174 and accompanying text (noting in three of the four securities cases leading up to *Billing*, antitrust claims were denied on jurisdictional grounds); see also *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2387 (2007) (holding that antitrust claims were precluded by securities regulation).

312. This seems particularly poignant given the supposed neutrality of the SEC as the final arbiter in securities matters. See Ernest E. Badway & Jonathan M. Busch, *Ending Securities Industry Self-Regulation As We Know It*, 57 RUTGERS L. REV. 1351, 1370–71 (2005) (suggesting because SEC staff are public servants, “the SEC is the only actor in the securities industry that does not have conflicts of interest”).

313. See HAZEN, *supra* note 81, § 7.17 (summarizing how growing concern over abuses in securities class-action cases prompted Congress to respond).

314. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. §§ 77, 78).

315. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C. §§ 77, 78).

316. The higher requirements for pleading with particularity, see e.g., Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 737–39 (codified in 15 U.S.C. §§ 77z-1), are but one example of procedural limitations the amendments place on remedies formerly preserved in the savings clauses. See *supra* note 293 (discussing savings clauses).

restricts access to federal courts, the 1998 Act “prevents most securities fraud-based class actions from being brought in state court.”³¹⁷ Thus, while the saving clauses still stand, the remedies investors can actually pursue have been severely limited.³¹⁸

What then do we make of the SEC’s assertions that the IPO tie-in arrangements alleged in *Billing* are not allowed under its rules?³¹⁹ In a letter-brief addressed to the Second Circuit, the SEC pointed to enforcement actions against three investment houses, which had already settled in the matter.³²⁰ The SEC also noted it brought an injunction suit against another underwriter, also a *Billing* defendant, for violating federal securities laws, as well as NASD rules, for receiving excessive commissions in return for allocating hot IPO stock to its customers.³²¹ In the same letter, the SEC described the securities class litigation, then pending in the district court, along with the actions taken by the SEC, as “appropriate responses” to the alleged IPO misconduct.³²² As a direct result of the tighter class-action standards imposed by the 1995 and 1998 amendments, that very same securities litigation came to a screeching halt when the Second Circuit reversed the district court’s class certification, in

317. HAZEN, *supra* note 81, § 7.17.

318. See also *supra* note 3 (noting other Supreme Court decisions that restrict access to remedies other than through the securities regulations).

319. *But c.f.* Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Release Nos. 33-8565; 34-51500; IC-26828; File No. S7-03-05, at 4, 70 Fed. Reg. 19,672, 19,672 (proposed Apr. 7, 2005) (“Attempts to induce aftermarket bids or purchases during a . . . restricted period . . . have always been prohibited . . . [However, r]ecent enforcement actions suggest that during the hot IPO market of the late 1990s and 2000, some underwriters . . . failed to comply”).

320. See Letter from Giovanni P. Prezioso, SEC General Counsel, to Roseann B. MacKechnie, Clerk, U.S. Court of Appeals for the Second Circuit (Mar. 21, 2005), available at <http://www.sec.gov/litigation/briefs/csfb032105.pdf> (last visited Oct. 11, 2007) [hereinafter Prezioso Letter]. Goldman Sachs, J.P. Morgan, and Morgan Stanley were the three banks that settled. The SEC accused them of violating Rule 101 of Reg. M, 17 C.F.R. § 242.101, under the 1934 Act by attempting to induce certain customers to enter into laddering agreements for shares in the IPO aftermarket. Both Morgan Stanley and Goldman Sachs agreed pay to US\$40 million in civil fines, respectively, while J.P. Morgan, an early repenter, disgorged US\$25 million. See SEC v. Morgan Stanley & Co. Inc., SEC Litigation Release No. 19050 (Jan. 25, 2005), available at <http://www.sec.gov/litigation/litreleases/lr19050.htm>; SEC v. Goldman Sachs & Co., SEC Litigation Release No. 19051 (Jan. 25, 2005), available at <http://www.sec.gov/litigation/litreleases/lr19051.htm>; SEC v. J.P. Morgan Securities Inc., SEC Litigation Release No. 18385 (Oct. 1, 2003), available at <http://www.sec.gov/litigation/litreleases/lr18385.htm>.

321. Prezioso Letter, *supra* note 320.

322. See *id.* (“In addition, private class actions *under the securities laws* are proceeding in the district court.”). For an example of such private class actions, see *In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003), *rev’d*, 471 F.3d 24 (2d Cir. 2006).

the very same week the Supreme Court granted its companion antitrust case—*Billing*—certiorari.³²³

In addition to its enforcement actions, the SEC solicited comments to its proposed amendment of Regulation M (“Reg. M”), the rule that directly deals with what constitutes market manipulation and how to avoid it.³²⁴ In its proposed Reg. M modification, the SEC reiterated it “has long considered tying the award of allocations of [IPO] shares to additional consideration to be fraudulent and manipulative.”³²⁵ The NASD and the NYSE both responded to the SEC’s draft with their own proposals for amendments.³²⁶ Disturbingly, but perhaps not surprisingly, their proposed rules leave plenty of interpretive wiggle room.³²⁷ The SROs were adamant, though, that “the proposed prohibition [must not] interfere with a . . . member organization’s business relationships with its customers.”³²⁸

