UNCLEAR REPUGNANCY: ANTITRUST IMMUNITY IN SECURITIES MARKETS
AFTER CREDIT SUISSE SECURITIES (USA) LLC V. BILLING

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INTRODUCTION

For over a century, American antitrust laws have sought to promote competitive conduct in the market place, and to protect consumers from price discrimination, price fixing, and other ill effects of monopolistic behavior.\(^1\) The application of antitrust laws to industries subject to federal regulation presented a difficult issue, since an activity otherwise prohibited by the antitrust laws may be permitted or even required by a regulatory statute enacted by Congress.\(^2\) A court must determine whether a regulatory


statute, either expressly or by implication, repeals the antitrust laws, and whether jurisdiction over the particular conduct lies with the regulatory agency, not the court. When Congress has remained silent, a court may determine that implied immunity exists if the maintaining an antitrust action would “thwart the regulatory regime created by Congress.” Although both securities regulation and antitrust laws seek to promote

(1973)); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, § 19.3b (2d ed. 1999) (stating that traditionally, regulated markets have been viewed as a “closed box,” where antitrust enforcement is “generally unwelcome or at least seriously confined”).

3 KALINOWSKI, supra note 2, at § 60.02.

4 Id. The doctrine of implied immunity or “implied repeal” is derived from two Supreme Court cases, Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), and Keogh v. Chicago & N.R. Co., 260 U.S. 156 (1922). In Abilene, a non-antitrust case, the plaintiff had brought an action to recover damages caused by a common carrier's collection of an allegedly unreasonable rate. The defendant argued that it was exempt from liability, because the rate it charged had been approved by the Interstate Commerce Commission. The Supreme Court held that it would conflict with the regulatory scheme granted to the ICC to permit a state court to hear the plaintiff’s claim, and the plaintiff was required to seek redress through the ICC. Keogh was the first case in which the Supreme Court dismissed an antitrust claim because the industry was regulated. In Keogh, the plaintiff, a shipper, brought an antitrust action alleging a price-fixing conspiracy by an association. The association’s defense was that the rates had been
efficient markets,\textsuperscript{5} the SEC, in regulating securities markets, must consider additional
issues, such as “the economic health of the investors, the exchanges, and the securities
industry,” unlike antitrust law, which is concerned solely with competition.\textsuperscript{6} The parallel
application of antitrust laws and securities regulation could therefore potentially interfere
with regulatory controls and “could undercut the very objectives the antitrust laws are
designed to serve.”\textsuperscript{7} The Securities Act, the Exchange Act and the Investment Company

\textsuperscript{5} See Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990).

\textsuperscript{6} Gordon v. New York Stock Exch., 422 U.S. 659, 689 (1973); see also Herbert
(“For the SEC these various goals may sometimes be in conflict and must be balanced
against each other. By contrast, antitrust is myopic . . . .”).

\textsuperscript{7} Town of Concord, 915 F.2d at 22.
Act,\(^8\) like most regulatory statutes, are silent on the issue of antitrust jurisdiction, \(^9\) leaving courts to determine whether implied immunity exists.\(^{10}\)

While the Supreme Court has written that the general principles applicable to antitrust immunity are “well-established,”\(^{11}\) commentators have opined that the case law of implied immunity is a “quagmire.”\(^{12}\) Courts have differed greatly on when implied immunity can be inferred.


\(^9\) See, e.g., Gordon, 422 U.S. at 687 (holding that the Exchange Act did not confer a general antitrust immunity). Other regulatory statutes, however, such as the Telecommunications Act of 1996, contain a savings clause stating that nothing in the statute effects the applicability of antitrust laws. See 47 U.S.C. § 152, note (2000).

\(^{10}\) HOVENKAMP, supra note 2, at § 19.3a.


\(^{12}\) John Kern, Comment, Price Manipulation in the Commodity Futures Market: A Reexamination of the Justifications for Simultaneous Causes of Action Under the CEA and The Sherman Act, 34 UCLA L. Rev. 1305, 1318 (1987); see also Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 727 (9th Cir. 1981) (“[W]e must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity.”); PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1A ANTITRUST LAW § 243(c) (3rd ed. 2006) (“The implied immunity cases resist definitive harmonization.”).
immunity is necessary.\textsuperscript{13} Despite this confusion, courts have developed two distinct approaches towards implied immunity. Most courts have looked at whether the challenged conduct fell under the authority of the regulatory agency.\textsuperscript{14} If the challenged practice fell under the agency’s jurisdiction, and the agency has exercised its authority over the practice, then a finding of implied immunity may be appropriate. Courts have differed though, as to what extent the agency must exercise its authority over the practice in question before finding implied immunity.\textsuperscript{15} A second approach is to base a finding of

\textsuperscript{13} See James M. Falvey & Andrew N. Kleit, \textit{Commodity Exchanges and Antitrust}, 4 \textit{Berkeley Bus. L.J.} 123, 155 (2007) (“To say that the implied repeal . . . cases lack adequate guidelines and/or a satisfactory standard to follow in future cases is an understatement.”).

\textsuperscript{14} Gordon v. New York Stock Exch., 422 U.S. 659, 685 (1973) (finding implied immunity when the challenged conduct fell under the SEC’s jurisdiction); \textit{cf.} Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (finding that implied immunity was not applicable when conduct did not fall under SEC’s jurisdiction).

\textsuperscript{15} See \textit{NASD}, 422 U.S. at 729–30 (finding implied immunity though SEC had not exercised its authority over the conduct in question); \textit{see also In re} Stock Exchs. Options Trading Antitrust Litig., 317 F.3d 134, 149 (2d Cir. 2003); \textit{cf.} Gordon, 422 U.S. at 689–90 (finding of implied immunity based on active role of the SEC); Silver, 373 U.S. at 358 (refusing to find immunity when there is nothing in the regulatory scheme to perform the antitrust function); \textit{Am. Agric. Movement}, 977 F.2d at 1167 (7th Cir. 1992) (holding that implied immunity is only appropriate when agency approval of the challenged practice is “active, intrusive and appropriately deliberative”); Sound, Inc. v. Am. Tel. & Tel. Co.,
implied immunity solely on the presence of a pervasive regulatory scheme. Courts have found implied immunity appropriate when the agency controls every aspect of the industry’s conduct, or when “Congress must be assumed to have foresworn the paradigm of competition in creating the regulatory scheme.” Implied immunity, however, has rarely been established solely on the presence of pervasive regulation.

631 F.2d 1324, 1330 (8th Cir. 1980) (finding no implied immunity when the FCC did not exercise its authority). Gordon has been criticized for failing to establish whether immunity may be implied when an agency does not exercise its authority over the activity. See Areeda & Hovenkamp, supra note 12, at § 243; Kern, supra note 12, at 1320.

16 See Am. Agric. Movement, Inc. v. Bd. of Trade, 977 F.2d 1147, 1158 (7th Cir. 1992).


18 C. Douglas Floyd & E. Thomas Sullivan, Private Antitrust Actions § 3.4.4.2 (1996); see also MCI, 708 F.2d at 1103 (holding that implied immunity is not established by the mere pervasiveness of a regulatory scheme); Ne. Tel. Co. v. Am. Tel.
Steady throughout these differing approaches to implied immunity in the case law is the long-held standard that, for implied immunity to apply, there must be “a convincing showing of clear repugnancy between the anti-trust laws and the regulatory system.”\textsuperscript{19} Still, courts have applied even this seemingly simple rule in different ways. Some courts have held that a repugnancy exists where application of both antitrust laws and the regulatory scheme would produce conflicting standards for the regulated industry.\textsuperscript{20} \textit{Gordon v. New York Stock Exchange},\textsuperscript{21} provides a clear example of this traditional implied immunity analysis. In \textit{Gordon}, the SEC had approved a system of fixed commission rates, a practice that would be a per se violation of antitrust laws. Since the

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\textsuperscript{20} Strobl v. New York Mercantile Exch., 768 F.2d 22, 27 (2d Cir 1985) (“Antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow.”); see also Finnegan v. Campeau Corp., 915 F.2d 824, 829 (2d Cir. 1990) (holding that implied immunity “may only be found where there is a conflict between the provisions of the antitrust and securities laws”).

\textsuperscript{21} 422 U.S. 659 (1975).
practice fell under the SEC’s authority and there was a direct conflict between the two laws, the Supreme Court found implied immunity.\textsuperscript{22}

Other courts have also viewed repugnancy, not in terms of a conflict between two laws, but as a conflict of authority: Application of antitrust laws would conflict with the authority Congress has granted to regulatory agencies.\textsuperscript{23} Courts have also differed as to what effect agency approval or disapproval of the activity has on the question of implied immunity. Some courts have been willing to find implied immunity even when the challenged conduct has been disapproved of by both antitrust laws and the regulatory agency.\textsuperscript{24} Many courts, however, have chosen to treat agency disapproval of the challenged practice as refuting any claim of implied immunity since, in such cases, there

\textsuperscript{22} \textit{Id.} at 689.

\textsuperscript{23} \textit{See, e.g., Stock Options,} 317 F.3d at 149 (“[I]mplied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme . . . .”); Friedman v. Salomon/Smith Barney, 313 F.3d 796, 800–01 (2d Cir. 2002) (holding that implied immunity exists when antitrust laws would “conflict with Congress's implicit determination that the SEC should regulate the alleged anti-competitive conduct”); \textit{see also} Jeffrey R. Babin, et al., \textit{Developments in the Second Circuit: 2002-2003,} 36 CONN. L. REV. 1187, 1235 (2004) (arguing that \textit{Stock Exchs. Options} equates “repugnancy” with the \textit{Silver} “necessity” standard).

\textsuperscript{24} \textit{See Stock Exchs. Options,} 317 F.3d at 149.
would be no conflict between antitrust laws and the regulatory scheme.\textsuperscript{25} In short, the “clear repugnancy” standard appears as muddled as the other areas of implied immunity case law.

Two recent Supreme Court cases have addressed the issue of implied antitrust immunity for regulated industries. Instead of providing a much-needed definite standard, however, these cases, by shifting the Court’s focus to a more outcome-determinative analysis, have only produced additional questions. In *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko* ("Trinko"),\textsuperscript{26} the Court suggested that implied immunity for violations of the Sherman Act may be appropriate when there is a real possibility that antitrust courts will produce judgments that conflict with the FCC’s regulatory scheme.\textsuperscript{27} The Court, upon finding that implied immunity was not appropriate, proceeded to apply a “costs-benefits” analysis, maintaining that, where a strong regulatory agency is in place, the benefits of additional antitrust enforcement are slight and, thus, unnecessary.\textsuperscript{28} *Trinko* is significant; unlike previous immunity analysis, which was largely concerned with whether authority over the challenged conduct fell to the agency or antitrust laws,

\textsuperscript{25} See *Strobl*, 768 F.2d at 28; MCI Comme’ns. Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1105 (7th Cir. 1982); Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 732 (9th Cir. 1981).

\textsuperscript{26} 540 U.S. 398 (2004).

\textsuperscript{27} Id. at 406; see also Falvey & Kleit, supra note 13 (arguing that *Trinko* "reinforces the *Strobl* antitrust laws and regulatory scheme conflict standard of reviewing").

