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Credit Suisse v. Billing: The Limited Impact on Application of Antitrust Laws in Federally Regulated Industries Following the 2008 Financial Crisis and Beyond

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In *Credit Suisse Securities v. Billing*,[1] the Supreme Court of the United States considered whether antitrust laws were implicitly precluded from being brought in underwriting securities activities regulated by the securities laws.[2] The Court held that antitrust laws were implicitly precluded from this specific area because there was a "clear repugnancy" between antitrust laws and the regulatory scheme that would cause dangerous, inconsistent standards if antitrust laws were enforced in tandem with the underwriting securities regulations.[3] The Court narrowly and consistently extended its previous precedents in finding implied antitrust immunity.[4] The Court's holding in *Billing* created a workable standard of when implied immunity applies to federal antitrust laws. Under this standard, implied antitrust immunity is not likely to be even narrowly extended to other federally regulated industries which, like securities laws, have been deemed by the Court to be 'pervasively' regulated. This narrow holding will not be extended within the securities industry itself following the even after the regulatory response within the securities industry following 2007-2008 financial crisis.[5]

I. The Case

Plaintiffs, a group of recent buyers of newly issued securities, alleged that Credit Suisse and nine other major underwriting firms engaged in a vast Wall Street con-

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1. 551 U.S. 264 (2007).
2. *Id.* at 267.
3. *Id.* at 264.
4. *See infra* Part II.D and accompanying text.
5. *See infra* Part IV.D.

spiracy.[6] Specifically, the plaintiffs alleged that these leading ten securities underwriting firms created illegal contracts with securities purchasers in initial public offerings (IPOs).[7] More specifically, the underwriting firms, acting as a syndicate, allegedly inflated the market price of securities in the IPO after-market.[8] Because of this seemingly collusive activity, the underwriting firms were accused of violating several antitrust statutes: § 1 of the Sherman Act of 1890[9] and § 2(c) of the Robinson-Patman Anti-Discrimination Act of 1936.[10] The underwriting firms allegedly harmed both direct IPO purchasers and after-market purchasers.[11] The plaintiffs explicitly alleged that the underwriting firms were involved in a conspiracy to get certain "anti-competitive" considerations from IPO purchasers through tie-in agreements.[12] These tie-in agreements would require the IPO purchasers to purchase inflated commissions on trades of other securities, to purchase issuer's shares in a secondary public offering, to purchase less attractive securities, or to execute a laddering transaction.[13] Any of these options practically would require an IPO pur-

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6. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497, 499 (S.D.N.Y. 2003), *vacated and remanded sub nom*. by Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005), *overruled* by Credit Suisse Sec. v. Billing, 551 U.S. 264 (2007). Underwriting is a common method of taking on the financial risks associated with the price 'fluctuations' during the initial distribution of new securities. There are several forms of underwriting securities (best efforts, stand-by, firm commitment), but the point of underwriting is to offset costs and risks associated with an IPO while simultaneously making money for the invest firm doing the underwriting. Gershon Mandelker & Arthur Raviv, *Investment Banking: An Economic Analysis of Optimal Underwriting Contacts* 32 J. FIN. 683, 684 (1977) (arguing that issuers choose the type of underwriting that will maximize their wealth).

7. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d at 499. An IPO is the block of securities that is initially offered to the public at a certain price after the underwriting syndicate goes through its process. *IPO*, INVESTOPEDIA, http://investopedia.com/terms/i/ipo.asp (last visited Feb. 7, 2011).

8. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d at 499. The after-market is the market in which securities that have already been issued are traded. A syndicate is a group comprised of members of the leading underwriting firms which allows underwriters to assume less overall financial risk. The syndicate agrees to purchase an entire 'issue' of securities discharged by a corporation at a pre-fixed price. The syndicate then immediately resells the issue to the public at a slightly higher rate, called the issue price. Underwriting is a for-profit business. *See* Katrina Ellis, et al., *When the Underwriter is the Market Maker: An Examination of Trading in the IPO Aftermarket*, 55 J. FIN. 1039, 1039, 1044–1045 (2000) (arguing that the lead underwriter is the "dominant market maker").

9. Sherman Act of 1890, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. § 1-7 (2006)). Section 1 of the Sherman Act forbids contracts and conspiracies from creating an "unreasonable" restraint of trade. *See* Stuart M. Reynolds, Jr., *The Relationship of Antitrust Laws to Regulated Industries and Intellectual Property in the New Marketplace*, 4 TUL. J. TECH. & INTELL. PROP. 1, 3 (2002). *See infra* notes 36–38 and accompanying text.

10. Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (current version at 15 U.S.C. § 13 (2006)). Section 2(c) of the Robinson-Patman Act forbids individuals and companies from using brokerage methods to buy and sell items. *Id*. *See infra* notes 47–48 and accompanying text.

11. *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d at 510.

12. *Id*. A tie-in is a relationship between underwriters and prospective purchasers where the purchaser must give consideration above the stated offering price to receive an allocation of the shares. For example, an underwriter could require buyers to take part in other offerings, place orders for the IPO after-market for the same security they are purchasing in the initial issue. While some manipulation of IPOs and after-market is allowed by the SEC, tie-ins are specifically prohibited. *Id.* at 515.

13. *Id*.

chaser to pay above-market prices for their desired securities.[14] Plaintiffs also alleged harm to after-market purchasers because they would have to buy securities at an intentionally inflated price.[15] Plaintiffs alleged that these illegal agreements were accomplished by the underwriting firms agreeing to allocate very large numbers of IPO securities as long as the institutional defendants agreed to comply with the underwriters' policies.[16]

The Southern District of New York granted the defendant underwriters' motion to dismiss, holding that the underwriting firms were not liable under antitrust laws because the securities laws impliedly repealed federal antitrust claims and preempted state antitrust laws.[17] The Court stated that any implied immunity analysis "require[d] a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflict[ed] with antitrust law."[18] After discussing the SEC's authority and pervasive ability to regulate broker-dealer conduct and the National Association of Securities Dealers (NASD), the Court concluded that there was a "plain repugnancy" between the antitrust laws and the federal regulatory scheme and thus implied antitrust immunity was applicable.[19]

Billing appealed the district court's decision, arguing that antitrust laws were not implicitly precluded by securities laws.[20] The Second Circuit overturned the district court's decision and held that the securities laws did not 'shelter' the underwriting firms from being liable under antitrust laws.[21] The Court then noted that there was no legislative history indicative of a Congressional intent to "immunize anticompetitive tie-in agreements."[22] The Court stated that there was no threat of "irreconcilable mandates" if the antitrust laws were permitted to be enforced.[23] The Second Circuit finally explained that the SEC never authorized the specific anticompetitive behavior at issue.[24]

The Supreme Court of the United States granted certiorari to decide whether securities laws were impliedly immunized from antitrust laws.[25]

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14. *See id*.

15. *Id*. at 497.

16. *Id*. at 507 ("[T]he Underwriter Defendants engaged in a secret 'centralizing agreement' that the lead underwriter 'could itself distribute all the shares of each Class Security.'").

17. *Id.* at 524.

18. *Id*. at 504.

19. *Id*. at 518.

20. Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 136–37 (2d Cir. 2005) *overruled* by Credit Suisse Sec. v. Billing, 551 U.S. 264 (2007).

21. *Id*. at 137.

22. *Id*. at 169.

23. *Id*.

24. *Id*.

25. *Id.*, *cert granted*, 549 U.S. 1092 (U.S. Dec. 7, 2007) (No. 05-1157). In the order granting certiorari, Justice Kennedy recused himself from hearing the case.

II. Legal Background

The Supreme Court has hesitantly approved implied antitrust immunity in federally regulated industries[26] over the past century.[27] The Court has consistently recognized that it is important to preserve market competition.[28] The Supreme Court has held that implied immunity to federal antitrust laws only applies to 'pervasively' regulated federal industries.[29] If an industry is pervasively regulated, the Court will extend implied antitrust immunity to the minimum extent necessary to make the regulatory scheme effective.[30] While recognizing that antitrust laws and federal regulatory schemes sometimes have differing goals, the Court has also recognized that these two areas can coexist without the need for implied immunity.[31]

The Court has narrowly found implied immunity of antitrust in securities laws in three main cases.[32] This implied immunity is limited to a small set of circumstances that has been refined by the Court over the past half-century, reflecting the need to preserve the purposes of antitrust and the integrity of the unique niche of securities laws themselves.[33]

While there has been an increase in federal regulation of the financial sector following the 2007-2008 financial crisis, the importance of federal antitrust laws remains intact.[34] Antitrust laws will not be superseded by an influx of implied antitrust immunity findings.[35]

A. The history of antitrust laws demonstrates that they serve an important purpose in the preservation of competition.

American antitrust law originated in response to the large monopolies, trusts and cartels that characterized America's post-Industrial Revolution business landscape.[36] The first antitrust legislation in the three-part series was the Sherman Antitrust Act

26. *See infra* Part II.B.1 and accompanying text (discussing federally regulated industries).

27. *See infra* Part II.D (discussing the precedential Supreme Court cases approving implied antitrust immunity).

28. *See infra* Part II.A and accompanying text.

29. *See infra* Part II.D.

30. *See infra* note 140 and accompanying text.

31. *See infra* Part II.B.

32. *See infra* Part II.D.

33. See *infra* Part II.D.

34. *See infra* Part IV.D and accompanying text for information on the continuing importance of antitrust laws after the recent financial crisis.

35. *See infra* Part IV.B and accompanying text.

36. *See generally* George Bittlingmayer, *Antitrust and Business Activity: The First Quarter Century*, 70 BUS. HIST. REV. 363, 363 (1996) (arguing that "trust-busting hurt business activity"); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 363 (1965); Robert H. Bork, *The Goals of Antitrust Policy*, 57 THE AM. ECON. REV. 242 (1967).

which was first passed in 1890.[37] The purpose of the Sherman Act was to protect competition.[38] The Act is divided into three sections: Section One bans certain specific anticompetitive behavior.[39] Section Two bans end results that are anticompetitive in nature.[40] Section Three extends the first section to U.S. territories and to the District of Columbia.[41]

The next major antitrust legislation passed by Congress was the Clayton Act in 1914.[42] The Clayton Act aimed to deter anticompetitive[43] behavior at early stages of

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37. George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUDIES 1, 1 (1985) (discussing the origins of the Sherman Act).

38. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1053 (1979) (discussing legal challenges to behavior creating monopoly power). There are two competing theories of antitrust generally as reflected by the Sherman Act. One is an economic rationale, the other is a public welfare or public interest rationale. *See, e.g.* Phillip E. Areeda, *Antitrust Laws and Public Utility Regulation*, 3 BELL J. ECON. & MGMT. SCI. 42, 42 (1972) (stating that the antitrust laws are meant to protect competition "from the business behavior . . . that endanger[s] competitive processes or threaten[s] to deny society . . . benefits" derived from competition); Bork, *supra* note 36, at 242 (explaining that these two goals (consumer welfare and small business welfare) are "mutually inconsistent" ends); Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 342 (2004) (explaining that antitrust generally works to fill in the gaps that regulations create by preventing anti-competitive tendencies).

39. Sherman Act of 1890, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. §§ 1–7 (2006)). The text of § 1 is as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." *Id*. at § 1.

40. *Id*. at § 2. The text of § 2 is as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

See also Donald I. Baker, *The Antitrust Division, Department of Justice—The Role of Competition in Regulated Industries*, 11 B.C. INDUS. & COM. L. REV. 571, 574 (1970) (noting that the Department of Justice mainly uses § 2 of the Sherman Act when enforcing antitrust laws).