Meanwhile, empirical studies have directly linked the tying arrangements and other tactics employed in the *Billing* context to widespread fraud on the market.³²⁹ The researchers argued that such arrangements in fact caused distortions not reflective of a normally functioning, competitive market.³³⁰ The end result was that a market, already inflated by unreasonable investor expectations,³³¹ collapsed. The artificial price inflation, triggered

323. See *Billing v. Credit Suisse First Boston Ltd.*, 127 S. Ct. 762 (Dec. 7, 2006) (No. 05-1157) (granting certiorari); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d at 24 (decided on Dec. 5, 2006).

324. See Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings, 69 Fed. Reg. 75,774 (Dec. 17, 2004) (outlining and soliciting comments for the proposed amendments).

325. *Id.* at 75,783.

326. See Self Regulatory Organizations; Notice of Filing of Proposed Rule Changes by New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc. Relating to the Prohibition of Certain Abuses in the Allocation and Distribution of Shares in Initial Public Offerings (“IPOs”), Release No. 34-50896 (Dec. 20, 2004) at 1–2., available at <http://www.sec.gov/rules/sro/nyse/34-50896.pdf>.

327. See, e.g., *id.* at 2 (“No member . . . may offer or threaten to withhold shares it allocates in an [IPO] as consideration or inducement for the receipt of compensation *that is excessive in relation to* the services provided by the member or member organization.” (emphasis added)).

328. *Id.* at 14.

329. See Aggarwal & Wu, *supra* note 24, at 1948 (noting the results of their study of block trades are relevant to securities fraud cases).

330. See *id.* (concluding that market manipulations such as block trades analyzed in their study are associated with stock volatility and impact market efficiency).

331. See Alan Greenspan, Chairman, Fed. Reserve Bank, The Challenge of Central Banking in a Democratic Society, Speech at the Annual Dinner and Francis Boyer Lecture of The American Enterprise Institute for Public Policy Research (Dec. 5, 1996), available at <http://www.federalreserve.gov/BoardDocs/speeches/1996/19961205.htm> (hinting stockmarkets were overvalued owing to “irrational exuberance”).

by the quid pro quo arrangements, laddering, and booster-shots, exacerbated an already precarious market situation and directly contributed to the burst of the dot.com bubble.³³²

Such anticompetitive behavior significantly disrupts the market as a whole, and a “blunt” tool, like an application of the antitrust laws, may have been the right corrective remedy.³³³ The study’s findings suggested that the Second Circuit correctly analyzed that the securities regulations and antitrust laws were in fact compatible, directly contradicting the Supreme Court’s views.³³⁴ In fact, the two sets of laws were in lock-step, and the conduct at issue violated both.³³⁵ The empirical study found a significant manipulation of the market as a whole.³³⁶ “The willingness of informed market participants . . . to distort demand through manipulation for private gain is essential to understanding why prices deviated so dramatically from fundamentals.”³³⁷ In light of the proven fraud and the SEC’s position that its own rules prohibit the *Billing* IPO practices, it is interesting to note that the deadline for posting a revised Reg. M has passed, yet no new regulation is in force.³³⁸

2. *Implications for the Ordinary, Retail Investor.* “Antitrust requires an injury to competition, and not just to individual buyers.”³³⁹ Thus, antitrust laws should be viewed as a mechanism for maintaining competitive markets, rather than protecting the average stock-market investor.³⁴⁰ However, purchasers of securities

332. See generally Aggarwal & Wu, *supra* note 24 (suggesting in their analysis that the statistically abnormal returns found could not be attributable to a properly functioning market, even if such a market was inflated).

333. See *id.* at 1917–19, 1937–38, 1942 (positing statistical data reveals that tie-in schemes created artificial excess demand for the IPOs, leading to distorted price levels in the immediate aftermarket). By comparing IPOs associated with such manipulative tie-in agreements to IPOs that conform to IPO activities authorized by the SEC, the authors show that the former exhibit a distinctly different return pattern from the rest of the IPOs of the same period.

334. See *supra* text accompanying notes 97–101 (noting the Second Circuit found the *Billing* defendants’ conduct to constitute market manipulation).

335. See *supra* note 319 and accompanying text (stating the SEC’s view of tying agreements).

336. Aggarwal & Wu, *supra* note 24, at 1915 (stating the study found manipulators affect the market by causing increases in volatility, liquidity, and returns).

337. Rajesh K. Aggarwal, Amiyatosh K. Purnanandam, & Guojun Wu, Underwriter Manipulation in Initial Public Offerings (Sept. 25, 2007), available at http://www.bauer.uh.edu/wu/Papers/IPO_ladder.pdf.