\textsuperscript{28} *Trinko*, 540 U.S. at 412–13.
Trinko is largely concerned with outcome (i.e., what are the potential effects of withholding antitrust immunity).29

Three years later, in Credit Suisse Securities (USA) LLC v. Billing (“Billing”)30 the Court considered the issue of whether there was a clear repugnancy between antitrust and securities laws.31 Although both the regulatory scheme and antitrust laws prohibited the activity in question, the Court still found a conflict between securities and antitrust laws. In determining whether the Sherman Act and the Clayton Act were “irreconcilable” or “in conflict” with the Securities Act and the Exchange Act, the Court looked chiefly at the potential difficulties for judges and juries in resolving such issues, as opposed to the SEC,32 as well as applying a costs-benefits analysis for antitrust enforcement (echoing Trinko).33 The Court pointed to the danger of conflicting standards—both a conflict between courts and the SEC, as well as the possibility of different courts providing a variety of different standards for the industry.34 In light of this new approach to implied immunity analysis by the Court, the standard for determining when a repugnancy exists is still anything but clear.

29 Areeda & Hovenkamp, supra note 12, at § 243(g)(1).


31 See 127 S.Ct. 2383, 2393 (2007) (“[T]he question before us concerns . . . [i]s there a conflict that rises to the level of incompatibility?”).

32 Id. at 2394–2396.

33 Id. at 2396.

34 Id. at 2395.
This Note argues that a “clear repugnancy” does not exist when both the SEC and antitrust laws prohibit the activity in question. In reaching its finding of implied immunity, Billing departed from the principles of traditional immunity analysis to create a new, outcome-determinative test for repugnancy. This approach—that a repugnancy exists when there is the potential for conflicting outcomes from lower courts—is an unprecedented broadening of the implied immunity doctrine. Part I of this Note examines courts’ divergent approaches to the “clear repugnancy” standard in implied immunity cases concerning the securities industry prior to Billing. Part II of this Note analyzes Billing, and the Court’s approach to the “clear repugnancy” standard. Part III of this Note proposes that SEC approval of the challenged conduct is essential to a finding of “clear repugnancy” and that, for a conflict to exist, the two laws must produce “differing results.”

I. HISTORY OF IMPLIED IMMUNITY IN THE SECURITIES INDUSTRY

A. The Supreme Court Cases: Silver-Gordon-NASD

Three Supreme Court cases established certain basic factors for a finding of implied immunity in the securities markets. First, there must be a clear repugnancy between securities laws and antitrust laws. A repugnancy is present when the SEC has been granted authority over the activity, and exercised that authority, and when the application of both laws would result in conflicting standards for the industry.35

35 See id. at 2392 (discussing the factors required for antitrust immunity as derived from Gordon and NASD).
The Supreme Court first addressed the issue of implied antitrust immunity in the securities industry in *Silver v. New York Stock Exchange.* In *Silver,* a securities firm that was not a member of the New York Stock Exchange arranged to have direct telephone wire connections to Exchange members, in order to have greater access to market data. The Exchange originally approved of the connections but later rescinded its decision and cut off the connections to Exchange members. Silver brought an action against the Exchange for violations of the Sherman Act, arguing that the Exchange had engaged in anticompetitive behavior resulting in substantial losses for Silver’s firm. Since the removal of the wires by the Exchange would have constituted a per se violation of antitrust laws, the Court had to determine whether the Exchange Act had created a duty of exchange self-regulation so pervasive as to preclude the application of antitrust laws, thus exempting the Exchange from liability in this case. The Court first noted that the Exchange Act provided no express exemption from antitrust laws, and that immunity by implication is “not favored,” but may be found if immunity is necessary to make the Exchange Act work, and even then only to the minimum extent necessary.

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37 *Id.* 343–44.

38 *Id.* at 344.

39 *Id.* at 344–45.

40 *Id.* at 347.

41 *Id.* at 357; *see also* Thill Secs. Corp. v. New York Stock Exch., 433 F.2d 264, 269 (7th Cir. 1970) (holding that implied immunity must be based on a showing of true
Once the Court noted that antitrust laws and regulatory schemes should be reconciled whenever possible,\(^\text{42}\) the key issue for the Court was whether Silver’s antitrust suit was “incompatible” with the SEC’s regulation of the Exchange.\(^\text{43}\) Since the Court found that the Exchange Act was not sufficiently pervasive to create to create a total exemption from the Sherman Act and the Clayton Act for the industry\(^\text{44}\) and that the SEC did not have authority under the Exchange Act to regulate the challenged activity, there was no possibility of a conflict and, thus, implied immunity was not appropriate.\(^\text{45}\) Silver provided two factors in determining antitrust immunity: First, as a threshold issue, there had to be a clear repugnancy (or “incompatibility” in the language of Silver) between the regulatory scheme and antitrust laws and, second, the Silver “necessity rule”—that the

\(\text{necessity). This is referred to as the “Silver Necessity Rule.” See AREEDA & HOVENKAMP, supra note 12, at § 243(d).}

\(\text{42 Silver, 373 U.S. at 347; see also United States v. Borden, 308 U.S. 188, 198 (1939) (holding that when two laws touch upon the same subject, the rule is to give effect to both laws if possible).}

\(\text{43 Silver, 373 U.S. at 358; see also Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 301 (1973) (discussing the Silver court’s analysis of incompatibility between regulatory statutes and antitrust laws).}

\(\text{44 Silver, 373 U.S. at 360.}

\(\text{45 Id. at 358; see also Falvey & Kleit, supra note 13, at 150 (“Although there was a comprehensive regulatory framework in place, there was no direct securities regulation addressing the telephone issue found in Silver. Accordingly, the Court denied the defense of Implied Immunity.”).}
immunity for the challenged conduct is granted only to the minimum necessary to make the regulatory scheme work.\textsuperscript{46}

Twelve years later, the Court in \textit{Gordon v. New York Stock Exchange}\textsuperscript{47} reexamined antitrust immunity in the securities industry. The plaintiff alleged that the Exchange’s fixed commission rates for stockbrokers, along with other practices, violated the Sherman Act.\textsuperscript{48} The Court employed a standard similar to the “incompatibility” test used in \textit{Silver} and stated that an implied repeal could only be found where there is a “‘plain repugnancy between the antitrust and regulatory provisions.’”\textsuperscript{49} Unlike the \textit{Silver} Court, however, the \textit{Gordon} Court found a conflict between antitrust laws and the regulatory scheme and granted implied immunity.\textsuperscript{50} The Court based its decision on the fact that the Exchange Act gave the SEC direct regulatory power over the challenged

\begin{footnotesize}
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  \item[47] 422 U.S. 659 (1975).
  \item[50] \textit{See id.} at 684–85.
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activity and that the SEC had taken an active role in regulating the activity.\footnote{Id. at 685; see Harding v. Am. Stock Exch., 527 F.2d 1366, 1368 (5th Cir. 1976) (“[R]ather than presenting a case of SEC impotence . . . this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with rates of commission and resultant SEC continuing activity.”); Jacobi v. Bache & Co., 520 F.2d 1231, 1237 (2d Cir. 1975) (reading Gordon as posing a two-part test: whether the activity fell under the SEC’s jurisdiction, and whether the SEC had actively asserted its authority); see also Credit Suisse Secs. (USA) LLC v. Billing, 127 S.Ct. 2383, 2390 (2007) (discussing the Gordon court’s rationale for finding a conflict between the two laws).}

Furthermore, to deny antitrust immunity would subject the exchanges and their members to “conflicting standards.”\footnote{Gordon, 422 U.S. at 689; see FLOYD & SULLIVAN, supra note 18, at § 3.4.4 (discussing that, in Gordon, the Exchange Act clearly contemplated that the SEC would approve some commission rates, while antitrust laws would condemn any fixed rates, therefore the two laws were incompatible); see also Phonetele. Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 729 (9th Cir. 1981).} Gordon focused not on the pervasiveness\footnote{See Gordon, 422 U.S. at 688–89; see also Jacobi v. Bache & Co., 520 F.2d 1231, 1238 (2d Cir. 1975) (holding that, although the Exchange Act is not sufficiently pervasive to grant blanket antitrust immunity, “particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim”); cf. Otter Tail} of the regulatory
scheme but rather on the congressional intent to give authority over the activity to the
SEC and the SEC’s exercise of its authority.54 In finding that the SEC had “actively
regulated” the practice, the Court pointed to the SEC’s fifteen-year process of studying
the effects of fixed commission rates, holding hearings, proposing rules, setting
breakpoints for commission rates, approving increases in those breakpoints, and
eventually prohibiting fixed commission rates, while still retaining the power to reimpose
fixed rates if necessary.55 The Court reasoned that this long history of regulation,
coupled with the authority conferred by the Exchange Act and subsequent congressional
approval of SEC rules, showed that Congress intended to confer on the SEC the power to
regulate commission rates.56 It concluded that antitrust immunity was therefore
necessary to protect the SEC’s power.57 Here, the Court tinkered with the Silver

Power Co. v. United States, 410 U.S. 366, 373–75 (1973) (holding that antitrust
immunity is appropriate in the presence of a pervasive regulatory scheme).

54 See, e.g., Kern, supra note 12, at 1320. Gordon, however, “spawned additional
ambiguities” by failing to articulate the consequences of the SEC’s failure to exercise its
authority. Id.

55 See Gordon, 422 U.S. at 670–83.

56 Id. at 691. The fact that § 19(b), which permitted the SEC to fix commission
rates, was passed seven years after the Supreme Court held the practice to be a per se
violation of antitrust indicated to the Gordon Court the Congressional intent to impliedly
repeal antitrust laws in this context. See Robert Simon Balter & Christian C. Day, Implied

57 Gordon, 422 U.S. at 691.
necessity standard, by asking not whether the particular SEC rule was necessary to make the Exchange Act work\(^{58}\) but, rather, whether antitrust enforcement would conflict with the overall regulatory scheme.\(^{59}\)

In the same year as Gordon, the Supreme Court decided United States v. National Ass’n of Securities Dealers, Inc. ("NASD").\(^{60}\) In NASD, the Government alleged that the NASD, mutual funds, and broker-dealers had conspired to restrict the sale and fix the resale price of mutual fund shares, thereby inhibiting the growth of a secondary market in mutual fund securities,\(^{61}\) and forcing investors to pay “artificial and non-competitive”

\(^{58}\) Id. at 687. The Gordon court distinguished its ruling from Thill Secs. Corp. v. New York Stock Exch., 433 F.2d 264 (1970), and declined to follow Thill’s holding that concerned whether the particular rule itself was necessary to make the Exchange Act work. Id. at 686–87.

\(^{59}\) See Gordon, 422 U.S. at 688–89 (“[W]e are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress.”); see, e.g., Areeda & Hovenkamp, supra note 12, at § 243(d). Under Gordon “necessity” may have two meanings: 1. whether antitrust immunity is necessary to make the statute function as a “general matter,” or 2. whether the specific activity was “necessary to achieve regulatory goals.” The second inquiry is not needed if the first question is satisfied. Id.

\(^{60}\) 422 U.S. 694 (1975).