41. Sherman Act of 1890, ch. 647, 26 Stat. 209. The text of § 3 is as follows:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or both said punishments, in the discretion of the court." *Id*.

42. Clayton Act of 1914, 38 Stat. 730 (1914) (current version at 15 U.S.C. § § 12–17 (2006), 29 U.S.C. § § 52–53 (2006). *See also* Peter C. Dooley, *The Interlocking Directorate*, 59 THE AM. ECON. REV. 314, 314 (1969).

43. Merriam-Webster defines *anticompetitive* as "tending to reduce or discourage competition." *Anticompetitive*, MERRIAM WEBSTER DICTIONARY (2011), http://www.merriam-webster.com/dictionary/ anticompetitive.

business.[44] Specifically, the Act prohibited conduct that was regarded as anticompetitive in nature.[45] Examples of anticompetitive activities include price discrimination, exclusive dealings, mergers that substantially diminish competition, and prohibiting the same person from being a director of two competing companies.[46]

The third, and final, major antitrust act, amending § 2 of the Clayton Act, was the Robinson-Patman Act of 1936.[47] Its main provision banned a company from selling comparable goods to different buyers at different prices.[48] It was the first antitrust statute to prohibit price discrimination with the goal of protecting small businesses from being edged out of the market by larger corporations.[49]

B. Antitrust laws are often at odds with laws regulating federal industries because of their conflicting goals: antitrust attempts to preserve competition whereas federal regulations attempt to protect the public interest.

Antitrust laws strive to protect competition.[50] Federally regulated industries strive to protect the public interest.[51] Antitrust laws and federal regulations mostly work in tandem and coexist without issue.[52] However, because they have dueling purposes, antitrust enforcement and federal regulation enforcement sometimes conflict with each other.[53] Although antitrust laws are statutory in nature, the Court has long

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44. Dooley, *supra* note 42, at 314 ("The Clayton Act of 1914 prohibited interlocking directorates among competing corporations").

45. Clayton Act of 1914, 38 Stat. 730 (1914) (current version at 15 U.S.C. § § 12–17 (2000), 29 U.S.C. § § 52–53(2000).

46. *See* A.M. POLLARD AND J.P. DALY, BANKING LAW IN THE UNITED STATES §19–25 (3d ed. 2004) (discussing the standards for determining the presence of anticompetitive behavior during mergers and acquisitions).

47. Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (current version at 15 U.S.C. § 13 (2006)). Interestingly, this act was passed during the same time as the Securities and Exchange Act. *See infra* note 95 and accompanying text.

48. *Id.* at §13a. However, the Robinson-Patman Act provides for the following exceptions: prices can be different to meet the needs of competition, a firm can provide a 'cost justification' for the difference in pricing, and if there are 'changed conditions' in the market, prices can also be different. *Id. See also* Bork, *supra* note 36, at 244–45 (emphasizing the importance of the 'predatory intent' element for a violation of the Robinson-Patman Act to occur).

49. Donald S. Clark, Secretary, Fed. Trade Comm'n, Address before the Ambit Group Retail Channel Conference for the Computer Industry (June 7, 1995), *available at* http://www.ftc.gov/speeches/other/patman.shtm.

50. *See supra* notes 35–46 and accompanying text. *See also* Pamela J. Ashley, Comment, *Vanishing Immunity: The Antitrust Assault on Regulated Industries*, 27 LOY. L. REV. 187, 187 (1981) (stating that antitrust laws promote "free and unrestrained compet tion").

51. *See infra* Part II.B.1. Also note that the antitrust/regulation debate fits into the broader debate between neoclassicism and neo-liberalism economic theories, in which the former avers that competition amongst firms in a free market economy is most efficient, whereas the latter avers that regulation controlling monopolies will improve the general welfare. Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSPECTIVES 89, 91 (1998).

52. *See* Areeda, *supra* note 38, at 53 (stating that antitrust laws and regulations are not mutually exclusive because federal courts are responsible for interpreting both); Baker, *supra* note 40, at 584 (noting that "competition and regulation do not necessarily serve inconsistent goals").

53. It is also important to remember that because inconsistencies lead to 'inefficient' results, there is no presumption of Congressional intent to create these inconsistencies. Hovenkamp, *supra* note 38, at 343.

recognized their importance in the preservation of America's market economy and has been loath to find an irresoluble conflict between antitrust laws and federal regulations.[54] Nevertheless, the Court has recognized two instances where there antitrust immunity is mandated: state action immunity[55] and implied immunity.[56] In the case of implied immunity, the Court has only allowed a narrow version of implied antitrust immunity to be invoked when there is a 'clear repugnancy' between antitrust laws and regulations in a 'pervasively' regulated industry.[57] The implied antitrust immunity is not granted to the entire industry, rather, it is granted only to the extent necessary to make the regulatory scheme workable.[58] For example, in *United States v. Philadelphia National Bank*,[59] the Court held that the exemption granted in the Clayton Act for the Federal Trade Commission was narrow in scope and did not extend to asset bank mergers, and thus the bank merger at issue was illegal and in violation of antitrust laws.[60] In addition, in *United States v. Borden Company*,[61] the Court held that there was no implied antitrust immunity under the Agricultural Marketing Agreement Act when Chicago milk producers were indicted for price fixing and supply limiting of milk.[62]

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54. Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSPECTIVES 27, 27 (2003) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596 (1972)).In fact, antitrust has been called the "Magna Carta of free enterprise." *Id.*(quoting *Topco*). Even when Congress explicitly provides antitrust immunity to regulated industries, such as in interstate commerce and in communications, it does so w thin limited parameters. *See* George J. Alexander, *Antitrust and the Telephone Industry after the Telecommunications Act of 1996*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 227, 243 (1996) (arguing generally that there is no implied antitrust immunity under the Telecommunications Act of 1996).

55. The state action exemption to antitrust arises when the state takes action in certain regulated areas, such as in regulating public utilities, because the Sherman Act exempts government action from antitrust laws. *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L. J. 486, 488 (arguing that the revisionist analysis of state action immunity, stating that courts should narrow its scope, is wrong). *See also* Parker v. Brown, 317 U.S. 341, 368 (1943) (holding that the California Prorate Act was exempt from antitrust liab lity and articulated the state action exemption); *see also* Ashley, *supra* note 50, at 191 (discussing the origins of the state action ant trust exemption).

56. *See infra* notes 57–62 and accompanying text. Agencies themselves have been required to take competition into account when promulgating regulations that might restrict competition and have anti-competitive tendencies. *Id.* In fact, the Supreme Court has held that a 'serious' anti-competitive effect is adequate to demonstrate a regulation contrary to the public interest. *See* Fed. Mar. Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 252 (1968) (holding that when shipping conference policies conflicted with antitrust laws, they would only be allowable if the conflicting policy was evidenced as being a serious transportation need); United States v. Radio Corp. of Am., 358 U.S. 333, 334 (1959)(holding that the FCC needed to consider antitrust principles when it interpreted the Communications Act).

57. Bruce L. Merman & James P. Hermance, *Implication of SEC's Victory over Antitrust Regulation in the Securities Industry: Justice Department's Suit Against AT&T on the Line*, 2 J. CORP. L. 305, 317 (1977) (explaining that where antitrust laws can work w thin the regulatory framework proscribed by Congress, the Supreme Court have been 'hesitant' to find implied immunity).

58. *See* Hovenkamp, *supra* note 38, at 345 (noting that courts only invoke implied antitrust immunity when enforcement of antitrust laws would stop the agency from carrying out its operations).

59. 374 U.S. 321 (1963).

60. *Id*. at 371.

61. 308 U.S. 188 (1939).

62. *Id*. at 192.

1. The Federal Government regulates industries to protect the public interest.

During the Great Depression's New Deal, a powerful administrative state became the cornerstone of the American welfare state.[63] Federal agencies were created to regulate many aspects of American life, including securities, telecommunications, interstate commerce and others.[64] This heightened level of federal regulation was a major departure from the previous government policy of preserving competition and maintaining a *laissez-faire* approach to economic policy.[65] Federal regulation was justified as protecting the public interest, and it tended to decrease competition amongst firms in an industry.[66] In the trying economic times of the Great Depres-

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63. *See* Hovenkamp, *supra* note 38, at 340 (noting that it is the New Deal position that a complex system creates consumer 'vulnerability' and that New Dealers tried to regulate almost everything because they lost all confidence in an open market economy following the Great Depression); Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 727 (1984) (explaining that one major consequence of the New Deal was the elevation of the President's power within the new administrative state which has endured to today); Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. OF POL. ECON. 779, 779 (2004) (equating the New Deal with the "cartelization" of industry, where the government controlled the labor market and wages).

64. *See* Cole & Ohanian, *supra* note 63, at 783. For instance, the National Labor Relations Act established the National Labor Relations Board, which regulated collective bargaining of workers' unions, price controls and wage levels. *Id.* The Social Security Act was enacted to provide long-term relief to retired Americans. Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 MINN. L. R. 379, 382 (1983–1984). *See also* Edwin Amenta & Bruce G. Carruthers, *The Formative Years of U.S. Social Spending Policies: Theories of the Welfare State and the American States during the Great Depression*, 53 AM. SOC. REV. 661, 664 (1988) (arguing that there are three differing rationales for regulation in lieu of market competition: emergency relief, democratic partisanship political reasons and assisting state capacities to help). The Securities and Exchange Commission was created to increase disclosure of securities and transactions. *See* Parrish, *supra* note 63, at 727. The Federal Communications Commission was enacted to regulate communications. Harry M. Shooshan and Erwin G. Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 HASTINGS J. COMM. & ENT. L. 619, 619 (exploring the tension between the FCC and Congress).

65. Hovenkamp, *supra* note 38, at 341 (noting that "[o]ne consequence of regulation is a reduced role for the antitrust laws" because market forces are no longer in control). In fact, even in the early days of antitrust law before the New Deal, conflict existed between business regulations and antitrust laws. *See* Parrish, *supra* note 63, at 724. The Act to Regulate Commerce, establishing the Interstate Commerce Commission (which predated the Sherman Act by three years) created a monopoly approved by the government regulating, as its name suggests, commerce between the states. *Id.* However, the Court determined that the Commerce Act did not permit passage of regulations that violated the Sherman Act and skirted the issue. *Id.* (noting that the nineteenth century *laissez-faire* economy tended to favor entrepreneurs whereas twentieth century regulations, beginning with the New Deal, adapted concepts to fit w thin the new American framework).

66. Ashley, *supra* note 50, at 187 (explaining that regulated industries promote "control and possible elimination" of competition in the name of furthering the public interest).Increased regulation of industries was justified as being done in the public interest and for the protection of the people. *Id.* A common explanation of the need for regulation is the rise of a "natural monopoly," which happens when large economies work most efficiently if one company is in charge of a single industry. *See* J. Baker, *supra* note 54, at 585, 571 (stating that a main justification for government industry regulation is that t serves to ensure "reasonable economic performance"). The paradigmatic example of a 'natural monopoly' to be regulated is a public utility: the argument made is that it is more efficient in a large-scale economy for a heavily regulated public utility to offer water and electricity services than it is for several competing companies to competitively offer these services. *Id.*; Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 871–72, 874 (1973) (arguing that there are inherent contradictions in the natural monopoly justification for regulation and that regulation is not consistently completed in the true public interest); Ashley, *supra* note 50, at

sion, legislators were willing to overlook the anti-competitive results of regulation, which were troubling to legislators at the end of the nineteenth century, to stabilize the economy.[67] The 1970's were the height of regulation in America. Beginning with the Reagan Administration, the United States entered a period of deregulation, which remains relatively intact today.[68] However, regulated industries still play a major role in government enforcement in almost every area, including securities, the environment, and communications.[69]

2. The Court has held that implied antitrust preclusion is only applicable to 'pervasively' regulated federal industries.