338. See U.S. Securities and Exchange Commission Search, <http://www.sec.gov/cgi-bin/txt-srch-sec?section=Entire+Website&text=33-8511&sort=rank> (last visited Sept. 25, 2007) (evidencing that the proposed amendments to Regulation M are still “proposed”).

339. Hovenkamp, *supra* note 262, at 622.

340. *Id.* at 609 (“[The purpose of antitrust] is not to . . . protect little traders as such.

should not be precluded from using antitrust liability when the injury arises from uncompetitive market behavior. The *Billing* defendants perpetrated a fraud on the market; this was statistically proven and acknowledged by the SEC.³⁴¹ The conduct alleged in *Billing* not only falls afoul of the securities laws, it is also a blatant violation of antitrust laws.³⁴²

Interestingly, some observers feel the punishment for such manipulative practices, even before the Court's *Billing* holding, lacked deterrent effect.³⁴³ Sadly, the securities class-action litigation fell victim to the new limitations imposed by the 1995 and 1998 Acts when the Second Circuit reversed the district court's class certification.³⁴⁴ Investors who lost money because of these IPO games now must pursue their remedies on an individual basis and in state court. For many of these investors, this is the end of the road.³⁴⁵ Those who wish to continue to "fight the good fight" will find themselves in court against the deep pockets of the Wall Street powerhouses because "[t]he investment banks can afford to hire more expensive lawyers and to drag out these cases."³⁴⁶ For many investors, the legal fees alone will be difficult to justify.³⁴⁷

Its goals are much narrower than those of the [SEC], which is certainly concerned with . . . sharp practices that may injure customers."

341. See *supra* text accompanying notes 221–223, 329 (discussing the SEC's enforcement action against the *Billing* defendants and the Aggarwal and Wu study).

342. See *supra* text accompanying notes 329–337 (arguing that the *Billing* conduct violates both SEC regulations and antitrust laws).

343. See Dawn Skelly, *Monitoring the Manipulation of IPOs*, FINANCE INSIGHTS (Nov. 2005), available at <http://www.carlsonschool.umn.edu/page4627.aspx> ("[T]he punishment is not sufficient to deter such behavior in the future."). Professor Aggarwal claims, "[t]he message sent by the SEC fines was that the underwriters could pay to make the SEC investigation go away The penalties they incurred weren't all that great. The class-action lawsuits may be more significant, but that litigation could take many years to resolve." *Id.* (quoting Professor Aggarwal).

344. See *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 45 (2d Cir. 2006) (vacating the certification of the class saying the plaintiffs could not satisfy the predominance requirement for a class action).

345. However, the *Billing* plaintiffs are not entirely composed of small, hapless investors. Milton Pfeiffer, the original lead plaintiff in the Robinson-Patman action, pursued multiple securities class actions in the past decade. See Pfeiffer v. Integrated Fund Serv's, 371 F. Supp. 2d 502 (S.D.N.Y. 2005); accord Brian Womack, *Investments Banks Still in the Dock in IPO Case*, INVESTOR'S BUS. DAILY, available at <http://www.investors.com/editorial/IBDArticles.asp?artsec=26&issue=20061222> ("It's not like it was only the 70-year-old retiring plumber that was buying[.] It was mainly very large, fairly sophisticated investors who had access to the same information the sellers had." (quoting Professor Hovenkamp)).

346. See Skelly, *supra* note 343 (quoting Professor Aggarwal).

347. See *id.* (stressing the ability of the investment banks to drag out the lawsuits).

IV. CONCLUSION

How the Supreme Court chose to apply the complex implied immunity and primary jurisdiction doctrines at issue in *Billing* now critically impacts all investors in U.S. stock markets. By failing to follow the Second Circuit and confining the implied immunity doctrine to its historically narrow form, the Supreme Court exiled investors alleging fraud on the securities market, like those in *Billing*, from the accessible forum of this nation's courtrooms.

The Court in *Billing* successfully brought into being the creation *Trinko* foreshadowed—a broad “primary jurisdiction plus” for a regulatory agency.³⁴⁸ The result is to remove, at a minimum, any *Billing*-type IPO securities violations from the reach of the courts for the foreseeable future. Moreover, it appears unclear at this point if the SEC is either willing or equipped to vigorously prosecute any *Billing*-type violations in the future.

The *Billing* Court certainly achieved one of the mandates of primary jurisdiction—national uniformity. By elevating the five *Gordon* factors to the *Billing* bright-line immunity rule it finally succeeded in recasting primary jurisdiction in the guise of a single implied immunity test. And, while theoretically simplifying primary jurisdiction, in practice, the Court merely added to an already extensive body of nonsensical legal doctrine. Most importantly, however, it did so at the expense of justice because the *Billing* holding, plain and simple, leaves ordinary retail investors out in the cold.

The doctrines may be obscure and abstract. However, the collateral impact on you, me, our 401Ks, and our investment portfolios is anything but.

Luitgard W. Lina Chambers

348. See *supra* notes 13, 257–261 and accompanying text (discussing *Trinko* and Professor Bush's “primary jurisdiction plus” hypothesis in light of the *Trinko* Court's reasoning).