\(^{61}\) Mutual fund shares are purchased by investors from the fund itself or through a broker for the fund, which would be considered a primary market. Investors do not purchase shares from other investors on a secondary market, such as the New York Stock
sales loads for mutual fund shares.\textsuperscript{62} Employing many of the same factors as \textit{Gordon},\textsuperscript{63} the Court found a clear repugnancy between antitrust laws and the regulatory statute and granted antitrust immunity.\textsuperscript{64} \textit{NASD}, however, differs from \textit{Gordon}, in that, while the SEC had been given authority to regulate such activities, the SEC had arguably never exercised that authority, such as by promulgating standards that permitted the challenged conduct.\textsuperscript{65} The Investment Company Act of 1940 permitted mutual fund companies to impose restrictions on the sales of their shares, as long as these limitations conformed to the rules promulgated by the SEC.\textsuperscript{66} The SEC, however, had not set any standards.\textsuperscript{67} At Exchange. SEC.gov, Mutual Funds, http://www.sec.gov/answers/mutfund.htm (last visited Nov. 11, 2007); see \textit{NASD}, 422 U.S. at 699–700. An active secondary market in mutual fund shares existed prior to 1940, and abuses in the secondary market led to the passage of the Investment Company Act, which was designed to restrict most secondary market trading. See \textit{NASD}, 422 U.S. at 709–10.


\textsuperscript{64} See \textit{NASD}, 422 U.S. at 719.

\textsuperscript{65} See id. at 727; \textit{Areeda & Hovenkamp}, supra note 12, at § 243(d).

\textsuperscript{66} \textit{NASD}, 422 U.S. at 722.

\textsuperscript{67} Id. at 721. Although the SEC had not prescribed any rules, SEC reports had repeatedly acknowledged “the significant role that private agreements have played in restricting the growth of a secondary market in mutual-fund shares,” and the SEC had
first glance, it would seem that the SEC had not exercised its authority. The Court, however, looked at the role of the SEC prescribed by the Act: Mutual funds retained the initiative in adopting sales restrictions in order to combat disruptive trading practices, subject to oversight by the SEC. The Court held that the SEC’s decision not to impose restrictions was an appropriate exercise of its authority considering its role under the Act of providing administrative oversight.

The Court framed the issue of repugnancy as a conflict between antitrust laws and the authority of the SEC. In other words, since Congress had charged the SEC with final oversight authority over mutual fund companies, to permit an antitrust suit would conflict with the authority granted to the SEC to approve or disapprove of the companies’ practices. The Court also pointed to the pervasive supervisory authority of the SEC permitted fund-initiated restrictions for over three decades. The Court noted that the SEC’s election not to prescribe its own rules was not an “abdication of its regulatory responsibilities,” but rather a manifestation of “informed administrative judgment.”

68 *Id.* at 727.

69 *Id.* at 728.

70 See *id.* at 729–30.

71 *Id.*; see also FLOYD & SULLIVAN, supra note 18, at § 3.4.6 (stating that NASD stands for the proposition that, for implied immunity to apply, the SEC did not have to approve of the conduct, just not exercise their authority to disapprove).

72 NASD, 422 U.S. at 733; see also Austin Mun. Secs., Inc. v. Nat’l Ass’n of Secs. Dealers, Inc., 757 F.2d 676, 695–96 (5th Cir. 1985).
and the danger of “conflicting standards” in the absence of antitrust immunity. While *Gordon* was silent as to what extent the SEC must exercise its authority, *NASD* indicated that this issue largely depends on the role conferred by Congress on the SEC concerning a particular activity. The *NASD* Court reasoned that Congress had determined that there should be some restrictions on competition in mutual fund industry, and that funds would impose restrictions subject to SEC approval; it was Congress’ clear intent that the SEC would have the authority to determine to what extent these restrictions should be tolerated in order to protect the interests of investors. A repugnancy existed because of the pervasive supervisory authority granted to the SEC, rather than any affirmative act or policy by the SEC.

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73 *NASD*, 422 U.S. at 735.

74 *Id.* at 726; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 *Va. L. Rev.* 1051, 1237 (1996) (“*NASD* suggested that the mere fact that the statute permits private parties to enter anticompetitive agreements is alone sufficient to establish ‘clear repugnancy’ with the antitrust laws.”).


76 The Court determined that the SEC held “pervasive supervisory authority” over the mutual funds, since the SEC had the power to determine if a company had satisfied the requirement of the Investment Company Act of 1940. Furthermore, all registered companies were required to submit any proposed rule changes to the SEC for approval, and the SEC had the power to request changes, or order such changes itself. *NASD*, 422 U.S. at 732.
B. Interim Lower Court Decisions

The lower court decisions prior to Billing provide additional clarity to the line of reasoning established by Silver, Gordon, and NASD. First, when a regulatory agency has disapproved of an activity that is also prohibited by antitrust laws, a repugnancy does not exist, and implied immunity should not be found. When Congress has granted the SEC some level of autonomy over an activity, however, a repugnancy may exist, even if the SEC has not exercised its authority to approve or disapprove of the activity. In such cases, a repugnancy may exist, even if the agency currently disapproves of the activity, as long as the agency could potentially approve of the activity.

The lower court cases immediately following Gordon and NASD tended to cover the same ground as Gordon: Implied immunity is appropriate when the activity falls under the SEC’s authority, the SEC has actively regulated that activity, and immunity is necessary to make the regulatory statute function as intended.\(^77\) In Austin Municipal Securities, Inc. v. National Ass’n of Securities Dealers, Inc.\(^78\) and Harding v. American

\(^77\) See, e.g., Jacobi v. Bache & Co., 520 F.2d 1231, 1237 (2d Cir. 1975) (finding no implied immunity when the SEC’s power to enforce a rule on stock sales revenues was at “the periphery of its jurisdiction” and the SEC had disclaimed any power to review).

\(^78\) 757 F.2d 676 (5th Cir. 1985) (holding that the pervasive regulatory scheme of the Maloney Act and the Exchange Acts shielded disciplinary officers of the NASD from an antitrust action).
Stock Exchange, the Fifth Circuit examined cases factually similar to NASD and found implied immunity.

The next group of significant implied immunity cases occurred in the Second Circuit. Although involving commodities markets, rather than the securities markets, Strobl v. New York Mercantile Exchange is an important implied immunity case and clarifies the clear repugnancy standard. Unlike prior case law, Strobl involved conduct that was both a per se violation of antitrust laws, as well as prohibited by the regulatory statute. The plaintiff, a speculator in potato futures, alleged that potato processors had conspired to manipulate the futures prices, resulting in a loss to the plaintiff. Since price manipulation was specifically forbidden by the Commodity Exchange Act, as well as by the Sherman Act and the Clayton Act, the provisions of the CEA did not conflict with antitrust laws. The Strobl court maintained that the presence of a regulatory scheme alone is insufficient to grant immunity; rather, there must be an actual conflict

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79 527 F.2d 1366 (5th Cir. 1976) (holding that the delisting of an investor’s stock by an exchange was “without the ambit” of antitrust laws, since delisting was subject to approval by SEC).

80 See Austin, 757 F.2d at 695; Harding, 527 F.2d at 1369–70.

81 768 F.2d 22 (2d Cir. 1985).

82 See Falvey & Kleit, supra note 13, at 152.

83 See Stobl, 768 F.2d at 28; Falvey & Kleit, supra note 13, at 152.

84 Strobl, 768 F.2d at 24.

85 Id. at 27–28.
not simply an overlap of authority). Gordon and Silver “teach that antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow.” In Strobl, price manipulation was expressly prohibited under section 6(b) of the CEA; this was not a case, such as NASD, where Congress had granted the agency some degree of autonomy over the practice and the agency could permit or prohibit manipulation at its discretion. Strobl indicates that, unless an agency has been granted pervasive supervisory power over an activity, agency approval of the challenged conduct is necessary for a finding of implied immunity, since, otherwise, no clear repugnancy would exist.

The Second Circuit adopted a line of reasoning more in keeping with NASD in Finnegan v. Campeau Corp., focusing its inquiry on the question of the SEC’s authority. In Finnegan, the shareholder of a target company brought an antitrust action, alleging that the conspiratorial practices of two bidders in a takeover attempt violated the Sherman Act. The court held that, since the Williams Act gave the SEC authority to require disclosure of bidding arrangements and prevent fraudulent practices, the Act and

86 Id. at 27.
87 Id.
88 AREEDA & HOVENKAMP, supra note 12, at § 243(e)(3) (noting that Finnegan follows NASD).
89 915 F.2d 824 (2d Cir. 1990).
90 Id. at 826.
antitrust laws were in conflict.\textsuperscript{91} The fact that the SEC had not exercised that authority did not “reduce the SEC’s supervisory power.”\textsuperscript{92} Since the SEC’s authority in this instance primarily consisted of ordering disclosures, however, it arguably would not necessarily conflict with the SEC’s authority to apply both the Williams Act and the Sherman Act.\textsuperscript{93}

The Second Circuit continued this interpretation of repugnancy in \textit{Friedman v. Salomon/Smith Barney, Inc.},\textsuperscript{94} finding antitrust immunity based on a conflict of authority, even when the SEC had studied the activity in question, and failed to exercise its authority to disapprove of the activity.\textsuperscript{95} In \textit{Friedman}, individual investors alleged that defendants, sellers of stock, restricted investors from “flipping” (selling their purchases shortly after an initial public offering) as a form of price stabilization (a restriction not in place for institutional investors) in violation of the Sherman Act.\textsuperscript{96} The court found that since, under the Exchange Act, price stabilization measures were permitted subject to

\begin{itemize}
  \item \textsuperscript{91} \textit{Id.} at 829–31.
  \item \textsuperscript{92} \textit{Id.} at 831.
  \item \textsuperscript{93} William T. Reid IV, Comment, \textit{Implied Repeal of the Sherman Act Via the Williams Act: Finnegan v. Campeau Corp.}, 65 ST. JOHN’S L. REV. 974–76 (1991) (“Since intervention into conspiratorial bidding arrangements is beyond any procedural powers vested in the SEC by section 14(e), the Sherman Act can coexist with the Williams Act.”).
  \item \textsuperscript{94} 313 F.3d 796 (2d Cir. 2002).
  \item \textsuperscript{95} \textit{See id.} at 800–01; AREEDA & HOVENKAMP, \textit{supra} note 12, at § 243(e)(3).
  \item \textsuperscript{96} \textit{Friedman}, 313 F.3d at 797–98.
\end{itemize}
SEC approval, Congress had granted the SEC pervasive oversight authority over the activity. Therefore, permitting antitrust litigation would conflict with the role given to the SEC by Congress to have final authority over the challenged conduct.

Although not explicitly overturning *Strobl, In re Stock Exchanges Options Antitrust Litigation* (“Stock Options”), diverged significantly from *Strobl*’s previous emphasis on “conflicts.” In *Stock Options*, the purchasers of equity options alleged that several exchanges had conspired to restrict the listing and trading of particular options to one exchange at a time, rather than multiple listings, thereby restraining trade in violation of the Sherman Act. Although the SEC’s view on whether multiple listings should be permitted had changed often in the past, at the time of *Stock Options*, both the SEC and the Sherman Act prohibited restrictions on multiple listings. The plaintiff contended that implied repeal was not necessary since there was no conflict between the two laws. Nevertheless, the court found that implied immunity does not depend on a conflict between the views of the agency and antitrust laws, rather “it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers

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97 See id. at 802.

98 See id. at 800–01.

99 317 F.3d 134 (2d Cir. 2003).


101 *Stock Options*, 317 F.3d at 138.

102 *Id.* at 143.

103 *Id.* at 142 (citing SEC Amicus Brief).