Because the Court is incredibly hesitant to apply implied antitrust immunity to federally regulated industries, it has consistently only applied such immunity to industries that have pervasive regulatory schemes in which the agency is able to deter anti-competitive behaviors through its own operations.[70] Even if an industry has pervasive characteristics, the Court will try and limit the amount of implied anti-

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187. *But note* that other theories for regulation exist. For example, the *contestability theory* asserts that competition does not have to exist within a market to be successful: it can be equally competitive to have competition for a market. *See* Hovenkamp, *supra* note 38, at 364.

67. Cole & Ohanian, *supra* note 63, at 779 (arguing that there is surprising lack of economic equilibrium because of New Deal policies In fact, reducing competition was a stated goal of New Dealers because it stabilized price levels which led to a decrease in antitrust enforcement and an increase in government collusion.). *Id.* A major political science argument for New Deal spending during the Depression is that spending was politically motivated and influenced by party politics. John Joseph Wallis, *Employment, Politics and Economic Recovery during the Great Depression*, 69 THE REV. OF ECON. & STATISTICS 516, 516 (1987) (noting that while politics is a largely accepted spending justification, responding to the alarming economic situation was still a key factor in New Deal spending). *See generally* Amenta & Carruthers, *supra* note 64, at 661 (arguing that the statist perspective for the timing of New Deal passage is most supported by available data).

68. Hovenkamp, *supra* note 38, at 341 (explaining that in the deregulation of the past twenty years, antitrust has been a major "growth industry"); Winston, *supra* note 51, at 90 (noting that deregulation is a slow process in which currently only minor industries have been able to fully deregulate, such as niche transportation industries). The following industries have been deregulated since the 1970's: the airline industry, the transportation industry generally and the communications and power industries. *Id*. A good example of a fully deregulated industry is the airline industry, where once deregulated, competition became fierce. Budget airlines such as Southwest and AirTran were able to cut prices and wedge into the profit margins of the old standbys Delta, etc. *Id.* at 93–94 (also arguing that this increase in competition and decrease in regulation has actually created an increase in consumer welfare because there has been an improvement in quality of service, a decrease in prices and a decrease in operating costs). *Id*. at 100. *See generally* Richard A. Posner, *The Economic Analysis of the Law Approach: The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT'L. L.J. S7, S8 (2000) (arguing that because regulation is so pervasive over industries, deregulation stands for the decrease in the 'comprehensive controls' that the government holds over industries).

69. *See* Robert W. Crandall, *Letting Go? The Federal Communications Commission in the Era of Deregulation*, 7 R. NETWORK ECON. 481, 483–485 (2008) (noting that the FCC continued regulating the telephone industry well after legislation was passed to deregulate it). Because deregulation is a slow process, many major industries that were regulated beginning with the New Deal remain regulated today. *See* Winston, *supra* note 51, at 91. Additionally, regulation itself has shifted from being seen as a mutually exclusive alternative to competition to regulating only when compet tion takes place. *See* Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761, 762 (2006).

70. *See* Gordon v. New York Stock Exch., 422 U.S. 659, 682–85 (1975) (discussed *infra* at notes 135–42 and accompanying text).

trust immunity it grants to the industry in light of regulatory framework being challenged.[71] To determine if an industry is pervasively regulated, the Court looks to the protections triggered by the regulatory scheme, how extensive agency controls are over the entire industry and if regulatory controls can be used in lieu of enforcement of antitrust laws.[72] There is no bright line test which the Court employs to make this determination; it is rather a case-by-case inquiry in which the Court strives to make the bottom line decision as to whether the regulatory scheme proposes a 'clear repugnancy' to the enforcement of antitrust laws.[73]

Before deregulation began in the 1980s,[74] there were numerous cases arguing for implied antitrust immunity because of a pervasive federal regulatory scheme where the Court determined under a case-by-case inquiry whether implied antitrust immunity would be applied.[75] For example, in *Pan Am. World Airways Inc. v. United States*,[76] the Court held that under the Federal Aviation Act, antitrust suits were barred because there was a pervasive regulatory scheme in place and because the Act specifically granted the Civil Aeronautics Board jurisdiction over antitrust claims in lieu of the Sherman Act or the Clayton Act.[77] The Court, in *Fed. Commc'ns Comm'n v. RCA Comm'ns, Inc.*,[78] also held that an FCC order mandating competition amongst telecommunications carriers was not legitimate under the pervasive communications regulatory scheme and therefore narrowly applied implied antitrust immunity to the communications industry.[79]

However, even during the period of heightened federal regulation, the Court's application of implied antitrust immunity was still narrow, and it refused to extend the implied immunity where the regulatory scheme was not pervasive.[80] For instance, in the banking industry, in *United States v. Philadelphia Nat'l Bank*,[81] the Court held that the Bank Merger Act of 1940 section being challenged did not preclude an antitrust suit from moving forward because the limited powers granted to the agency in the regulatory statute did not allow the agency to oversee antitrust-

71. *Id.* at 682. *See also supra* notes 58-63 and accompanying text.

72. *See generally* Merman & Hermance, *supra* note 57, at 305 (expounding on the antitrust challenges both within and outside of the securities industry). *See also* Credit Suisse Sec. v. Billing, 551 U.S. 264, 275 (2007).

73. *See infra* notes 74–88 and accompanying text.

74. *See supra* note 69 and accompanying text for a discussion of deregulation.

75. *See infra* notes 76–79 and accompanying text.

76. 371 U.S. 296 (1963).

77. Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304 (1963) (noting the statute specifically states that persons affected under certain aeronautics regulations under the Board are "relieved from" the antitrust acts).

78. 346 U.S. 86 (1953).

79. *Id.* at 96 (further noting that even though there was a national policy in favor of competition, it was not enough to trigger antitrust laws).

80. *See infra* notes 81–88 and accompanying text.

81. 374 U.S. 321 (1963).

like claims.[82] The Court also refused to apply implied antitrust immunity in another area of the communications industry: in *United States v. Radio Corp. of Am.*,[83] the Court determined that an antitrust claim under the Sherman Act was allowable because the Federal Communications Act did not create a pervasive regulatory scheme in which antitrust would ruin the regulatory scheme envisioned by Congress.[84] Then again in *Ottertail Power Co. v. United States*,[85] the Court held that implicit repeal of antitrust laws did not extend to the regulatory power of the Federal Power Commission.[86] In *Federal Maritime Comm'n. v. Seatrain Lines, Inc.*,[87] the Court held that even though the Shipping Act provided antitrust immunity in some instances, it did not extend to the specific government acquisition in question because the Federal Maritime Commission did not pervasively regulate the activity in question.[88]

In the one major implied antitrust immunity case since the deregulation of the communications industry, the Court, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,[89] held that the Telecommunications Act of 1996 did not create a repeal of antitrust laws because a savings clause existed that specifically prohibited a finding of implied antitrust immunity.[90]

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82. *Id.* at 321. *Compare* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304 (1963), with *supra* note 76.

83. 358 U.S. 334 (1959).

84. *Id.* at 334. The Court engaged in a lengthy discussion of the FCA's legislative history before concluding that Congress did not intend to give the FCC jurisdiction to override antitrust suits. *Id.* at 338–346. *But note* that the Court also reiterated in this case that the FCA's regulatory scheme could be seen as pervasive in other specific sections that might bar antitrust suits in the future. *Id.*

85. 410 U.S. 366 (1973).

86. *Id.* at 374. The Court noted that just because the Federal Power Commission maintained regulatory authority in a specific area, it did not mean automatic antitrust immunity was triggered. *Id.* More specifically, the Court stated that "Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships." *Id.* at 374. Because Congress rejected a pervasive regulatory scheme, antitrust immunity would not be extended. *See also* Merman & Hermance, *supra* note 57, at 327.

87. 411 U.S. 726 (1973).

88. *Id.* at 740. Here, the FMC had approved the purchase of an entire fleet by a common nautical carrier to another common carrier. The Court stated that Congress did not intend to immunize the asset acquisition agreements that would require continuous management by the FMC from antitrust claims. *Id.*

89. 540 U.S. 398 (2004).

90. *Id.* at 398. The Telecommunications Act imposed sharing duties onto local exchange carriers (LEC's) in a "detailed regulatory scheme" *Id.* at 406. The specific savings clause was as follows: "Section 601(b)(1) of the 1996 Act is an antitrust specific saving clause providing that 'nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the ant trust laws.'" *Id.* at 406 (quoting 110 Stat. 143, 47 U.S.C. § 152)). *But see* notes 201–03 and accompanying text for Justice Thomas's discussion of a pertinent savings clause in the securities regulatory scheme.

C. Securities laws present a 'pervasively' federally regulated industry which also relies heavily on antitrust enforcement, except in the instance of narrow implied immunity.

1. The history of Securities Laws demonstrates the government's intent to create a pervasive regulatory structure in the securities industry.

Securities laws were one of the many regulative results of the Great Depression.[91] Before the stock market crash of 1929, the market experienced a boom where there was a large amount of market manipulation by bankers and corporations.[92] After the market crashed, President Franklin D. Roosevelt's New Deal government decided to reign in the securities markets.[93]

In March, 1932, the Senate Committee on Banking and Currency reviewed the state of the securities industry and the stock exchange and determined that regulation was needed.[94] The Securities Act and the Securities and Exchange Act were passed in 1933 and 1934, respectively, following these hearings.[95]

The main goal of the securities laws was to ensure full disclosure of financial information.[96] This full financial disclosure was aimed at increasing ethics and accountability in the financial industry and allowing businesses to recover, thereby

91. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1223–24 (1999); *see* Jerry W. Markham, *Accountants Make Miserable Policemen: Rethinking the Federal Securities Laws*, 28 N.C.J. INT'L L. & COM. REG. 725, 761 (2003) (arguing that the self-regulation aspect of securities laws which attempted to self-police caused problems such as the Enron scandal). *See generally* James Burk, *The Origins of Federal Securities Regulation: A Case Study in the Social Control of Finance*, 63 SOC. F. 1010, 1010 (1985) (arguing that the securities acts were established because of appearance of market failure, electoral politics and because of politically contingent events).

92. Williams, *supra* note 91, at 1224. Additionally, before 1929, securities regulation was left up to individual states to determine. Markham, *supra* note 91, at 730. This delegation of power allowed trusts to continue operating and risky economic practices to take place. *Id.* For example, New Jersey laws allowed corporations to maintain holding companies, which therefore allowed trusts such as Standard Oil to legally operate. *Id.* Because of this, antitrust laws such as the Sherman Act did not initially affect securities to a great degree. *See id.* at 734.

93. Williams, *supra* note 91, at 1223. One commentator has likened the passage of the securities laws to a "revolution" instead of the "gradual . . . evolution" that occurred prior to the Great Depression. Amar Bhide, *The Hidden Costs of Stock Market Liquidity*, 34 J. FIN. ECON. 31, 34 (1993) (quoting Charles Meyer).

94. Williams, *supra* note 91, at 1223–24. The Pecora hearings are named for Ferdinand Pecora, who was the Chief Counsel to the U.S. Senate's Committee on Banking and Currency. The Pecora Hearings found that there were several pre-market crash securities practices that needed to be curbed. These are mainly excess speculation, wash sales, matched orders and short sales. *Id*. at 1224–25.

95. *See infra* Part II.C.2.

96. Williams, *supra* note 91, at 1226–27. The laws were also passed to prevent another Great Depression-sized market crash in the future. *Id.* Additionally, Congress made a policy choice to "reassert" control over monies that had benefitted only a small percentage of wealthy people to the 'detriment of m llions' of Americans. *Id*. at 1227. The full disclosure goal was further designed to allow an investor to make intelligent, fact-based decisions on which securities he was investing in and their true value, as well as to "safeguard against the negligent and fraudulent practices perpetrated upon [the investor]…by incompetent and unscrupulous bankers, underwriters, dealers, and issuers." Markham, *supra* note 91, at 739 (quoting S. Rep. No. 1455 (1934)). Investors were protected by the securities acts in three main ways: full disclosure of securities information, the discouraging of unfair use of insider information, and the elimination of sudden price fluctuations. *See* Bhide, *supra* note 93, at 34.

helping those in financial need.[97] By having to make full disclosures of their balance sheets and internal books, businesses could not practice the same exceedingly risky behavior they did before 1929.[98] This in turn increased market efficiency because investors could determine through firms' transparency if their investments were fairly safe or risky ventures.[99]

2. The content of the Securities Laws created a pervasive regulatory structure.

The Securities Act of 1933 was passed on May 27, 1933.[100] It put the burden of full disclosure of securities being offered for sale to those selling the securities.[101] The main enforcement mechanisms were parameters for information disclosure and harsh penalties for lack of compliance.[102]

The Securities and Exchange Act of 1934 was passed on June 6, 1934.[103] The Act regulated speculative trading of securities and prohibited bankers from simultaneously holding commercial and investment functions in the same institution and prohibited bad practices.[104] Perhaps most importantly, the Securities and Exchange Commission (SEC) was established to provide oversight of securities and to promote the "fair market" and "market efficiency."[105] The SEC was granted, and continues to have, broad self-regulatory power over the securities industry.[106] The SEC regulates virtually every area of the securities industry: it regulates underwriting activities, IPO activities, supervises the system of self-government,[107] regulates securi-

97. Burk, *supra* note 91, at 1014. Specifically, this material aid went to giving the public help with loans, financing mortgages and agricultural land and create jobs. *Id.*

98. *See* Bhide, *supra* note 93, at 31 (noting that the securities laws were meant to restore public confidence, protect investors and create "orderly markets"); Markham, *supra* note 91, at 729 (noting the same).

99. Markham, *supra* note 91, at 729.

100. Burk, *supra* note 91, at 1012.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.* Among the prohibited practices were wash sales, matched orders, and supplying false information. *Id.* at 1013.

105. *Id.* at 1012. The SEC accomplished this through registering securities (taking over this function from the Federal Trade Commission), monitoring rules and guaranteeing that stock exchanges complied with the new regulations. *Id.* Although basic in its inception, the SEC has continually expanded since its passage. Bhide, *supra* note 93, at 35.

106. *See* Richard W. Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 L. AND CONTEMP. PROBS. 663, 664 (1964) (discussing the broad self-regulatory authority the SEC possesses over the securities industry).

107. *See id.* (noting that while self-regulating institutions such as the NASD have some responsibly, the SEC "is assigned the task of supervising the operation of this system of self-government"). The system of self-government includes voluntary registration by brokers and securities firms with self-regulating bodies, mainly the Federal Industry Regulatory Authority (FINRA). *About FINRA*, FINRA, www.finra.org/aboutFINRA/. Note that FINRA represents the 2007 merger between NASD and the New York Stock Exchange and is now the self-regulating organization responsible for regulating activities by registered brokers and firms. *See* Carrie Johnson, *SEC Approves One Watchdog for Brokers Big and Small*, THE WASHINGTON POST, July 27, 2007, at 1. However, FINRA is still subject to SEC supervision. *Id.*

ties rules enacted, ensures fair dealing between brokers and firms, and imposes sanctions when fair practices have been violated.[108] It has an almost unparalleled level of control over the securities industry.[109]

D. The Supreme Court's decisions in Silver, Gordon and NASD proscribe the narrow set of circumstances in which the securities laws have implied immunity from antitrust laws.

In *Silver v. New York Stock Exchange*,[110] the Supreme Court established the framework to determine when, and if, securities laws are immune from antitrust laws.[111] The Court established in *Silver* the 'clear repugnancy' test: antitrust laws would be implicitly precluded only when there was a clear repugnancy between the antitrust laws and the securities laws in question.[112] In *Silver*, the Court found a *per se* violation of the Sherman Act when the New York Stock Exchange (NYSE), an entity supervised by the SEC, discontinued use of private wires set up in the NYSE offices for instant communication because this activity directly violated § 1 of the Sherman Act.[113] The Court also held that there was no implied immunity to antitrust laws because the NYSE was not liable to the non-member broker-dealer.[114]

Although the Court determined that in this instance antitrust laws were not impliedly repealed, it identified the 'clear repugnancy' test.[115] The Court stated that when determining if antitrust laws are impliedly precluded, the goal of antitrust laws to preserve competition must be weighed against the public-policy goal of securities laws to self-regulate.[116] Self-regulation in the securities industry might lead to anti-competitive results, as certain securities regulations actually encourage behavior deemed inappropriate by the federal antitrust statutes.[117] When this happens, antitrust laws must be found to be impliedly precluded because the SEC encourages, and regulates, anticompetitive behavior.[118] For example, the SEC creates rules and regulations governing the actions of exchange member firms and brokers.[119] In these rules, the SEC allows member firms and brokers to engage in trading, which if applied in normal circumstances would be "inconsistent with just and

108. Jennings, *supra* note 106, at 664.
109. *See id*. at 663–73 (discussing the SEC's broad regulatory powers).
110. 373 U.S. 341 (1963).
111. *Id*. at 357.
112. *Id*.
113. *Id*. at 347.
114. *Id*. at 341. Silver was the non-member broker-dealer who had installed his private wires in the NYSE. *Id*. at 343.
115. *Silver*, 373 U.S. at 357.
116. *Id*. at 349.
117. *Id*.
118. *Id*. at 349, 358–59.
119. *Id*. at 353. *See supra* notes 101–10 and accompanying text.

equitable principles of trade."[120] The Court noted that many of the regulations promulgated by the SEC in its self-regulation efforts deal with interactions between exchange members and non-members.[121] In this particular case, the Court stated that while the self-regulation of the NYSE in removing private wires was a *per se* violation of the Sherman Act, antitrust laws were not precluded because there was no 'clear repugnancy' between the antitrust laws and the SEC's self-regulating of the NYSE.[122]

Twelve years after *Silver*, the Court decided two cases in the same year that further developed and clarified the 'clear repugnancy' test established in *Silver*: *National Ass'n of Securities Dealers, Inc.*[123] and *Gordon v. New York Stock Exchange, Inc.*[124] These two cases further illustrated how the Court determines whether implied antitrust immunity exists in certain areas of the securities industry.[125]

In *United States v. National Ass'n of Securities Dealers, Inc.*(NASD),[126] the Court found that the Maloney Act's § 22(f) conferred regulatory authority to the SEC that impliedly precluded enforcement of the Sherman Act antitrust laws.[127] The Court asserted that the requisite 'clear repugnancy' was present in this instance because it was necessary to preclude enforcement of the antitrust laws to allow the securities regulatory scheme function in any capacity.[128] Unlike in *Silver*, the SEC's mutual fund regulations could not be effective if the federal antitrust laws were applied to them because of the anticompetitive nature of the SEC's regulations.[129] In *NASD*, the government brought suit against NASD alleging that the NASD, mutual funds, mutual fund underwriters, and broker-dealers violated § 1 of the Sherman Act when they "combined and agreed to restrict the sale and fix the resale prices of mutual-fund shares in secondary market transactions between dealers," investors, and brokered transactions.[130] The Court further held that if antitrust laws were not implicitly precluded in this instance, the NASD would be subjected to "duplicative and

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120. *Id*. at 355. For example, the SEC allows member firms and brokers to trade in the over-the-counter market and deal in listed securities, which increases the potential for the "loss to the principal in the transaction." *Id*. at 354–355.

121. *Silver*, 373 U.S. at 354.

122. *Id*. at 364.

123. 422 U.S. 694 (1975).

124. *Id.*

125. *See infra* notes 71–91 and accompanying text (illustrating how the Court determines whether implied antitrust immunity exists).

126. 422 U.S. 694 (1975).

127. *Id*. at 694. Specifically, the Court determined that mutual fund sales were exempt from antitrust. *Id.* The Maloney Act, which amended the Securities Exchange Act of 1834, allows security brokers to self-regulate in the over-the-counter mutual fund market. *Id*.

128. *Id*. at 734 (quoting Silver v. NYSE, 373 U.S. 341, 357 (1975)).

129. *Id*. at 722–23. Specifically, the Investment Company Act governing mutual fund transactions included restrictions on their distribution as well as limitations on the funds' face value, in direct conflict with antitrust provisions. *Id*.

130. *Id*. at 694.

inconsistent" standards defining what was legal action in the mutual fund market[131] which would be dangerous to the overall functioning of the mutual fund process.[132] Section 22(f) of the Maloney Act specifically allowed mutual funds to create restrictions on negotiability and transferability of shares, which was in direct conflict with antitrust's goal of preserving competition.[133] It was thus necessary to for the Court to apply implied antitrust immunity in this narrow area of securities law.[134]

In *Gordon v. New York Stock Exchange*,[135] the Supreme Court determined that the NYSE's practice of using fixed commission rates for its members impliedly precluded the application of federal antitrust laws because the SEC had direct authority to approve or disapprove of exchange commission rates.[136] In *Gordon*, the Court further refined the clear repugnancy standard by enumerating several factors which should be considered when determining if antitrust laws are implicitly repealed in regards to securities laws.[137] The Court reiterated that antitrust laws should be implicitly precluded only in narrow circumstances and only when a clear repugnancy existed between the securities regulations in question and the antitrust laws.[138] The

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131. One standard from the SEC regulations, and the other standard from the antitrust laws.

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

133. *Id*. at 720–21.

134. *Id*. at 719. However, the Court found that § 22(d) of the Maloney Act did not implicitly preclude antitrust laws in the same way as § 22(f). Section 22(d) prohibited mutual funds from selling shares at other than the current public offering price unless done so through an underwriter. *Id.* The Court determined that if read in a 'reasonable manner,' § 22(d) could be reconciled with the antitrust laws and work in tandem and thus there was no implicit preclusion. *Id*.

135. 422 U.S. 659 (1975).

136. *Id.* at 659. Specifically, there was an allegation that the fixed commission rates violated Sections 1 and 2 of the Sherman Act. *See supra* note 9 and accompanying text for Sherman Act discussion. However, the NYSE had always fixed its commission rates to prevent competition amongst its members. *Gordon*, 422 U.S. at 665–66. The Securities and Exchange Act gave the SEC the power to fix and ensure 'reasonable' commission rates in Section 19(b). *Id.* Section 19(b) of the Securities and Exchange Act is as follows:

> The Commission is further authorized, if . . . the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange . . . the fixing of reasonable rates of commission, interest, listing, and other charges.