104 *Id.* at 149.
the agency to allow conduct that the antitrust laws would prohibit.”\textsuperscript{105} Section 9(b) of the Exchange Act made it unlawful for any person to engage in options transactions “in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors . . .”\textsuperscript{106} Congress had thus granted the SEC broad supervisory power to regulate options trading.\textsuperscript{107} The court saw no way to reconcile the authority of the SEC (which could potentially permit exclusivity agreements) with antitrust laws.\textsuperscript{108} The court reached this decision despite an amicus brief from the SEC arguing against granting immunity.\textsuperscript{109}

\textsuperscript{105} Id.


\textsuperscript{107} See \textit{Stock Options}, 2001 WL 12835 at *2. The district court decision noted that, when Congress amended the Exchange Act in 1975, the SEC’s power over options trading increased. The exchanges were required to submit all rule changes to the SEC for approval, and the SEC was authorized to alter exchange rules. Id. This is similar to the “pervasive supervisory” authority found in \textit{NASD}. See supra note 77.

\textsuperscript{108} \textit{Stock Options}, 317 F.3d. at 150.

\textsuperscript{109} See id. at 149. The SEC maintained that “‘[t]his is an unusual case, in which the Commission has addressed the precise conduct at issue and has decided to prohibit it . . . [i]t does not present a situation where, in our view, the antitrust laws are impliedly
prompting some commentators to note that *Stock Options* “does not even allow a regulatory agency to deny authority.”¹¹⁰ Under *Stock Options*, the traditional inquiry of whether there is a clear repugnancy, thus making implied immunity necessary to make the Exchange Act work, has been equated with the inquiry of whether antitrust laws conflict with an overall regulatory scheme that grants the power to a regulatory agency to permit the challenged conduct.¹¹¹

II: CREDIT SUISSE SECURITIES (USA) LLC v. BILLING

In *Credit Suisse Securities (USA) LLC v. Billing*,¹¹² the Supreme Court again addressed the issue of antitrust immunity in the securities industry, and held, in a 7-1 decision,¹¹³ in favor of implied immunity. Although *Billing* purported to be solidly based on the Court’s earlier decisions in *Silver, Gordon*, and *NASD*, something had clearly repealed, such as where the securities laws authorize the conduct or the Commission has approved or permitted it.” "Id. at 142.

¹¹⁰ Falvey & Kleit, supra note 13, at 155.

¹¹¹ Babin, supra note 23, at 1234–35.


¹¹³ Justice Thomas dissented arguing that both the Securities Act and the Exchange Act have broad saving clauses that preserved the right to seek remedies under other laws. Id. at 2399. Justice Kennedy recused himself, since his son is a managing director of Credit Suisse Securities. See Linda Greenhouse, *Justices Back Underwriters on New Issues*, N.Y. TIMES, June 19, 2007, at C1.
changed in the Court’s antitrust immunity analysis. While prior cases focused on/questions of authority over the challenged conduct, the bulk of Billing’s analysis
concerned the potential results of antitrust litigation. This “new test,” initially proposed
by Trinko and seconded by Billing, recasts “clear repugnancy” as a question of outcomes,
rather than any inherent differences in policy or authority. In Billing, “conflict” is not
premised on a difference of opinion between antitrust laws and the regulatory agency, or
even a conflict of authority between the two laws. Rather, the Court’s finding of a
conflict is largely based on the possibility of differing results from lower courts if
antitrust lawsuits are permitted. At the heart of this new approach is the underlying
policy of limiting securities and antitrust lawsuits that could be “numerous” and
“unmeritorious.” In fashioning a new standard for antitrust immunity, Billing has
conferred such broad-scale immunity114 from antitrust suits that it begs the question
when, if ever, immunity would be inappropriate in the securities industry.

In Billing, a group of sixty investors filed two antitrust class action suits against
ten leading investment banks.115 During the stock market bubble of the late 1990s, the
banks had served as underwriters, forming syndicates116 to execute the IPOs of hundreds

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115 Billing, 127 S.Ct. at 2388.
116 Two or more investment banks often form a syndicate to underwrite IPOs. The
banks assess the market value, and price the shares of the new IPO. The banks buy the
shares from the company at an agreed price, and resell the shares to investors at full price.
See Wesley R. Powell & Matthew Freimuth, Antitrust Disputes Nixed: SEC Governs IPO
of technology-related companies. The investors alleged that the banks violated antitrust laws by conspiring not to sell shares of the new IPOs unless the buyers agreed (1) to pay excessively high sales commissions; (2) to purchase other, less desirable securities, a practice known as “tying”; and (3) to buy additional shares of the IPO at escalating prices, a practice known as “laddering.” The investors alleged that the purpose of this conspiracy was (1) to increase the price of shares that purchasers paid following the IPO well-above what the price would have been in a competitive market.


117 Powell & Freimuth, supra note 116, at 4; see also Roberta S. Karmel, Underwriters’ Victory in Supreme Court Case, N.Y. L.J., August 16, 2007, at 3; Howe, supra note 114, at 60.

118 Billing, 127 S.Ct. at 2389; Karmel, supra note 117; Howe, supra note 114. Certain tie-in arrangements require customers to purchase shares of the same security after the IPO, creating an artificial demand for the stock. This practice is manipulative since its purpose is to push the price of the stock higher following the IPO. See Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 142 (2d Cir. 2005).

119 Billing, 127 S.Ct. at 2389. Laddering agreements, a variation on “tying,” is another form of price manipulation of a stock, where the pre-arranged purchase of shares at escalating prices following the IPO stimulates the demand for the stock, helping the price rise to a premium. See Billing, 426 F.3d at 142–43.
and (2) to create an artificial demand for the shares, leading to increased commissions and fees for the banks.\textsuperscript{120}

The banks moved to dismiss the claim, arguing that federal securities laws impliedly repealed antitrust laws for the challenged conduct.\textsuperscript{121} The district court found immunity, and dismissed the complaint,\textsuperscript{122} while the Second Circuit reversed and reinstated the complaint.\textsuperscript{123}

In addressing the issue of implied immunity, the Supreme Court drew heavily on the \textit{Silver-Gordon-NASD} line of cases,\textsuperscript{124} reiterating the old standards that repeal of antitrust laws may be implied “only to the minimum extent necessary,” and only if a “plain repugnancy” exists between the antitrust laws and regulatory provisions.\textsuperscript{125} From the \textit{Silver-Gordon-NASD} triumvirate, the Court distilled four critical factors for finding a “clear repugnancy” between antitrust and securities laws:

\begin{itemize}
  \item[(1)] the existence of regulatory authority under the securities law to supervise the activities in question;
  \item[(2)] evidence that the responsible regulatory entities exercise that authority;
  \item[(3)] a resulting risk that the
\end{itemize}

\textsuperscript{120} \textit{In re Initial Public Offering Antitrust Litig.}, 287 F. Supp. 2d 497, 500 (S.D.N.Y. 2003).
\textsuperscript{121} \textit{Billing}, 127 S.Ct. at 2389.
\textsuperscript{122} \textit{See IPO Antitrust Litig.}, 287 F. Supp. 2d at 524–25.
\textsuperscript{123} \textit{See Billing}, 426 F.3d at 170.
\textsuperscript{124} \textit{See Billing}, 127 S.Ct. at 2389–92; Powell & Freimuth, \textit{supra} note 116, at 7 (stating that the \textit{Billing} court “anchored” its opinion on \textit{Silver-Gordon-NASD}); Karmel, \textit{supra} note 117, at 3.
\textsuperscript{125} \textit{See Billing}, 127 S.Ct. at 2390.
securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. . . . (4) . . . the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.  

The Court easily dispatched with three of these requirements.  

First, the Court found that the activity in the question, investment banks acting jointly to underwrite new securities, is “central to the proper functioning of well-regulated markets.” The Court also found that the SEC had broad authority to regulate the banks’ conduct, and had continuously exercised that authority.  

126 Id. at 2392.  

127 See Powell & Freimuth, supra note 116, at 7 (“In short order, the Court found three of the factors present in Billing.”).  

128 In analyzing the fourth factor, the Court looked beyond whether the activity was regulated by the SEC to the importance of the activity to the securities markets. The Court noted that the IPO process is valuable to the market since it “supports new firms that seek to raise capital; it helps to spread ownership of those firms broadly among investors; it directs capital flows in ways that better correspond to the public's demand for goods and services.” Id.; see also Brief of Plaintiff, In re Shorts Sale Antitrust Litig., 2007 WL 2959914 (S.D.N.Y. 2007) (No. 06 Civ. 2859) (interpreting the fourth factor from Billing as whether the activity “impact[s] the proper functioning of the securities markets”).  

129 Billing 127 S.Ct. at 2392–93 (“Indeed the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage.”). The Court pointed
The Billing Court devoted most of its analysis to the third issue: If the concurrent application of both securities and antitrust laws would produce conflicting standards for the banks.\(^{131}\) The SEC had long considered tying and laddering arrangements to be “fraudulent and manipulative,” and such practices had always been actionable under section 17(a) of the Securities Act and section 10(b) and Rule 10b-5 of the Exchange Act\(^{132}\) and the SEC had brought actions against underwriters who had engaged in tying specifically to 15 U.S.C. §§ 77b(a)(3), 77j, and 77z-2 (granting the SEC power to regulate the process of book-building, solicitations of "indications of interest," and communications between underwriting participants and their customers); § 78o(c)(2)(D) (granting the SEC power to define and prevent, through rules and regulations, acts and practices that are fraudulent, deceptive, or manipulative); §§ 78i(a)(6), 78j(b) (similar).

\(^{130}\) *Id.* at 2393.

\(^{131}\) *Id.* at 2393.

\(^{132}\) See *id.*; Powell & Freimuth, *supra* note 116, at 7; Karmel, *supra* note 117, at 7 (“The only serious issue to examine, therefore, was the issue of incompatibility.”).

and laddering agreements.\textsuperscript{133} Furthermore, the SEC had extensively reviewed tying and laddering agreements and had continuously exercised its authority by proposing rules and issuing statements concerning such agreements.\textsuperscript{134} The investors argued that, since the SEC and the antitrust laws both prohibited such anticompetitive conduct, there could be no “conflict” or “incompatibility” between the two laws.\textsuperscript{135}

The Court, however, rejected this argument, holding that even though the SEC had disapproved of the banks’ conduct (and \textit{arguendo} would continue to disapprove of it), “securities law and antitrust law are clearly incompatible.”\textsuperscript{136} This decision was

\textsuperscript{133} \textit{Billing}, 127 S.Ct. at 2393.

\textsuperscript{134} See \textit{Billing v. Credit Suisse First Boston Ltd.}, 426 F.3d 130, 142–43, 170 (2d Cir. 2005); \textit{IPO Antitrust Litig.}, 287 F. Supp. 2d at 514–15. As an example of the SEC exercising its authority in this area, the \textit{Billing} Court mentioned that the SEC has defined in detail “what underwriters may and may not do and say during their roadshows.” \textit{Billing}, 127 S.Ct. at 2393.

\textsuperscript{135} \textit{Billing}, 127 S.Ct. at 2394.