Securities and Exchange Act of 1934, 48 Stat. 881 (enacted June 6, 1934), codified at 15 U.S.C. § 78a. After conducting several studies into the fixed commission rate practices, the SEC thought that competition decided that competition would be a better protection than fixed commission rates, and Congress enacted new legislation codifying the SEC's findings. However, the SEC retained discretion to re-impose the fixed rates. *Gordon*, 422 U.S. at 669–75. *See also* SEC Exchange Act Release No. 11019, Doc.App. 60 (Sept. 19, 1974).

137. *Gordon*, 422 U.S. at 682.

138. *Id.* (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350–51 (1963). *See supra* note 83 for more information on *Philadelphia Nat'l Bank*. *See also Gordon*, 422 U.S. at 683 (citing Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) (holding that the Civil Aeronautics Board maintained antitrust immunity under the Federal Aviation Act for transactions under its pervasive regulatory scheme)); Carnation Co. v. Pacific Conference, 383 U.S. 213 (1966) (holding that there was no antitrust immunity for unlawful rulemaking agreements not approved by the Federal Maritime Commission); U.S. v. Borden Co., 308 U.S. 188, 207 (1939) (holding that the Agricultural Marketing Agreement Act of 1937 did not repeal the Sherman Act for milk producers not operating under the Secretary of Agriculture).

Court also stated that implied antitrust immunity should be found only when necessary to make the regulatory scheme operable and should be applied to the minimum extent possible.[139] The Court then laid forth the pertinent factors to evaluate when determining if antitrust should be impliedly repealed. First, does the SEC have pervasive authority over the regulatory scheme in question?[140] Second, would the regulatory scheme be "unduly interfer[ed]" with if antitrust laws were in force?[141] Third, would there be incompatible standards resulting if both the securities laws and the antitrust laws were allowed to operate in tandem?[142]

E. The regulatory response to the financial crisis has been swift, but it has not been as extensive as the response following the Great Depression.

Since 2007, the United States experienced the most prolonged economic recession since the Great Depression.[143] The U.S. economy is still in the early recovery stages from this recession, with unemployment consistently hovering around ten percent and retail sales down sharply.[144] In brief, one major cause of the financial crisis was the over-speculation during the housing bubble.[145]

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139. *Gordon*, 422 U.S. at 682 (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1975)).

140. *Id*. at 683–84. In *Gordon*, the Court determined that the SEC maintained pervasive authority over the approval of commission exchange rates utilized by the exchange. *Id.* at 681. The SEC maintained final say in the use of commission rates. *Id*. at 681.

141. Id. at 685–86. Again in *Gordon*, the Court held that if federal antitrust laws were applied to the exchange's fixed commission rates, the SEC's regulatory framework for these rates could not operate, and would result in their being interfered with unduly. *Id.* at 685–86.

142. *Id.* at 686, 688. In *Gordon*, the Court held that the SEC was given direct authority over commission rate practices. *Id.* at 689. Additionally, allowing antitrust enforcement would unduly interfere with the regulatory scheme established. *Id.* Finally, there would be inconsistent standards if antitrust was not repealed because "the sole aim of antitrust legislation [was] to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges and the securities industry." *Id*.; *See also infra* Part IV.A.

143. *Gallup finds U.S. Unemployment at 10.0% in Mid-October*, GALLUP.COM (Oct. 18, 2010), http://www.gallup.com/poll/143714/gallup-finds-unemployment-mid-october.aspx. In March 2009, the recession was entering its seventeenth consecutive month. Chris Isidore, *The Great Recession*, CNNMONEY.COM (Mar. 25, 2009), http://money.cnn.com/2009/03/25/news/economy/depression _comparisons/index.htm. *See also* Carl Shapiro, Deputy Assistant Att'y Gen. for Econ. Antitrust Div., U.S. Dep't. of Justice, Competition Policy in Distressed Industries: Remarks as Prepared for Delivery to the ABA Antitrust Symposium: Competition as Public Policy, 16 (May 13, 2009) (noting that this is the "sharpest downturn" since the Great Depression). *See generally* Markus K. Brunnermeier, *Deciphering the Liquidity and Credit Crunch 2007–2008*, 23 J. ECON. PERSPECTIVES 77 (2009).

144. Isidore, *supra* note 143. 86% of industries decreased their production, and for the first time ever, unemployment increased in every state in 2009. *Id.*

145. Victoria Ivashina and David Scharfstein, *Bank Lending During the Financial Crisis of 2008* 1(EFA 2009 Bergen Meetings Paper, July 2009), *available at* http://ssrn.com/abstract=1297337 (noting that contributing factors included the sub-prime mortgage problem, the bank failures and the failures and government takeovers of Fannie Mae, Freddie Mac and AIG). These fa lures led to huge increases in banking costs for borrowing, and the market became very unstable. Stephen G. Cecchetti, *Crisis and Responses: The Federal Reserve and the Financial Crisis of 2007-2008*, 11 (Nat'l Bureau of Econ. Research, Working Paper No. 14134, June 2008). Another problem was that lending by banks to consumers and corporate entities also decreased across the board. *Id.* In fact, in the fourth quarter of 2008, corporate lending was forty-seven percent lower than in the third quarter and a full seventy-nine percent lower than it was at the height of 2007. *Id*. at 2. Lending also took a dive because

The financial crisis was further complicated by the downfall of several of America's top investment firms, leading to a continued loss of confidence in the U.S. market.[146] In March 2008, Bear Stearns collapsed,[147] followed shortly by Lehman Brothers in September 2008,[148] setting off a domino effect of bank failures and mergers.[149] The result of this has been the consolidation of the securities industry—currently, there are only a handful of investment banks left standing, holding most of the assets and bargaining power.[150]

Finally, the Dodd-Frank Wall Street Reform and Consumer Protection Act,[151] signed into law by President Obama on July 21, 2010, provides new rules with which the banking industry must comply.[152] One stated goal of the legislation is to end "Too Big To Fail."[153] To avoid creating a mortgage lending meltdown like the

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there was a "substantial increase in credit risk" for banks: basically, it was more probable that borrowers would default on their loans than it was previously. *Id.* Additionally, it became difficult to for both credit ratings agencies (Moody's, etc.) to value several complex securities, such as subprime mortgages. *Id*. at 11. The subprime mortgage fiasco was the ball that set the crisis in motion. There was a decade-long housing bubble, during which Americans bough houses they could not afford with low interest rates and floating mortgage rates. Lawrence J. White, Commentary, *Financial Regulation and the Current Crisis: A Guide for the Antitrust Community* 32 (Am. Antitrust Inst., 2008). After these mortgages went through, they were given high ratings by agencies, bundled with securities and sold to investors. *Id*. There was an industry-wide blind eye turned towards the imprudence of these mortgages, at least partially motivated by the high transaction fees being paid to intermediaries. *Id*. *See* Anil K. Kashyap et al., *Rethinking Capital Regulation*, in MAINTAINING STABILITY IN A CHANGING FINANCIAL SYSTEM: A SYMPOSIUM 431, 437 (2009) (explaining that a "key factor" in the recession was the fact that it is difficult to see if a corporate manager is adjusting for risk with profits or if the risk is concentrating itself).

146. *See* Kashyap et al., *supra* note 145, at 431 (noting that one "proximate cause" of the recession was the "interplay" between banking choices about mortgage-backed securities and short-term market borrowing).

147. John Vickers, *The Financial Crisis and Competition Policy: Some Economics*, GLOBAL COMPETITION POLICY MAGAZINE (Dec. 15, 2008), *available at* www.globalcompetitionpolicy.org. The reason for Bear Stearns's collapse is complicated. In brief, the company's "liquidity pool" had drastically decreased from $18 billion to $2 billion in only four short days. Cecchetti, *supra* note 145, at 17. Had Bear Stearns gone bankrupt, the result would have been "catastrophic" for the remainder of the banking system because of the investment bank's complex relationships with the entire system. *Id*. Because of this, the Federal Reserve Bank of New York made a direct loan to Bear Stearns, and then it allowed JP Morgan Chase to purchase Bear Stearns. *Id.*

148. Vickers, *supra* note 147.

149. One law professor has likened the ensuing bank mergers to "buy[ing] when there [was] blood on the streets." Sharon E. Foster, *Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis*, 78 MISS. L.J. 777, 777 (2009). There was a myriad of bank mergers following the collapse of Bear Stearns. For example, Bank of America acquired Countrywide and Merrill Lynch, Morgan Stanley acquired Bear Stearns, Wells Fargo acquired Wachovia and Lloyds of London acquired HBOS. *Id*. at 777–78.

150. *See* James Suriwiecki, *Why Banks Stay Big*, THE NEW YORKER, Nov. 2 2009, at 46 (noting that the four largest banks—Bank of America, J.P. Morgan Chase, Citigroup and Wells Fargo—have actually gotten larger during the crisis).

151. Pub. L. No. 111-203 (2010).

152. *See generally* Marcia Clemmitt, *Financial Industry Overhaul: Will the New Law Avert Another Crisis?*, 20 CQ RESEARCHER 631 (2010). James Barth & John Jahera, *United States Enacts Sweeping Financial Reform Legislation*, 2 J. FIN. ECON. POLICY 192, 193 (2010).

153. Pub. L. No. 111-203 (2010). "Too Big to Fail" is a concept under which financial institutions, such as banks and mortgage lenders, were viewed as too large of players to fail because if they did, they would simultaneously cause the collapse of their investors, creditors, employees and their entire industries. *See* Tim Fernholz, *The Myth of Too Big to Fail*, THE AMERICAN PROSPECT (Oct. 28, 2009), *available at*

one experienced in 2008, banks will be restricted in how much consumer money they can use when speculating in financial markets.[154] The SEC will also undertake a study to determine if the creation of a federal ratings board is feasible or useful.[155] Whereas hedge funds were largely unregulated before the 2008 crisis, hedge funds that contain over $100 million must now register with the SEC.[156] The new legislation additionally creates many new regulatory oversight bodies.[157] The Financial Stability Oversight Council will determine if systemic risks are present in the financial industry.[158] The Consumer Financial Protection Bureau will regulate the methods and information given out by firms to consumers.[159] The Office of Credit Rating Agencies will be created as a subdivision of the SEC and will "provide oversight for credit ratings agencies."[160]

Even though the legislation is brand new, criticism has already been voiced.[161] For one, critics comment that while the legislation creates many new regulatory checks, it still "depends" on the same regulators who did not take any preventative action before the 2008 crisis.[162] Another major criticism of the legislation is that it does not address reforms of Fannie Mae and Freddie Mac.[163]

III. The Court's Reasoning

In *Billing v. Credit Suisse of First Boston Ltd.,*[164] the Supreme Court of the United States overturned the Second Circuit's decision and held that there was a 'clear repugnancy' between securities laws and antitrust laws and that securities laws implicitly precluded underwriting syndicates from being liable under antitrust claims.[165]

Writing for the majority, Justice Breyer stated that there are two instances when antitrust claims are precluded: when a statute explicitly precludes antitrust claims and when the relationship between antitrust laws and the regulatory program is

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http://www.prospect.org/cs/articles?article=the_myth_of_too_big_to_fail (noting that too big to fail is inherently "systemically risky"). *See also* Barth and Jahera, *supra* note 152 ("Clearly, the law represents, at a minimum, a move towards greater and stricter regulation of the financial industry in the United States in the hope of minimizing, if not preventing, the severity of any future crises in our financial markets.").

154. *Id*.

155. *Id*. at 195.

156. *Id*. at 196.

157. *See* Clemmitt, *supra* note 152, at 636 (describing oversight of the Federal Reserve and overseeing insurers, hedge funds and private equity funds).

158. Barth & Jahera, *supra* note 152, at 194. This Council will be comprised of nine members from various federal agencies, and it will be housed at the Federal Reserve. *Id*.

159. *Id*. at 195.

160. *Id*. at 197.

161. *See infra* notes 162 and accompanying text.

162. Nin-Hai Tseng, *Bayh: How Financial Reform Could Impede Growth*, CNNMONEY.COM (July 26,2010),http://money.cnn.com /2010/07/26/news/economy/bayh_financial_reform.fortune/index.htm.

163. *See* Barth & Jahera, *supra* note 152, at 195.

164. 551 U.S. 264 (2007).

165. *Id*. at 285.

such that the Court decides that antitrust claims are impliedly precluded.[166] Since the statute in question here did not explicitly preclude antitrust claims, Justice Breyer noted that it was therefore up to the Court to determine if the requisite repugnant relationship existed for antitrust claims to be implicitly precluded.[167]

Justice Breyer first recognized that the Court has been reluctant to find implicit preclusion.[168] He then discussed the three narrow Supreme Court decisions dealing specifically with implicit preclusion of antitrust: *Silver*, *Gordon*, and *NASD*.[169]

Justice Breyer stated that in *Silver v. New York Stock Exchange*,[170] the Supreme Court stated that antitrust laws are impliedly repealed only when such repeal is "necessary to make the Securities Exchange Act remain work, and even then, only to the minimum extent necessary."[171]

Justice Breyer then restated the three-part test the Supreme Court established in *Gordon v. New York Stock Exchange*.[172] The Court stated that there must be a 'plain repugnancy' between the antitrust and securities law in question and the following three factors must be met: (1) the SEC must have direct regulatory power over the precluded area of regulation, (2) the SEC must have taken an active role in regulating the activity, and (3) if antitrust laws were to remain in force, there would be 'conflicting standards' that would ensue.[173]

Justice Breyer noted that in the final case in this series, *NASD*,[174] the Supreme Court held that because the securities laws and antitrust laws were in direct conflict, there was a 'clear repugnancy' and therefore antitrust laws were implicitly precluded.[175]

Justice Breyer employed a four-factor test, based on the *Gordon* test, to the case at bar. The following four factors must be met for antitrust laws to be implicitly precluded:

> *[T]he existence of regulatory authority under the securities law to supervise the activities in question;*
> *[E]vidence that the responsible regulatory entities exercise that authority;*

166. *Id.* at 270–71.
167. *Id.* at 271.
168. *Id.*
169. *Id.*
170. 373 U.S. 341 (1963).
171. Credit Suisse Sec. v. Billing, 551 U.S. 264, 271–72 (2007) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 347 (1963)). In *Silver*, the Court held that antitrust laws were not implicitly precluded. *See supra* notes 111–15 and accompanying text.
172. 422 U.S. 659 (1975).
173. *Billing*, 551 U.S. at 276–77 (quoting Gordon v. New York Stock Exch., 422 U.S. 659, 685 (1975)).
174. 422 U.S. 694 (1975).
175. *Billing*, 551 U.S. at 276.

> *[A] resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct;*
> *[T]hat this possible conflict [area] affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.*[176]

Justice Breyer stated that factors one, two and four were easily met here.[177] The underwriting activities were joint efforts and the antitrust claims in question were at the "very heart" of the securities regulatory authority over underwriting.[178] The SEC held the authority to supervise the underwriting process.[179] Furthermore, the SEC continuously exercised its authority in this area of regulation.[180]

The main avenue of inquiry to determine if antitrust was implicitly precluded was the incompatibly of standards factor.[181] This particular factor has a two-pronged analysis: (1) there must be a substantial risk for injury and (2) there must be a minimal need for antitrust enforcement.[182] Justice Breyer explained that both of these elements were present here.[183]

Justice Breyer noted that there was a substantial risk for injury if antitrust laws were not found to be implicitly repealed.[184] The substantial risk for injury arose out of four separate justifications.[185] First, there was a need for experts in underwriting.[186] Expert judgment is necessary in underwriting because someone unfamiliar with the syndicate process would most likely have a problem deciding if activities were illegal or legal.[187] Second, there would be overlapping evidence in determining the legality of the underwriting activities that could result in substantial injury to both the underwriters and the securities purchasers.[188] Third, there would be inconsistent judgments throughout the court system regarding underwriting activities

176. *Id.* at 275–76.
177. *Id*. at 277.
178. *Id*. at 276.
179. *Id*.
180. *Id*. at 277. For instance, the SEC defined the underwriting process, it defined what road shows can include, it has brought action against violators and it offered private litigation to remedy situations. *Id*.
181. *Id.* at 277.
182. *Id*. at 282–84.
183. *Id*. at 283.
184. *Id*. at 279.
185. *See infra* notes 186–90 and accompanying text.
186. *Billing*, 551 U.S. at 279. Justice Breyer expanded this thought by reasoning that there is a fine line between behavior approved by the SEC and prohibited behavior. *Id.* The practice of laddering was used as a prime example. *Id.*
187. *Id.* at 278–79.
188. *See id*. at 280. Overlapping evidence in this context means that the evidence demonstrating the illegality of certain underwriting activities could simultaneously demonstrate the legality of such activities. *See id*.

and antitrust violations.[189] Fourth, applying antitrust laws to underwriting practices would be unusually likely to cause economic harm because if antitrust laws were enforced in this area, there would be a "chilling effect" on joint underwriting activity which would potentially cause "serious harm to the efficient functioning of the securities market."[190] Because of these four potential injuries, Justice Breyer concluded that there was no method of targeting unlawful securities activities through the use of antitrust laws.[191]

Justice Breyer also concluded that the second prong of the incompatibility factor, the minimal need for antitrust enforcement, was also satisfied.[192] Private parties themselves can litigate and find remedies without resorting to bringing antitrust claims.[193] The SEC regulates underwriting activity, and the SEC is required to take into account preserving competition when it creates its regulations.[194]

The majority thus concluded that antitrust laws were impliedly precluded from being applied to underwriting securities activities.[195]

Justice Stevens concurred in the judgment.[196] He argued that the IPO agreements were "pro-competitive" joint ventures as defined by the Sherman Act.[197] Since the Sherman Act allows these types of joint ventures, antitrust laws could still apply, and the underwriting activities in question could continue without interruption because there would not be injury to competition as defined by the antitrust laws.[198] Justice Stevens would hold that antitrust laws were not violated as opposed to antitrust laws being precluded.[199]

Justice Thomas dissented in the opinion.[200] Justice Thomas argued that both the Securities Act and the Securities Exchange Act have broad savings clauses which preserve rights and remedies.[201] Justice Thomas asserted that the majority's opinion did not take these into account and therefore the antitrust claims could have and should have proceeded.[202]

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189. *Id*. at 281. Since antitrust claims are made in courts throughout the country, judges who do not have securities expertise would be likely to create conflicting standards and decisions, especially because the securities inquiry is very fact specific.

190. *Id*. at 282–83.

191. *Id*. at 281.

192. *Id.* at 283.

193. *Id.* at 283.

194. *Id*.

195. *Id*. at 287.

196. *Id*.

197. *Id*. at 287 (Stevens, J., concurring).

198. *Id.* at 287.

199. *Id*.

200. *Id*. at 287. (Thomas, J., dissenting).

201. *Id.* Specifically, Justice Thomas enumerated § 16 of the Securities Act, which states that the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or equity." *Id.* 15 U.S.C. § 77p(a).

202. *See id*. at 289.

IV. Analysis

In *Credit Suisse Securities v. Billing*,[203] the Supreme Court held that antitrust laws were implicitly repealed by securities regulations when there is a clear repugnancy between the two.[204] This further refinement of the Court's previous narrow findings of implied preclusion of antitrust is consistent with the goals of both antitrust and securities laws. While several commentators have suggested that the *Billing* decision will open the proverbial floodgates for judicial findings of implied antitrust immunity,[205] this will not occur. It is unlikely that the *Billing* decision will be applied to other federally regulated industries governed by antitrust laws, except for those few that are still 'pervasively' regulated from which direct conflict with antitrust laws could flow. Even after the recent financial crisis and regulatory response, the need for antitrust enforcement in federally regulated industries, including the vast majority of securities regulations, remains strong.

A. The Court's refinement of the clearly repugnant standard is consistent with the need for implied antitrust immunity because of the sometimes dueling purposes of securities regulations and antitrust laws.

Antitrust laws and securities laws are inextricably linked. The Roaring 20's relaxation of antitrust enforcement under President Calvin Coolidge partially led to the need for securities laws.[206] The modern corporation is a byproduct of the "trusts, mergers and holding companies of the late 19th century,"[207] and securities laws are in place to regulate that modern corporation and its security shares.[208]

However, while both antitrust laws and securities laws were enacted as responses to major economic developments in America, they serve different purposes. Antitrust laws were enacted to protect competition.[209] On the other hand, securities laws

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203. 551 U.S. 264 (2007).

204. *Id.*

205. *See infra* Part IV.B.1 and accompanying text.

206. Bittlingmayer, *supra* note 36, at 393 (arguing that "trust-busting hurt business confidence"). *See also supra* Part II.C.1.

207. Bittlingmayer, *supra* note 36, at 363.

208. *See* E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance for Securities and Antitrust*, 53 Emory L.J. 1571, 1577 (2004) (stating that private law is imperative to market stability and creating public confidence). *See also supra* Part II.C.

209. *See supra* Part II.A-B for a discussion of the purpose of antitrust laws and their details. In his opinion in United States v. Aluminum Co. of Am. [hereinafter Alcoa], 148 F.2d 416, 428 (2d. Cir. 1945) Judge Learned Hand stated that "great industrial consolidations are inherently undesirable" for political and economic reasons (quoted in Pitofsky, *supra* note 38, at 1053); s*ee also id*. at 1063 (asserting that Congress also saw implementation of antitrust laws as a means to prevent Communism from becoming widespread). The argument was that having only a few huge corporations and trusts could "facilitate the overthrow[ing] of democratic institutions." *Id*. at 1054. Another rationale for antitrust was consumer welfare. *See* Bittlingmayer, *supra* note 36, at 371–73; Bork & Bowman, Jr., *supra* note 36, at 365 (stating that competition is "desirable" because it "assists in achieving a prosperous society"). An interesting result of antitrust's aim for deterrence of collusion between firms is

were enacted half a century after the major antitrust legislation in response to the Great Depression to boost investor confidence and change how securities were regulated in the United States.[210] As demonstrated in the precedential case law, namely *Silver, NASD*, and *Gordon*, the SEC's regulations sometimes encourage anticompetitive behavior.[211]

Since antitrust laws were also crafted to deter 'direct regulation' of the market economy and because securities laws require direct governmental regulation,[212] there are times when securities laws are 'clearly repugnant' to antitrust laws.[213] Congress recognized this conundrum and explicitly repealed antitrust laws in some specific instances.[214] Since antitrust laws still attempt to prevent unhealthy cooperation and since securities laws sometimes explicitly require firm cooperation,[215] the two realms have the potential to clash.[216] Thus, there is a demonstrated need for implied antitrust immunity in certain narrow areas of securities regulation.

B. The narrow exceptions to antitrust enforcement carved out by the court in the Billing decision will not likely be extended to other less 'pervasively' regulated industries because Billing is continuous with the Court's implied antitrust immunity precedents.