\textsuperscript{136} \textit{Id.}
largely premised on policy considerations: See Karmel, supra note 117, at 7 (“In finding such incompatibility, the Court exhibited a policy animus to private antitrust actions in the securities area.”). First, to permit antitrust actions in the immediate case would present a “legal line-drawing problem” since lower courts lack the requisite expertise to determine which syndicate practices are permitted and which are forbidden. The Court held that the SEC, with its superior expertise, is in a better position to distinguish what practices should be forbidden, rhetorically asking, “[a]nd who but the SEC could do so with confidence?” The Court also maintained that permitting complex antitrust lawsuits could result in numerous, inconsistent results from nonexpert judges and juries and that, in this

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137 See Karmel, supra note 117, at 7 (“In finding such incompatibility, the Court exhibited a policy animus to private antitrust actions in the securities area.”).


139 Billing, 127 S.Ct. at 2394.

140 Id.; see also Howe, supra note 114, at 61 (“The Court’s decision amounts to a troubling no-confidence vote in the lower federal courts, at least for complex antitrust cases.”).

141 Billing, 127 S.Ct. at 2395.

142 Id. at 2395; see also Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406 (2004). In Trinko, an antitrust case concerning the telecommunications industry, the Court noted that the regulatory scheme established by the Telecommunications Act of 1996 was a “good candidate” for implied immunity, in
context, mistakes by lower courts were “unusually likely.” While earlier case law had
warned of the danger of “conflicting standards” from antitrust laws and the regulatory
scheme if antitrust lawsuits were permitted, the Billing court moved from this
“bilateral” approach, holding that permitting suits could produce multiple standards
that could chill the activities of underwriting syndicates with disastrous effects on the
market.

order to “avoid the real possibility of judgments conflicting with the agency’s regulatory
scheme ‘that might be voiced by courts exercising jurisdiction under antitrust laws.’ ” Id.
(quoting United States v. Nat’l Ass’n of Secs. Dealers, 422 U.S. 694, 734 (1975)). This
language from Trinko, however, has been categorized as dicta, since Trinko was not an
implied immunity case, as the Act contained a saving clause. See Falvey & Kleit, supra
note 13, at 154.

143 Id. at 2396.

144 See NASD, 422 U.S. at 734 (holding that the Court has found implied
immunity to assure that the regulatory agency could carry out its responsibilities “free
from the disruption of conflicting judgments that might be voiced by courts exercising
jurisdiction under the antitrust laws”); Gordon v. New York Stock Exch., 422 U.S. 659,
689 (1975).

145 See Hovenkamp, Antitrust Violations, supra note 6, at 629 (“[T]he problem of
inconsistent outcomes is not simply bilateral. Once regulation of an industry is entrusted
to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another
as well.”).

146 Billing, 127 S.Ct. at 2395.
This focus on the potential outcome of litigation continues in the Court’s subsequent “costs-benefits” analysis.\textsuperscript{147} The Court held that since the SEC actively regulates and forbids the activity in question, the benefits of additional enforcement by antitrust litigation are minimal.\textsuperscript{148} The Court’s analysis echoes its earlier decision in \textit{Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP}.\textsuperscript{149} The Court in \textit{Trinko} held that, where a regulatory structure that is “designed to deter and remedy anticompetitive harm,” the additional benefit provided by antitrust enforcement “will tend to be small.”\textsuperscript{150} Such a regulatory scheme, however, must perform an “antitrust function” in order to render additional enforcement unnecessary.\textsuperscript{151}

III: THE PROPER STANDARD FOR “CLEAR REPUGNANCY”

\textsuperscript{147} \textit{Id.} at 2396.

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} 540 U.S. 398 (2004). \textit{Trinko} involves an antitrust challenge and the Telecommunications Act of 1996. The Act imposes upon an incumbent local exchange carrier (LEC) the obligation to share its telephone network with competitors. Verizon was the incumbent LEC for New York State, and had signed an agreement to make its networks available to rivals, such as AT&T. The Respondent, an AT&T customer, alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme in violation of the Sherman Act. \textit{Id.} at 402–05.

\textsuperscript{150} \textit{Id.} at 412.

\textsuperscript{151} \textit{See} discussion \textit{infra} Part III.A; \textit{Trinko}, 540 U.S. at 412; \textit{Billing} 127 S.Ct. at 2390 (quoting Silver v. New York Stock Exch., 373 U.S. 341, 358 (1963)).
A. The Billing Standard

The Billing Court’s reading of the third factor, that securities and antitrust law are incompatible due to the possibility of mistakes by lower courts, created a new, problematic standard for determining that a “clear repugnancy” exists. In evaluating a repugnancy, courts have generally been bound by the Silver necessity standard\(^1\) and the principle that courts must try to reconcile the operation of “two statutory schemes, whenever and to the greatest extent possible.”\(^2\) Also pertinent to this analysis is whether Congress, by creating this regulatory scheme, intended to entrust antitrust enforcement exclusively to the agency.\(^3\) Billing, however, departs from some of the most basic and long-held tenets of antitrust immunity analysis to create a new standard for determining that there is a conflict between the two bodies of law.

The other factors employed by Billing to determine “clear repugnancy” rest on more solid precedent, and provide a useful starting point for clarifying implied immunity principles. First, the Court held that the activity in question must fall under the authority


\(^{153}\) Am. Agriculture Movement v. Bd. of Trade, 977 F.2d 1147, 1158 (7th Cir. 1992); see, e.g., Gordon, 422 U.S. at 683.

\(^{154}\) FLOYD & SULLIVAN, supra note 18, at § 3.4.1; see Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378, 389 (1981); Am. Agriculture, 977 F.2d at 1158; In re Wheat Rail Freight Rate Antitrust Litig., 759 F.2d 86, 106–07 (7th Cir. 1985).
of the SEC for a clear repugnancy to exist. The Court required more than simply the presence of a pervasive regulatory scheme. It also required that Congress have intended for the conduct to fall under the agency’s jurisdiction. It was this factor that was determinative in denying immunity in Silver and in granting immunity in Gordon.

Second, the regulatory agency must have “exercised” that authority. An agency’s exercise of authority, however, is only truly effective when it performs an “antitrust function” by taking competitive considerations into account when creating or

155 Billing, 127 S.Ct. at 2392–93. But cf. FLOYD & SULLIVAN, supra note 18, at § 3.4.4 (“The existence of regulatory jurisdiction over the conduct at issue does not necessarily imply antitrust immunity.”); Nat’l Gerimedical, 452 U.S. at 389 (“Intent to repeal the antitrust laws is much clearer when agency has been empowered to authorize or require the type of conduct under antitrust challenge.”).

156 Gordon, 422 U.S. at 688–89.

157 See id. at 689.

158 See, e.g., id. at 685; Falvey & Kleit, supra note 13, at 150 (“Although there was a comprehensive regulatory framework in place, there was no direct securities regulation addressing the telephone issue found in Silver. Accordingly, the Court denied the defense of Implied Immunity.”); Steven Semeraro, The Antitrust-Telecom Connection, 40 SAN DIEGO L. REV. 555, 569 (2003) (noting that Silver rejected the SEC’s “general power to adopt rules” as sufficient grounds for implied immunity).

159 See, e.g., Billing, 127 S.Ct. at 2393.
enforcing its policies.\textsuperscript{160} For example, in \textit{Silver}, the Court found that there was nothing in the regulatory scheme that performed the antitrust function, since the SEC did not ensure that the exchanges would not apply their rules in a way that would unnecessarily restrict competition.\textsuperscript{161} The rationale for requiring the “antitrust function” is that, by considering antitrust concerns, the agency “leaves open a forum for antitrust policy” when there is a finding of implied immunity by a court.\textsuperscript{162} Furthermore, if Congress intended that competitive factors play a role in an agency decisions, but the role is circumscribed by the goals of the regulatory scheme, then implied immunity is justified.\textsuperscript{163} Arguably, the “antitrust function” should not be read as synonymous with the standards of an antitrust court, since this could easily defeat a regulatory scheme that must take factors in addition

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\textsuperscript{161} \textit{Silver}, 373 U.S. at 358–59; see \textit{AREEDA & HOVENKAMP}, \textit{supra} note 12, at § 243(d).


\textsuperscript{163} \textit{Id.}
to competition into account.\textsuperscript{164} The Court, however, has held that a regulatory agency must apply standards “similar to standards developed in antitrust law.”\textsuperscript{165} If an agency is empowered only to consider the “public interest and convenience” in its decision-making, for example, rather the competitive considerations, this standard may be insufficient to support a finding of implied immunity.\textsuperscript{166} The Court has not prescribed any specific standards for the agency’s “antitrust function,” but the Court’s decisions seem to indicate that an agency must at least take antitrust considerations into account, and that these concerns must be given sufficient weight.\textsuperscript{167} In \textit{Billing}, the Court noted that the antitrust function was satisfied, since when the SEC is engaged in rulemaking, it must consider “whether the action will promote efficiency, competition, and capital formation” \textsuperscript{168} and “the impact any such rule or regulation would have on competition.” \textsuperscript{169}

\textsuperscript{164} See supra note 6 and accompanying text.


\textsuperscript{167} See Ponsoldt, supra note 165, at 54 (discussing United States v. Philadelphia Nat’l Bank, 374 U.S. 321 (1963)).


\textsuperscript{169} Id. at 2396 (quoting 15 U.S.C. § 78w(a)(2) (Supp. III 2006)).
It is not clear, though, how much of an exercise of authority by the agency is required. In *Gordon*, the SEC’s regulation of fixed commission rates had been active—the SEC had studied the practice and required major changes from the Exchange.\(^{170}\) In *Billing*, the Court noted that the SEC has prescribed specific rules for underwriters and brought actions against underwriters who violated those rules.\(^{171}\) *Trinko*, as well, considered how well the regulatory scheme was functioning\(^{172}\) and pointed to the fact that the FCC had imposed disciplinary measures and regulations for the challenged conduct.\(^{173}\)

When the SEC has been granted pervasive supervisory authority over the challenged conduct by Congress, affirmative action by the SEC is not necessary for a repugnancy to exist. In cases such as *NASD* and *Friedman*, federal securities laws granted the SEC pervasive supervisory power over the challenged conduct, such that the conduct could be permitted subject to SEC approval.\(^{174}\) Where Congress has vested the SEC with a certain level of autonomy, an antitrust suit may offend the authority granted


\(^{171}\) *Billing*, 127 S.Ct. at 2393.

\(^{172}\) AREEDA & HOVENKAMP, supra note 12, at § 243(g)(1).


\(^{174}\) See *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 171 (2d. Cir. 2005).
to the SEC.\textsuperscript{175} Therefore a repugnancy may still exist even if the SEC has not taken affirmative action. The Second Circuit’s decision in \textit{Stock Options} clarifies this principle further. In \textit{Stock Options}, even though the SEC disapproved of options trading on multiple exchanges, it retained the power to make rules permitting the practice. \textit{Stock Options} illustrates that, in an instance of pervasive supervisory power, the SEC’s current policy or actions is not determinative, rather the authority granted to the SEC creates a repugnancy.\textsuperscript{176}

In light of these cases, the more appropriate requirement for cases such as \textit{Billing} is that the agency must have “actively regulated” the activity by “scrutiniz[ing] and approv[ing]” the activity.\textsuperscript{177} Antitrust immunity is inappropriate when an agency’s

\textsuperscript{175} Id. at 160–61; see also Folse, \textit{supra} note 162, at 788 (arguing that, in certain circumstances where autonomy has been conferred on a regulatory agency, an antitrust suit may upset that autonomy).