The securities industry is still considered to be 'pervasively' regulated, even in this era of continuing industry deregulation.[217] When an industry is heavily regulated by the government, there are fewer gaps for antitrust laws to fill.[218] The pervasive regu-

that because antitrust laws, when working properly, deter this behavior, it is difficult to "quantify the benefits" derived from the laws. J. Baker, *supra* note 54, at 40.

210. *See supra* Part II.C for background on securities laws. *See also* Pitofsky, *supra* note 38, at 1067 (averring that political concerns of antitrust should be seen as "limited factors that influence the way in which prospective rules are designed to accomplish antitrust objectives").

211. *See supra* Part II.D and accompanying text.

212. Pitofsky, *supra* note 38, at 1057. Pitofsky also argues that antitrust served to deter Marxism from entering into the mainstream American economy. *Id.*

213. *See supra* Part II.C.

214. Hovenkamp, *supra* note 38, at 344–45. For example, the major area in which Congress has expressly immunized an area from antitrust is in labor. *Id.* Additionally, Congress specifically stated that the McCarran-Ferguson Act was specifically enacted to grant statutory immun ty from "the business of insurance." Even though the scope of insurance issues is unclear, t is evident that Congress statutor ly barred some antitrust suits from being brought against the industry. Bush, *supra* note 69, at 782. Another example is the Healthcare Quality Improvement Act, which allows hospital boards to fire physicians for just cause without being subject to antitrust laws. Hovenkamp, *supra* note 38, at 345. *But note* that even though express immunity seems clear-cut, it can be controversial and convoluted. If the parameters are not well defined by Congress, compet tion should be the "default rule." Bush, *supra* note 69, at 782–83.

215. Specific activities that encourage anticompetitive behavior are minimum commission rates, "rules formulated to restrict multiple trading in listed securities,;restrictive exchange membership requirements [(SEC Rule 19(b))] . . . that tend to control entry into the market; and even proposals for eliminating . . . paperwork backlogs . . . [in] brokerage houses." *See* Robert W. Wild, *Antitrust and the Securities Industry: Lessons from the Shipping Industry*, 55 CORNELL L. REV. 96, 100–01 (1969–1970) (noting that antitrust principles "have not been a significant factor in SEC decisions").

216. *See supra* Part II.A.

217. *See supra* Part II.C.

218. *See supra* Part II.B.

lation of the securities industry was a prerequisite in *Billing* for the Court to begin addressing whether antitrust might be implicitly precluded.[219] Thus, in order for the implicit preclusion of antitrust to be extended to other industries, it would be possible only in other pervasively regulated industries, similar to that of securities regulation.[220]

1. Some commentators erroneously argue that Billing will open the floodgates and create a plethora of implied antitrust immunity holdings even in other less-pervasively federally regulated industries.

Immediately following the *Billing*,[221] decision, criticisms were immediately voiced fearing that antitrust laws would fall by the wayside and findings of implied immunity would increase exponentially.[222] For example, at least one commentator argued that *Billing* stood for the proposition that in regulated industries, a sector-specific regulator should be responsible for handling both regulations and antitrust concerns in that industry.[223] Another critic stated that in the post-*Billing* world, it is necessary to look first to regulatory remedies instead of bringing antitrust enforcement claims in regulated industries.[224] Scholars began questioning if *Billing*'s implied antitrust immunity could be extended to other industries, such as the mortgage lending industry.[225] Others argued that the standard employed by the Court lowered the threshold for finding implied antitrust immunity.[226] However, the *Billing* decision does not break the continuity of the Court's previous decisions regarding implied antitrust immunity in pervasively regulated federal industries: rather, it fits squarely within the Court's prior requirements for implied antitrust immunity to apply.[227]

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219. *See supra* Part II.B.2.

220. *See* discussion *supra* Part II.C.1–2.

221. Credit Suisse Sec. v. Billing, 551 U.S. 264 (2007).

222. *See infra* notes 223–27 and accompanying text.

223. Timothy J. Brennan, *Essential Facilities and* Trinko: *Should Antitrust and Regulation be Combined?*, 61 FED. COMM. L.J. 133, 143 (2008) (arguing that the Supreme Court's 2004 decision in *Trinko* represented a change in the previous antitrust precedents in regulated industries).

224. Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11 (2009).

225. *See generally* Bruce H. Schneider, Cred t Suisse v. Billing *and a Case for Antitrust Immunity for Mortgage Lenders Subject to Federal Regulation*, 124 BANKING L. J. 833 (2007) (arguing that after *Billing*, implied antitrust immun ty should be applied to the federally regulated mortgage lending industry because Freddie Mac's regulatory system is similar to that of securities in that it encourages anticompetitive behavior in mortgage lending).

226. Justin Lacour, Note: *Unclear Repugnancy: Antitrust Immunity in Securities Markets after* Credit Suisse Securities LLC v. Billing, 82 ST. JOHN'S L. R. 1116, 1156 (2009) (arguing that the Court changed the clear repugnancy standard for finding implied antitrust immunity to a cost-benefit standard, thereby making the "finding of implied immunity all too easy.").

227. *See* Einer Elhauge, *Harvard, not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?*, 3 COMP. POLICY INT'L. 1, 11 (2007) (noting that the *Credit Suisse* decision was not a "big change from the implied exemption law of past cases"). *See also supra* Part II.B.2 and II.D and accompanying text.

2. The Court has continuously determined that implied antitrust immunity is applicable only in pervasively regulated industries, and even then only in the specific area of that industry where implied immunity is necessary to make the federal regulatory scheme operable.

Even though the Court upheld implied antitrust immunity in some narrowly defined circumstances in industries before the deregulation of most pervasively federally regulated industries,[228] the Court still refused to extend implied antitrust immunity across the entire securities industry in *Billing*.[229] Because implied antitrust immunity is only hesitantly allowed, the Court only carefully permitted it in narrow circumstances, and even then, the Court did not permit the implied antitrust immunity to apply to an entire industry: it only applied to the specific area of regulation being challenged.[230]

3. Cases after Billing continue to refuse to extend implied antitrust immunity to other less pervasively regulated industries, thereby adhering to the precedent set by the Supreme Court over the past century.

In the short time period since the *Billing* decision, lower courts have already refused to extend it's holding to other less pervasively regulated industries because a 'clear repugnancy' between the antitrust laws and the promulgated regulations does not exist.[231]

At least two courts have determined that different prongs of the four-pronged *Billing* test have not been met in their decisions regarding the extension of implied antitrust immunity. In *Energy Marketing Services, Inc. v. Columbia Gas Transmission Corp.*,[232] the Southern District of West Virginia held that the Federal Energy Regulatory Commission's regulatory scheme did not warrant a finding of implied antitrust preclusion because there was not the same danger of resulting inconsistent standards between antitrust enforcement and regulatory enforcement as there was in *Billing*.[233] In *Dahl v. Bain Capital Partners, LLC*,[234] the District of Massachusetts held that antitrust laws were not implicitly precluded under the leveraged buyout laws because the securities laws and the leveraged buyout offer laws at issue were

228. *See supra* notes 75–80 and accompanying text.

229. *See supra* note 192 and accompanying text.

230. *See supra* notes 75–91 and accompanying text.

231. *See infra* notes 232–40 and accompanying text.

232. 639 F. Supp. 2d 643 (S.D. W.Va. 2009).

233. *Id*. at 649. The District Court noted further that *Billing* was an "unusual" case. It also highlighted the fact that securities laws and the SEC encourage joint action, whereas it is not specifically encouraged in energy regulation. *Id*. at 650. Additionally, the FERC maintains less regulatory authority over energy regulation than the SEC does over securities. *Id*. at 652.

234. 589 F. Supp. 2d 112 (D.Mass. 2008).

not clearly incompatible with each other and thus implied immunity was non-existent.[235]

Other courts have determined that the *Billing* decision simply does not extend to other federally regulated industries. For example, in *Axcan Scandipharm Inc. v. Ethex Corp.*,[236] the District of Minnesota held that a manufacturer's false advertising claims were not precluded by the regulatory power of the Food and Drug Administration (FDA).[237] In its decision, the court stated that the *Billing* decision did not "break any new ground" in regards to the Lanham Act.[238] In *In re Western States Wholesale Natural Gas Antitrust Litig.*,[239] the District of Nevada held that there was no implicit antitrust preclusion under the Commodity Exchange Act for natural gas producers.[240]

C. Even in previously 'pervasively' regulated federal industries, it is unlikely that the threshold to establish implied antitrust immunity will be met.

As noted in the above section, courts have already begun refusing to extend the *Billing* implied antitrust preclusion to both other areas of the securities industry regulated by the SEC and to other federally regulated industries.[241] This is because even though other industries are federally regulated, they do not possess the same sort of pervasive authority as the SEC possesses over securities regulation and because these other industries do not have the same relationship with antitrust laws that securities laws maintain.[242] Thus, there is not the same threat of inconsistent standards that would cause injury as there was in *Billing* because the securities industry is unique in its regulatory framework.[243] Even if certain industries were once very heavily, even arguably pervasively, regulated the deregulation of federally regulated industries has further narrowed the number of industries that might argue pervasive reg-

235. *See id.* at 116. The District Court stated that securities laws did not regulate the conduct in question, that there is no pervasive regulatory authority overseeing private equity transactions and that the SEC did not maintain regulatory authority in this area. Therefore, securities laws and the leveraged buyout offer laws at issue were not clearly incompatible with each other and thus implied immunity was non-existent. *Id.* at 117.

236. 585 F. Supp. 2d 1067 (D.Minn. 2007).

237. *Id.* at 1076.

238. *Id.* The Lanham Act regulates drug marketing and provides a regulatory scheme in which drug companies can market their drug products. *Id.* at 1077. The Court further noted that even if *Billing* did change the precedent, there still would be no implied immunity from claims against the FDA because there was no danger of 'serious conflict' between the FDA's regulations and the claims in the case. *Id.*

239. 661 F. Supp. 2d 1172 (D.Nev. 2009).

240. *Id.* at 1172. Even though three *Billing* factors were met in this case, the District Court refused to extend implied antitrust immunity because there was no danger for inconsistent results or standards if antitrust claims were allowed to move forward. *Id.* at 1183. Specifically, the natural gas sales were not analogous to the securities syndicates in place for IPOs and aftermarkets. *Id.* at 1183.

241. *See supra* Part IV.C.2.

242. *See supra* Part II.B.

243. *See supra* Part III for a discussion of why inconsistent standards are so dangerous in the *Billing* fact set and in securities generally.

ulation.[244] Additionally, for a finding of implied antitrust immunity to be applied, the federally regulated industry will have to prove that there is a clear repugnancy between its regulations and the antitrust laws through use of the 4-part test enumerated in *Billing*.[245] This is a very high, specific threshold to meet.[246] It is therefore unlikely that unless an industry is pervasively regulated, similarly to the securities industry, that the proponent will make its case successfully.[247]

The utilities industry is one which might be argued as being pervasively regulated leading to inconsistent standards if antitrust laws are enforced. The manner in which the utilities industry is regulated is similar to that of securities.[248] Because of this similarity, if the utilities industry can convince the Court that it is still pervasively regulated and that its specific regulatory scheme is inconsistent with antitrust enforcement, it might have a viable claim to implicit antitrust preclusion. Overall, however, because of the *Ottertail* precedent rejecting implied antitrust immunity in the utilities industry under the National Gas Act,[249] it is unlikely that the Supreme Court will agree with the pervasive argument.[250]

Another industry which is seemingly a good candidate for a narrow extension of implied antitrust immunity is the telecommunications industry, which was very heavily regulated.[251] However, there has been a recent flood of new, competitive communication providers following the deregulatory 1996 Telecommunications Act.[252] In *Trinko*,[253] the Supreme Court held that a savings clause bars a finding of implied antitrust immunity.[254] However, at least one antitrust expert believes that this was an erroneous holding and that there might be a small window for the Court to change its mind in regards to finding implied antitrust immunity in the telecommunications industry.[255] Based on current precedent, though, it seems that at

244. *See supra* Part II.B.2.

245. *See supra* Part III.

246. One author goes as far as to state that the *Billing* decision might have actually further *narrowed* implied antitrust preclusion doctrine. Elhauge, *supra* note 227, at 11 (averring that it might even become a unique exemption to antitrust, similar to the labor and insurance antitrust exemptions).

247. *See supra* notes 242–46 and accompanying text.

248. *See supra* Part II.B for discussion of regulatory framework of utilities.

249. *See supra* notes 86–87 and accompanying text.

250. In fact, "peaceful coexistence" between the regulatory scheme and antitrust laws is feasible "because . . . courts interpret both the regulatory and antitrust statutes." Areeda, *supra* note 38, at 53.

251. *See supra* Part II.B.2 for discussion of regulatory framework of the telecommunications industry.

252. Hovenkamp, *supra* note 38, at 367. For example, there are many cable television providers, telephone providers, internet providers and other side industries related to telecommunications. *Id.*

253. 540 U.S. 398 (2004)

254. *See supra* note 91 and accompanying text.

255. *See* Hovenkamp, *supra* note 38, at 373 (arguing that utilizing the savings clause to preclude implied immun ty findings in telecommunications was not consistent with the goals of the Telecommunications Act). *But note* Alexander, *supra* note 54, at 243–44 (arguing generally that there is no implied antitrust immunity under the Telecommunications Act of 1996 prior to the Court's ruling in *Trinko*). Alexander further argues that ant trust is important to ensure fair telecommunications and that based on Judge Greene's ruling in *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982) (denying implied immunity to

least for the near future, implied antitrust immunity in the telecommunications industry will not be deemed permissible by the Court, even following the decision in *Billing*.

D. Since the financial meltdown in 2008, the Securities industry has become increasingly concentrated, and there has been a sweep of new regulations, both of which might have implications for further antitrust claims to be alleged against the securities industry.

Even in the securities industry, which has been deemed to be 'pervasively' regulated,[256] the fallout from the recent financial crisis has resulted in a more concentrated banking industry.[257] Thus, antitrust concerns might arise despite the Court's precedent that implied antitrust immunity *can* apply to the securities industry.[258] However, even though the Court proscribed in *Silver*, *NASD*, *Gordon,* and *Billing* that there are times when antitrust is clearly repugnant to the securities regulatory scheme, the Court did not extend the decision to the entire securities industry, regardless of its being pervasively regulated.[259] Thus, antitrust laws can still be enforced in certain areas of the securities industry.

Despite the new Dodd-Frank Wall Street Reform and Consumer Protection Act, which provides many new regulations that the financial industry must follow, the potential that the Court will extend the narrow implied antitrust immunity to these broad reforms is limited.[260] For example, although *Billing* extended the implied antitrust immunity to the securities regulations pertaining to underwriting syndicates in the IPO process, it is not at all clear that the Court would be willing to extend this precedent to investment banks generally or to the new securities regulations proscribed in the Dodd-Frank legislation, especially given the Court's general hesitancy in applying implied antitrust immunity to federal regulations.[261]

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the telephone giant because it was not regulated in a pervasive enough manner to trigger the rare implied antitrust immunity). *Id.* at 244–45.

256. *See supra* Part II.C.

257. *See supra* Part II.B.

258. The consolidation of the securities industry poses several competition issues. For example, the newly merged firm could possess deposits that exceed the allowable statutory thresholds maintained by the Fed. Additionally, the Antitrust Division of the Department of Justice can hone in on a specific antitrust concern: for instance, cred t card processing services provided to small and medium size businesses. Jonathan M. Rich & Thomas G. Scriven, *Bank Consolidation Caused by the Financial Crisis: How Should the Antitrust Division Review "Shotgun Marriages"?*, THE ANTITRUST SOURCE 6 (Dec. 2008), *available at* http://new.abanet.org/antitrust/Searchable Antitrust Library/Dec08-RichC.pdf. *See generally* Foster, *supra* note 149, at 778 (arguing that there will be a great cost to the American economy in the long run if antitrust concerns are not taken into account now).

259. Credit Suisse Sec. v. Billing, 551 U.S. 264, 285 (2007).The Court stated that the antitrust laws were 'clearly incompatible' with antitrust laws "in *this context.*" *Id.* (emphasis added).

260. *See generally* Clemmitt, *supra* note 152, at 631. *See also infra* notes 241–50 and accompanying text.

261. Foster, *supra* note 149, at 780–81 (noting that even though the financial and banking sectors of the US economy are heavily regulated, mergers taking place within them are still subject to antitrust laws); Rich & Scri-

Regarding investment banks, with the consolidation of banks into two major players (JP Morgan and Bank of America), it has become a potential danger ground for new antitrust concerns.[262] Even with the new oversight provided for in the Dodd-Frank Act,[263] this industry consolidation lends itself to antitrust claims because there is a succession of mergers taking place without first going through the regulatory overview process.[264] Additionally, competition between firms is still an important part of the United States economy.[265] If this industry consolidation results in a decrease in the level of competition in the securities industry, even more antitrust concerns will become prevalent.

Whereas the market crash of the Great Depression led to a period of intense regulation and lax antitrust enforcement,[266] the current financial crisis fallout has **not** included the same rush by lawmakers to drastically increase regulated enterprises in

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ven, *supra* note 258, at 7 (noting that a "substantial increase in concentration in a vital part of the economy creates the opportunity for anticompetitive effects in an area in which the economy can ill afford them").

262. *See supra* Part II.E.

263. *See supra* Part II.E.

264. For example, the Department of Justice has allowed un-reviewed mergers to take place between commercial and investment banks. *Id.* This has led to both horizontal and vertical consolidations that pose real questions about antitrust and the role of competition in future banking. FRESHFIELDS, BRUCKHAUS, DERINGER, LLP, BRIEFING, ANTITRUST IN THE DOWNTURN, (2008), *available at* http://www.freshfields.com/publications/pdfs /2008/nov08/24682.pdf. These quickly accomplished mergers have been likened to "shotgun marriages." Rich & Scriven, *supra* note 258, at 1. However, there are still tools that the oversight agencies possess to ensure that antitrust laws are being complied w th and that competition still exists. For example, the Antitrust Division of the Department of Justice and the Federal Trade Commission can use either a 'pocket decree' or a "blank check" to approve transactions while still reserving the right to continue investigation once the merger takes place. *Id*. *See also* Foster, *supra* note 149, at 778 (noting that there was "apathy" towards the competition issues arising because of these large mergers); Vickers, *supra* note 147, at 4 (noting that a policy response to the crisis was to "bypass [] competition" to allow these mergers to occur). *But see* White, *supra* note 145, at 41 (noting that as long as the DOJ-FTC Horizontal Merger Guidelines remain in place, even large bank mergers will most likely not pose major antitrust concerns because the regulations will be national in scope. However, White acknowledges that in smaller to medium size banking loans, there will most likely be ant trust problems because information asymmetries will increase); *see also* Suriwiecki, *supra* note 151, at 46 (noting that through a "series of government-sanctioned mergers," the four main banks now control "forty per cent of . . . total banking deposits and two-thirds of its credit cards").

265. *See* Shapiro, *supra* note 143, at 16; Rich & Scriven, *supra* note 258, at 7 (noting that antitrust laws should continue to be "relevant" in the post-Financial crisis landscape); *see also* Foster, *supra* note 149, at 781 (stating that competition is good for the "national economic health"). *See also* White, *supra* note 145, at 9 (noting that the only world in which antitrust is the "ideal" is the world in which there are only well-functioning markets with no external ties or sp llover problems—in short, this world does not exist). White also proposes modifications to financial regulation that will encourage competition. He proposes allowing the following: giving banks authority to:

> "[p]ay interest on business checking accounts . . . [a]llow[ing] non-financial companies to own banks…[r]epeal[ing] the Community Reinvestment Act . . . [e]nd[ing] collective filing of insurance rates . . . [o]ffer[ing] a federal insurance charter. . . [and] [r]eplac[ing] the regulation of credit rating agencies with a regulatory structure that would encourage competition."

Id. at 43, 45. *But see* Gheorghe Oprescu et al., *The Real Economy and Competition Policy in Periods of Retrenchment*, 3 AMFITEATRU ECON. 723, 728 (2009) (arguing that because government intervention and regulation will be the foundation for economic recovery, there will be "significant challenges" to competition).

266. *See supra* notes 64–68 and accompanying text for discussion about regulations during the Great Depression

the U.S.[267] Although there has been an increase in regulation, particularly with the passage of the Dodd-Frank Act, it has not been nearly as widespread or as sweeping as it was during the Depression.[268] Thus, even though the securities industry is pervasively regulated and lends itself to implied immunity claims against antitrust, it is probable that the Court will not extend this implied immunity in the wake of the recent financial crisis.

V. Conclusion

In *Credit Suisse v. Billing*,[269] the Supreme Court of the United States correctly determined that antitrust laws were implicitly precluded because there was a 'clear repugnancy' between the antitrust laws and certain securities regulations. In so holding, the Court narrowly and consistently extended its previous precedents in finding implicit antitrust preclusion.[270] This implied antitrust immunity is unlikely to be broadly extended to other federally regulated industries governed by antitrust laws. Even in the wake of the recent financial crisis, it is unlikely that antitrust laws will be brushed aside in the flurry of new regulations and fast-tracked bank mergers. Antitrust continues to play an important role in the U.S. economy and operation of the marketplace.

267. Shapiro, *supra* note 143, at 16 (also noting that instead, some lawmakers are asking for more antitrust exemptions but reiterating that the Department of Justice's Antitrust Division does not support any more antitrust immunities). However, that is not to say that there has been no government intervention or increased regulation. This paper does not seek to downplay the validity of the government intervention: rather, it seeks to explain the necessity for both regulation and competition. *See generally* Robert E. Wright, *Financial Crisis and Reform: Looking Back for Clues to the Future*, THE MCKINSEY QUARTERLY, Dec. 2008 at 1 (noting that regulatory reforms take place after every major financial crisis in the U.S).

268. Government regulatory responses to the financial crisis included many policies. For example, there was the government bailout of the U.S. Auto Industry, the government bailout and regulatory review of banks, temporary bans on short selling and cuts in interest rates. Vickers, *supra* note 147, at 4–5. There are many policy arguments for the increase in regulation. One of the most persuasive is the argument stating that because bank failures are negative for society as a whole, it is important to avoid such failure, particularly through increased regulation. *See* Kashyap et al., *supra* note 145, at 444. Specifically in the financial sector, financial 'safety' is the main justification for regulating the securities industry. White, *supra* note 145, at 13. This is accomplished through regulatory overview of financial institutions and the disclosure of financial information to decrease information asymmetries. *Id.* at 14–15. Securities laws are especially aimed at full disclosure. *Id.* at 27.

269. 551 U.S. 264 (2007).

270. *See infra* Part II.D.