\textsuperscript{176} \textit{In re} Stock Exchs. Options Antitrust Litig., 317 F.3d 134, 149 (2d Cir. 2003).

\textsuperscript{177} Am. Agric. Movement, Inc. v. Bd. of Trade, 977 F.2d 1147, 1158–59 (7th Cir. 1992); see Gordon v. New York Stock Exch., 422 U.S. 659, 689 (1975); see also AREEDA & HOVENKAMP, \textit{supra} note 12, at § 243(a). When an agency has authority over a practice and has exercised that authority “with some thoroughness,” antitrust laws may be “completely ousted.” Courts, however, have also found implied immunity where there is unexercised administrative power to control conduct, if agency expertise is important for intelligent decision making (e.g. \textit{NASD; Friedman; Stock Options}). Id. The issue of whether a regulatory agency must approve of the challenged conduct in order for antitrust immunity to apply is discussed \textit{infra} Part III.B.
approval is not manifested by affirmative action but by mere “acquiescence or the failure to take action.”  

In Billing, the SEC had the authority to regulate the underwriting process, but did not have broad oversight authority; therefore, it was appropriate for the Court to point to examples of the SEC’s “active” regulation.

B. Agency Approval of the Activity is Necessary for a Finding of Clear Repugnancy

Traditionally, a “repugnancy” between antitrust laws and a regulatory statute has been understood to exist in those instances where an agency has reviewed the activity using the same criteria as an antitrust court would use and approved it. The majority of

\footnote{Am. Agric. Movement, 977 F.2d at 1163–65 (finding implied immunity inappropriate when the agency’s supervision of the activity was “casual and modest”); see Sound, Inc. v. Am. Tel. & Tel. Co., 631 F.2d 1324, 1330 (8th Cir. 1980) (denying implied immunity when FCC enforcement had been “sluggish”); Hovenkamp, Antitrust Violations, supra note 6, at 629, 632.}

\footnote{See Hovenkamp, Antitrust Violations, supra note 6, at 629 (“Most aspects of the initial public offering process . . . are subject to the regulatory supervision of the SEC.”).}

\footnote{See Credit Suisse Secs. (USA) LLC v. Billing, 127 S.Ct. 2383, 2393 (2007).}

\footnote{Areeda & Hovenkamp, supra note 12, at § 243(e)(3); see Cable Am. Corp. & Cable Alabama Corp. v. FTC, 795 F. Supp. 1082, 1092 (N.D. ALA 1992) (holding that no repugnancy existed since defendant’s conduct had not been approved or authorized by the FCC).}
implied immunity cases have concerned facts in keeping with this definition; that is, a repugnancy existed when the regulatory agency had approved of conduct that would otherwise be prohibited by antitrust laws.\textsuperscript{182} Billing is factually distinct from these prior cases, in that both the SEC and the antitrust laws prohibited tying and laddering and a finding of implied immunity under these circumstances departs from established case law. While courts have stated that agency supervision of an activity may take many forms, if an agency has considered a particular activity but has “expressly denied it approval or expressly declared it inconsistent with regulatory goals, a claim of implied immunity must be rejected because of the failure to satisfy the threshold requirement of a repugnancy between the regulatory and antitrust regimes.”\textsuperscript{183} Approval of the challenged activity is an essential element for repugnancy and courts have denied implied immunity when the activity was “neither compelled nor approved” by the regulatory agency.\textsuperscript{184}

\textsuperscript{182} See Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 169 (2d Cir. 2005).

\textsuperscript{183} MCI Commc’ns., Corp. v. Am. Tel. & Tel. Co., 462 F. Supp. 1072, 1083 (N.D. Ill. 1978).

\textsuperscript{184} Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378, 389 (1981); see Am. Agric. Movement, Inc. v. Bd. of Trade, 977 F.2d 1147, 1158 (7th Cir. 1992) (defining conflict as conduct that would be prohibited under antitrust laws and justified or required under the regulatory scheme); see also Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 299–300, 306 (1973).
When an agency disapproves of an activity, this typically refutes any claim of implied immunity. For a repugnancy to exist, application of the two laws must produce “differing results” and implied immunity is not appropriate, unless the regulatory agency has “policies that directly contradict antitrust principles.” When both laws prohibit the same sort of conduct, there can be no repugnancy, since enforcing one would support the other. This approach can be reconciled with the Second Circuit cases that placed an emphasis on the authority of the SEC to regulate the conduct in question, since, in both cases, the SEC had studied the practice but had not condemned

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185 Floyd & Sullivan, supra note 18, at § 3.4.7; see Ricci, 409 U.S. at 304 (holding that, if the Commodities Exchange Commission was to determine that the activity was in violation of its rules, “the antitrust action should very likely take its normal course”); Strobl v. New York Mercantile Exch., 768 F.2d 22, 28 (2d Cir. 1985); MCI Commc’ns Corp. v. Am. Tel. & Tel., 664 F.2d 1081, 1105 (7th Cir. 1982); Phonetele, Inc. v. Am. Tel. & Tel. Co., 651 F.2d 716, 732 (9th Cir. 1981); Ne. Tel. Co. v. Am. Tel. & Tel. Co. 76, 84 (2d Cir. 1981); Oahu Gas Serv. Inc. v. Pacific Resources, Inc. 460 F. Supp. 1359, 1377–78 (D. Haw. 1978).


187 Falvey & Kleit, supra note 13, at 155.

188 See Sound, Inc. v. Am. Tel. & Tel. Co., 631 F.2d 1324, 1330 (8th Cir. 1980); see also Areeda & Hovenkamp, supra note 12, at § 243(e)(3).
it.\textsuperscript{189} In those cases, the SEC still had the “potential” to permit the activity in question,\textsuperscript{190} as opposed to cases such as \textit{Billing}, where the SEC had exercised its authority to condemn the practice.

It seems more difficult to finesse even a potential conflict in cases where the agency has clearly spoken and is in harmony with antitrust laws.\textsuperscript{191} \textit{Billing} is distinguishable from prior cases, since the SEC did not have pervasive supervisory authority over tying and laddering agreements, making a potential conflict unlikely. Congress did not explicitly grant the SEC the power to review such agreements, and approve or disapprove of the agreements at its discretion. Thus, \textit{Billing} is not a case like \textit{Friedman} (which noted that the Exchange Act permits “a little price manipulation” to further the SEC’s goals);\textsuperscript{192} rather, the agreements fell under the SEC’s congressionally-mandated duty to prohibit fraudulent and manipulative practices.\textsuperscript{193} Even the SEC could not envision a potential scenario where it could permit tying and laddering, which it had

\begin{footnotesize}
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\item See Hovenkamp, \textit{Antitrust Violations}, supra note 6, at 630–31.
\item See \textit{Billing v. Credit Suisse First Boston Ltd.}, 426 F.3d 130, 161–62 (2d Cir.2005) The Second Circuit held that its precedents in \textit{Finnegan}, \textit{Friedman}, and \textit{Stock Options} stand for the proposition that a conflict is possible when there is “potential” for the agency to permit the challenged conduct. \textit{Id.}
\item See Folse, supra note 162, at 789.
\item \textit{Billing}, 426 F.3d at 162 (quoting \textit{Friedman v. Salomon/Smith Barney}, 313 F.3d 796, 800 (2d Cir. 2002)).
\item See \textit{id.} (“[A]n agency’s power to review, if coupled with an \textit{obligation to prohibit} particular anticompetitive conduct, will not create conflict.”).
\end{enumerate}
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deemed to be fraudulent conduct.194 Pervasive supervisory authority is more likely to be present when the SEC has authority over self-regulatory organizations (SRO’s),195 since, as was the case in NASD, the SEC will usually have the power to review, approve, and order changes in the SRO’s rules.196 When this is the case, an antitrust suit could challenge the autonomy granted to the SEC, and a repugnancy would exist.197 This was not the nature of the SEC’s authority over the agreements in Billing; the SEC had clearly and consistently disapproved of tying and laddering agreements and an antitrust action would not conflict with the SEC’s authority.

The district court, in examining the class action suits that led to Billing, erred in analogizing the case to Stock Options, maintaining that, since the SEC had general authority over the underwriting process, there could still be a potential conflict (assuming that at some point in the future, the SEC could permit tying and laddering).198 Billing, however, differed from Stock Options, since the SEC had consistently condemned tying and laddering, under its general duty to prevent fraudulent conduct.199 The district

194 Id. at 170 (“The [SEC stated] that ‘it is difficult to envision the circumstances in which’ conduct similar to that alleged in the complaint might be permitted.”).

195 Id. at 171 (holding that SRO’s have a “special status” that the defendants in Billing could not claim).

196 Id.

197 See id.


199 See, e.g., Billing, 426 F.3d at 142.
The court’s reading cannot be the correct standard; it would mean that implied immunity would never be inappropriate, since the SEC could always potentially change its position on an issue. The court’s analogy to *Stock Options* is also misplaced since, in *Stock Options*, the SEC had pervasive supervisory authority over the exchanges concerning their rules for options trading rather than authority over private business conduct. In cases such as *Billing*, when both the SEC and the antitrust laws have prohibited private business conduct, implied immunity should not be found.

C. The Costs-Benefits Approach is Inappropriate for Implied Immunity Analysis

The additional “costs-benefits” test for repugnancy propounded by *Trinko* and adopted by *Billing* is problematic, particularly in cases where securities and antitrust laws are in agreement. *Trinko* holds that where a regulatory agency is actively regulating the challenged conduct, and there is potential for error by the lower courts, antitrust suits are not worth the costs. In reaching this conclusion, however, *Trinko* “did not rely on any of the established immunity doctrines.” Instead, *Trinko* signaled a shift in immunity

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analysis from a focus on “authority” to the “outcome” of potential litigation. This is problematic since holding that a well-functioning regulatory agency alone is sufficient to justify immunity runs perilously close to the “mere presence of a regulatory scheme” argument previously rejected by the Court.

While courts have previously addressed the danger of “conflicting mandates” in their immunity analysis, this concern is not truly applicable to cases, such as Billing, where both laws are in harmony. In such a case, the regulatory scheme does not create the potential for “irreconcilable mandates” since the SEC could not compel the conduct prohibited by antitrust laws. Of course, Trinko and Billing are concerned not simply with this bilateral view but with the danger of multiple, inconsistent outcomes from judges and juries. While it may be argued that permitting antitrust lawsuits would subject the securities industry to parallel track regulation that could produce inconsistent

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\textsuperscript{203} See AREEDA & HOVENKAMP, supra note 12, at § 243(g)(1).
\textsuperscript{204} See, e.g., Nat’l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross, 452 U.S. 378, 389 (1981) (holding that the mere presence of a regulatory scheme does not justify a finding of implied immunity "with respect to every action taken within the industry"); MCI Commc’ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1102 (7th Cir. 1983); Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 729 (9th Cir. 1981).
\end{flushleft}
outcomes, thus interfering with the SEC’s power to effectively regulate the industry.\textsuperscript{206} This argument is harder to maintain when both bodies of law are in harmony. First, “antitrust laws are not so inflexible as to deny consideration of government regulation”\textsuperscript{207} and antitrust courts may adjust their rules in recognition of government regulation.\textsuperscript{208} Thus, the chances are small that an antitrust court would produce a divergent outcome when both antitrust laws and the SEC prohibit the activity. Furthermore, permitting an antitrust suit would not interfere with the SEC’s authority—when the SEC has already prohibited a practice, application of antitrust laws would not curtail its power or “render nugatory” any provision of the securities laws.\textsuperscript{209}

The costs-benefits analysis of \textit{Trinko} and \textit{Billing} creates a new standard for repugnancy that is too broad to harmonize with the rules of prior case law.\textsuperscript{210} Most

\textsuperscript{206} See Hovenkamp, \textit{Antitrust Violations}, \textit{supra} note 6, at 628–30.

\textsuperscript{207} Mid-Texas Commc’ns Sys. v. Am. Tel. & Tel. Co., 615 F.2d 1372, 1385 (5th Cir. 1980).

\textsuperscript{208} Billing, 426 F.2d at 166 (quoting AREEDA & HOVENKAMP, \textit{supra} note 12, at § 240(c)(3)).

\textsuperscript{209} See \textit{id.} at 169; Gordon v. New York Stock Exch., 422 U.S. 659, 691 (1975) (“Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.”).

\textsuperscript{210} See Howe, \textit{supra} note 114, at 61 (“Rather than following the admonition in \textit{Silver} to minimize the scope of implied repeal of antitrust law, [\textit{Billing}] simply conferred broad-scale immunity.”); see also Powell & Freimuth, \textit{supra} note 116, at 7.
courts have clung to the Silver standard that immunity may be found only if necessary to make securities laws work and, even then, only to the minimum extent necessary. 211 The proper approach is to try to reconcile “the operation of both statutory schemes with one another rather than holding one completely ousted.” 212 Subsequent courts have interpreted this principle as making findings of implied immunity “rare” rather than the norm. 213 Implied immunity is dependent on the finding of an “actual repugnancy” rather than simply a “perceived repugnancy” between the regulatory statute and antitrust laws. 214 In prior cases, however, an actual conflict or the potential for conflict meant a conflict between the antitrust laws and the regulatory scheme, not merely the possibility that a lower court could rule in way that differed from the opinion of the regulatory agency. Billing has substituted the possibility of differing lower court opinions for general antitrust laws in implied immunity analysis to create a conflict where none truly

211 See cases supra note 152.


213 Am. Agric. Movement v. Bd. of Trade, 977 F.2d 1147, 1158 (7th Cir. 1992); see, e.g. United States v. Nat’l Ass’n of Secs. Dealers, 422 U.S. 694, 719–20 (1975) (“Implied antitrust immunity is not favored.”); Finnegan v. Campeau Corp., 915 F.2d 824, 828 (2d Cir. 1990) (holding that implied immunity is not favored and not to be “casually allowed”); Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 726 (9th Cir. 1981) (“[A]ntitrust immunities are to be strictly construed and not lightly conferred.”).

214 Phonetele, 664 F.2d at 732.
exists. If this reading of “conflict” is the standard, the application of implied antitrust immunity is limitless. It is no longer the possibility of conflict between two bodies of law that is the concern but rather the possible application of antitrust laws by lower courts that must be considered. Since it may always be argued that courts could apply the law in different ways, implied immunity would always be appropriate. This is not, however, the standard of prior case law. Billing has created a new standard that, unlike the standard espoused by Silver, Gordon, and NASD, confers an overly broad right of implied immunity to regulated industries and drastically limits a party’s ability to receive remedies for anticompetitive conduct.

Under the Billing standard, “repugnancy” does not truly exist as a requirement for immunity. The Court has replaced “repugnancy” with incompatibility, or the potential of inconsistent results from lower courts. In doing so, the Court has departed from not only the “clear repugnancy” standard, but the admonitions of the Silver court, the lodestar of antitrust immunity analysis for over forty years. Although the Billing Court pays lip

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215 See Keith Sharfman, Credit Suisse, Regulatory Immunity, and the Shrinking Scope of Antitrust, ESAPIENCE CENTER FOR COMPETITION POLICY (2007), http://www.globalcompetitionpolicy.org (“But Credit Suisse goes further . . . by creating the possibility of antitrust immunity even in cases of potential future incompatibility where an actually conflicting federal regulatory policy has yet to be clearly (or even at all) articulated.”).

service to the Silver necessity standard, this concern does not truly factor into the Court’s analysis. Contrary to Billing, finding a conflict alone should not be sufficient; there must be “a determination that repeal of the antitrust laws is necessary to make the regulatory act work.”\(^{217}\) In Gordon, for example, immunity was necessary to make the securities laws function since Congress, in passing the Exchange Act, had intended for the SEC to determine whether commission rates were reasonable or not.\(^{218}\) This is not the case in Billing, where the tying and laddering only fell under the SEC’s jurisdiction in a general way, as part of the SEC’s authority to prevent “fraud, deception, misrepresentation, and manipulation.”\(^{219}\) As such, immunity is not necessary to permit the proper functioning of federal securities laws.

If the only real requirement for immunity is simply the presence of a well-functioning regulatory agency and the potential for conflict among lower courts, then there would almost never be an instance when implied immunity would not be appropriate. Since antitrust cases are often complex, it could be easily argued that

\(^{217}\) Bush, supra note 186, at 784.

\(^{218}\) See Gordon v. New York Stock Exch., 422 U.S. 659, 691 (1975); see also Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 169 (2d Cir. 2005). Similarly, in Finnegan, the Second Circuit held that “using the antitrust laws to forbid joint bidding would conflict with the Williams Act's instruction that the SEC regulate ‘group’ bids.” Billing, 426 F.3d at 169.

\(^{219}\) Billing, 426 F.3d at 169.
litigation could result in inconsistent results from nonexpert judges and juries. This seems a far cry from the Silver necessity standard.

D. The Billing Decision is Premised on the Court’s Policy Against Private Securities Actions

The elephant in the room for Billing is the Court’s underlying rationale of limiting securities lawsuits. The Court exhibited both a mistrust of judges and juries, as well as a hostility towards private securities actions. Billing puts a particular emphasis on congressional intent to reduce unmeritorious securities litigation, as evidenced by the enactment of laws such as the Private Securities Litigation Reform Act (PSLRA); the Court saw a clear need to prevent plaintiffs from “dress[ing] what is essentially a securities complaint in antitrust clothing” to circumvent these laws.

220 Rosch Speech, supra note 216; see also 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, 2–3 (2003) (noting the hesitancy of courts in adjudicating complex securities regulation issues and that courts have tended to defer to the SEC to resolve these issues).


222 Billing, 127 S.Ct. at 2396; see also Memorandum, Skadden, Arps, Meagher & Flom, Supreme Court Finds Antitrust Immunity in Securities Regulation Case (June 19, 2007), http://www.skadden.com/content/Publications/Publications1273_0.pdf.
Billing and Trinko, along with the Court’s recent decision in Bell Atlantic Corp. v. Twombly, are unique in that they take into account the “costs” of antitrust litigation in evaluating questions of implied immunity. Both Billing and Trinko are concerned with the danger of antitrust litigation producing inconsistent (and mistaken) standards that are "‘especially costly, because they chill the very conduct the antitrust laws are designed to protect.’" Trinko goes a step further, noting that courts would be ineffective in evaluating antitrust suits of this nature (which are likely to be “extremely numerous”). In addition to such cases being “highly technical,” cases could require continuous supervision on a day-to-day basis to prevent antitrust violations; due to the highly detailed knowledge required for such supervision, regulatory agencies could more effectively perform this function.

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224 Howe, supra note 114, at 61; Rosch Speech, supra note 216 (“[T]he Court’s recent decisions, reflect a discomfort with the costs and burdens of private antitrust litigation.”).


226 See Trinko, 540 U.S. at 414.

227 See id. at 414–15.
Indeed, *Billing* and *Trinko* are better understood as part of a series of cases by the Court to limit litigation.\(^{228}\) In *Twombly* (a case not involving implied immunity), the plaintiffs had accused a telecommunications company and other local exchange carriers of violating the Sherman Act by engaging in anticompetitive behavior.\(^{229}\) The Court dismissed the antitrust action, holding that the plaintiff’s complaint did not allege enough facts to show that they could win at trial.\(^{230}\) In order to survive a motion for dismissal, “[f]actual allegations must be enough to raise a right to relief above the speculative level.”\(^{231}\) The Court’s ruling effectively raised the bar for how much information a plaintiff’s pleadings must show in order to proceed from the pleadings stage to discovery. *Twombly*’s new standard has had clear effects beyond antitrust cases, with the result\(^{232}\)

\(^{228}\) See Jess Bravin & Aaron Lucchetti, *Justices Harden Wall Street Armor: IPO Decision Gives Brokers Broad Antitrust Exemption in Latest Hit to Plaintiffs*, WALL ST. J., June 19, 2007, at A3 (noting that *Billing* is a “milestone” in the Court’s “recent movement to free markets from the cost and complications of plaintiff lawsuits”).


\(^{230}\) *Id.* at 1974 (“Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

\(^{231}\) *Id.* at 1965.

that many plaintiffs may be deprived of their day in court. In reaching its decision, the Court pointed to the expense of discovery in an antitrust suit. Like Billing, Twombly recognized a need to weed out unmeritorious lawsuits, “lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people.’” This approach comports with a string of recent Supreme Court cases, such as Tellabs v. Makor Issues & Rights, Merrill Lynch v. Dabit, and Dura Pharmaceuticals v. Broudo, that have made it more difficult for plaintiffs to bring private securities actions. On a

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233 *Id.* (“For example, cases where plaintiffs tend to find the crucial evidence during discovery, such as employment discrimination or conspiracy allegations, might now never make it to trial.”).


236 127 S.Ct. 2499 (2007) (holding that inferences of defendant’s knowledge of wrongdoing must be as compelling as an opposing inference of non-fraudulent intent).


238 544 U.S. 336 (2005) (holding that plaintiffs could not establish loss causation by alleging that a securities price was inflated through misrepresentation).

239 Beth Bar, *Raising the Bar: Attorneys Tailor Strategy to High Court Rulings*, N.Y. L.J., July 12, 2007, at 5. During the same term as Billing and Twombly, the Supreme Court also limited a plaintiff’s ability to bring an antitrust action in Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S.Ct. 2705 (2007), where the Court
second glance, the reasoning applied in *Billing* seems to flow more out of these policy considerations than traditional antitrust immunity analysis. The Court spent the bulk of its analysis propounding the large costs (and small benefits) of litigation and its potentially negative effects on the market.\(^{240}\) While these considerations may be overruled its 96-year-old decision, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), and held that it is not a per se violation of antitrust laws for a manufacturer to set minimum resale prices. See Erwin Chemerinsky, *Turning Sharply to the Right*, 10 Green Bag 2d 423, 436 (2007); cf. James Langenfeld & Daniel R. Shulman, *The Future of U.S. Federal Antitrust Enforcement: Learning From Past and Current Influences*, 8 Sedona Conf. J. 1, 14 (2007). The authors point to a recent trend in antitrust cases before the Supreme Court. Since *Trinko*, government enforcement agencies have sided with defendants, and argued for rulings that would make antitrust enforcement “more restricted and difficult,” and that, in each case, the Court has ruled for the defendant, “even going beyond the relief sought by the Government.” *Id.*

compelling, they are not truly a part of immunity analysis. Traditionally, the twin purposes of the “clear repugnancy” standard has been to allow the agency the freedom to carry out its regulatory mission and to protect the industry from inconsistent standards.241 A costs-benefits analysis furthers neither of these purposes and the potential costs of litigation cannot be equated with “repugnancy.”242

The Court has made it much more difficult for a plaintiff to receive a remedy from businesses from antitrust violations.243 After Billing, almost all securities activity that falls under the SEC’s regulation is immune from antitrust liability, leaving little or no

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(discussing the Paulson Committee Report, which noted that, as securities action settlements increase “so too do the incentives for companies to try to evade private litigation under the U.S. securities laws by simply choosing to sell their shares elsewhere.”) This concern was addressed directly by the Court in Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 2008 U.S. LEXIS 1091 at 25 (2008) (noting that, if scheme liability were permitted, “[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here. . . . This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.”).


242 See Credit Suisse Secs. (USA) LLC v. Billing, 127 S.Ct. 2383, 2398 (2007) (Stevens, J., concurring) (“I would not suggest . . . that the burdens of antitrust litigation or the risk ‘that antitrust courts are likely to make serious mistakes,’ . . . should play any role in the analysis of the question of law presented in a case such as this.”).

243 Chemerinsky, supra note 239, at 436.
The Court assumed that the presence of SEC regulation naturally results in less of a need for antitrust enforcement. Even if the Court is correct in painting Billing’s antitrust claim as simply a “dressed up” securities claim, the Court does not consider the effect of its decision on traditional antitrust claims. While Congress has restricted plaintiffs’ ability to bring securities actions in order to prevent frivolous suits, there is no similar legislation for antitrust suits. Although Billing’s policy decision is drawn from securities legislation, its effects will be keenly felt in other areas of law. Indeed, that may be the most pressing problem of the Billing standard: that the standard could plausibly be applied to other regulated industries, thus preventing suits against a variety of firms, from airlines to drug manufacturers.

244 Miller, supra note 116 (“After Billings,[sic] virtually any activity subject to Securities and Exchange Commission regulation is likely immune from the antitrust laws.”).

245 Id.

246 Id.

247 See Sharfman, supra note 215; see also Tony Mauro, Investment Banks Granted Broad Antitrust Immunity, N.Y. L.J., June 19, 2007, at 1 (“Justice Breyer's strong deference to the SEC could mark a new high-water mark for the regulatory state that could be applied in other contexts, including telecommunications and environmental law, where it could be argued that regulators have more expertise than courts.”); Memorandum, Cleary Gottlieb, U.S. Supreme Court Holds Securities Laws Preclude Antitrust Lawsuits Concerning Initial Public Offering Underwriting Conduct, (June 21, 2007), http://www.cgsh.com/files/tbl_s596AlertMemoranda/FileUpload5741/582/49-
Twombley, Billing’s crippling effects on a plaintiff’s ability to get to court could reach far beyond antitrust and securities.

This loss is of no small significance. The Supreme Court has recognized that Congress created treble damages remedies for antitrust violations to encourage private antitrust suits, since these private suits provide significant supplement to the limited resources available to government agencies for enforcing the antitrust laws.248 The availability of treble damages encourages private antitrust litigants to act as “private attorneys general” by bringing actions against anticompetitive behavior that might

2007.pdf (“Beyond this particular context, the endorsement of regulation in Credit Suisse could be applied in other contexts where it can be argued that regulators have more expertise than courts.”); see generally Bruce H. Schneider, Credit Suisse v. Billing and a Case for Antitrust Immunity for Mortgage Lenders Subject to Federal Regulation, 124 Banking L.J. 833 (2007). But cf. Axcan Scandipharm, Inc. v. Ethex Corp., 2007 WL 3095367 at *5 (D.Minn. 2007). Axcan alleged that Ethex engaged in unfair competition in violation of the Lanham Act. The court held that Billing was inapplicable to the Lanham Act, and even if it was applicable, there was no serious conflict between the FDA’s regulation of the drug market and Axcan’s claims. Id. The court’s holding was based, in part, on the fact that its research failed to locate any cases applying Billing to Lanham Act claims. Id. at *5 n.10.

248 Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979); see Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981) (explaining that the private action "supplements federal enforcement and fulfills the objects of the statutory scheme").
otherwise escape the antitrust enforcement efforts of government agencies.\textsuperscript{249} The supervision provided by a regulatory agency cannot control all of the activities of a regulated firm, and budgetary constraints may limit its effectiveness.\textsuperscript{250} It is unlikely that the “overworked and understaffed” SEC would be able to prevent all antitrust violations within the securities markets.\textsuperscript{251} In much recent securities law jurisprudence,

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\item \textsuperscript{249} Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).
\item \textsuperscript{250} AREEDA & HOVENKAMP, \textit{supra} note 12, at § 240(b)(2).
\item \textsuperscript{251} \textit{Cf.} Deborah Brewster, \textit{Rules To Target Bigger Hedge Funds}, \textbf{THE FINANCIAL TIMES.COM}, Jan. 8, 2004 (Arguing that proposed SEC supervision of hedge funds could be ineffective since “the understaffed SEC might not be able to cope with processing 6,000 fund registrations”); Frederick P. Gabriel Jr. & David Hoffman, \textit{Talk Does Little to Inspire or Provoke}, \textbf{INVESTMENT NEWS}, May 27, 2002, at 1 (noting that former SEC Chairman Harvey Pitt was concerned that the SEC’s role could be limited due to understaffing); Anya Schiffrin, \textit{A Big Victory for the Small Investor: SEC Bans Selective Information Disclosure}, \textbf{THE INDUSTRY STANDARD}, Aug. 21, 2000, \textit{available at} http://findarticles.com/p/articles/mi_m0HWW/is_32_3/ai_66672333 (noting that, despite the adoption of Regulation FD prohibiting companies from selectively disclosing information, “only the most egregious offenders are likely to be punished by an overworked and understaffed SEC”); see also Judith Burns, \textit{Moving the Market: Enforcement Cases By SEC Fall Again; Focus on Late Filers}, \textbf{WALL ST. J.}, Nov. 3, 2006, at C3 (“Declining enforcement cases comes as the SEC’s budget has been flat for several years and its enforcement-division staff fell 3.5% from a year earlier . . . [s]ome experts think the SEC’s budget would need to increase three- or four-fold for it to be sufficiently
\end{itemize}
courts have often chosen to defer to the SEC when possible, thus subjecting cases to “minimal judicial review.”

Such deference to agency, however, is only appropriate when the agency has superior resources or experience otherwise a court is the better vehicle for adjudication. Furthermore, while a regulatory agency may be able to provide the equivalent of injunctive relief to aggrieved parties, the agency cannot provide private damages, and certainly not treble damages. Thus, the “flexible arsenal of antitrust remedies” (injunction, private damages, and criminal sanctions) would be lost, replaced by cease and desist orders, rules, and fines (which do not benefit the aggrieved party).

Courts may also be “more skeptical than regulators about industry claims of efficiency or the social benefits of restraints on competition,” while an agency may more sympathetic to the claims of regulated firms, and treat the industry with “undue

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252 See Facciolo, supra note 220, at 5.

253 Id. at 93.

254 See Areeda & Hovenkamp, supra note 12, at § 240(b)(2).

255 Id. at § 240(c)(4); see Falvey & Kleit, supra note 13, at 176 (“[R]egulatory agencies may not be in a position to grant aggrieved firms effective relief, and courts should be reluctant to grant parties antitrust immunity.”).
According to the regulatory capture thesis, regulatory agencies are acutely susceptible to the influence of the very industries they regulate, and may unduly favor the interests of the industry. The SEC is subject to the influence of powerful interest groups, which could compromise the agency’s ability to effectively address antitrust violations by the industry. The SEC could be prone to tailor its policies and

256 Areeda & Hovenkamp, supra note 12, at § 240(c)(4).


259 See Mutual Fund Trading Abuses: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 109th Cong. (2005) (statement of Eric W. Zitzewitz, Professor of Economics, Stanford Graduate Business School) (“[T]here has been in some cases a striking similarity between what the industry has asked for and what the SEC has proposed.”). An example of such deference by the SEC occurred during the recent investigation into Pequot Capital Management, a
enforcement to suit the industry, rather than the best interests of investors. Judicial review remains necessary to counteract the effects of regulatory capture and more thoroughly combat antitrust violations.²⁶⁰

It is arguably Congress’ duty, not the Court’s to limit jurisdiction to this extent. Congress has chosen to limit securities class actions through passage of the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act,²⁶¹ and has not created similar restrictions for antitrust suits.²⁶² Also as Justice Thomas

large hedge fund. A Congressional report noted that, among the SEC’s failings in the investigation, were delays in the investigation, disclosure of sensitive information to opposing counsel, and the “special treatment” of a prominent Wall Street executive that resulted in the postponement of his interview until after the case's statute of limitations had expired. See 153 CONG. REC. S10889 (daily ed. Aug. 3, 2007) (statement of Sen. Grassley); see also Gretchen Morgenson & Walt Bogdanich, S.E.C. Erred On Pequot, Report Says, N.Y. TIMES, Aug. 4, 2007, at C1.

²⁶⁰ See Merrill, supra note 257, at 1052.


argued in his dissent in Billing, the Securities Act and the Exchange Act contain broad saving clauses, preserving a party’s right to other remedies at law. Both section 16 of the Securities Act and section 28 of the Exchange Act provide that the rights and remedies offered by the Act “shall be in addition to any and all other rights and remedies that may exist at law or in equity.” The Court has previously read these provisions broadly, and emphasized the fact that the remedies of the Securities Act and the Exchange Act are to be supplemented by “any and all” additional remedies. Also, the Trinko Court recognized the Telecommunications Act’s saving clause as “bar[ring] a finding of implied immunity.” Given the plain language of the securities saving

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263 See Credit Suisse Secs. (USA) LLC v. Billing, 127 S.Ct. 2383, 2399 (2007) (Thomas, J., dissenting). The majority contended that Justice Thomas’ reading of the savings clause was incorrect, since the same argument had been raised by the United States in an amicus brief in Gordon, and the Court rejected the argument. Id. at 2392. Justice Thomas argued that the issue was not discussed in Gordon or NASD, and there is no indication that the omission was the product of “reasoned analysis” rather than “inadvertent oversight.” Id. at 2400.


265 See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) (holding that the availability of an express remedy under the Securities Act did not preclude a plaintiff from maintaining an action under the Exchange Act).

clauses and the Court’s prior readings of saving clauses, the Billing Court dismissed Justice Thomas’ objections all too quickly.

CONCLUSION

Billing signals a significant departure from well-established principles of antitrust immunity analysis. The Court’s overly broad interpretation of “clear repugnancy” does not consider whether the activity is essential to permit federal securities laws to properly function nor does it require immunity to be extended only to the minimum extent necessary. When both the SEC and antitrust laws disapprove of an activity, a clear repugnancy does not exist and the two laws may be reconciled. By substituting a costs-benefits analysis for the repugnancy standard, the Court has made the finding of implied immunity all too easy, in contradiction of prior cases that hold that grants of implied immunity should be rare. Billing is more properly understood as an extension of the Court’s policy animus against private securities actions rather than a continuance of earlier antitrust immunity analysis. While the Court may have cogent arguments for limiting litigation, the altering of immunity analysis to further that goal represents an unprecedented block on a party’s ability to get to court that will be felt far beyond the world of underwriters and IPOs.

. . . that antitrust remedies are not included within the ‘any and all’ remedies” mentioned in the securities savings clauses. Billing, 127 S.Ct. at 2399 (Thomas, J., dissenting).