

COURTS, COMPETENCE, AND COMPETITION: BREWING TENSIONS BETWEEN ADMINISTRATIVE, ANTITRUST, AND SECURITIES LAW

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INTRODUCTION	1617
I. THE <i>BILLING</i> TEST	1627
<i>A. Pre-Billing Implied Antitrust Immunity Cases</i>	1629
1. <i>Silver v. New York Stock Exchange</i>	1629
2. <i>Gordon v. New York Stock Exchange</i>	1632
3. <i>United States v. National Association of Securities Dealers</i>	1637
<i>B. Credit Suisse Securities (USA) LLC v. Billing</i>	1639
<i>C. Post-Billing Caselaw and Developments</i>	1644
II. RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW	1647
<i>A. Kisor v. Wilkie</i>	1648
<i>B. West Virginia v. EPA</i>	1653
III. FUTURE OF THE <i>BILLING</i> TEST AND SIMILAR DOCTRINES	1661
<i>A. The Billing Test's Continued Viability</i>	1661
<i>B. Has the Billing Test Worked?</i>	1663
<i>C. Reshaping the Billing Test</i>	1673
<i>D. Implications for Rule 10b-5 Litigation</i>	1675
CONCLUSION	1677

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Abstract: Many securities law doctrines presume that the Securities & Exchange Commission (SEC) holds a comparative advantage over non-expert judges and juries when distinguishing legitimate securities activity from illegitimate securities fraud. But recent Supreme Court opinions on administrative delegation, deference, and structure reveal an emerging skepticism toward agencies' ability to engage in neutral, apolitical decision-making. These opinions also reflect the Supreme Court's renewed commitment to rigid separation-of-powers protections between the executive and legislative branches. As a result, doctrines or arguments rooted in regulators' comparative expertise carry less persuasive weight than in times past.

This Article examines an area of securities law—implied antitrust immunity—premised on comparative agency expertise. Juxtaposing recent Supreme Court decisions in *Kisor v. Wilkie* and *West Virginia v. EPA* with even more recent calls to expand implied immunity beyond antitrust claims, the Article argues that courts are likely to restrict such immunity going forward. With that said, the Article shows how this approach leaves lower court judges with equally challenging interpretive questions surrounding the scope of conduct subject to private antitrust and securities claims. The Article also argues that the Supreme Court's analytical shift risks undercutting the effectiveness of securities law as a stabilizing legal framework for existing and emerging financial activities. To address these concerns, the Article proposes a nuanced evaluative approach to antitrust immunity questions focusing on whether the SEC (or any other market regulator) actually—and effectively—brings its comparative expertise to bear when taking regulatory action.

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INTRODUCTION

Author Michael Lewis's bestselling book *Flash Boys: A Wall Street Revolt* sent shockwaves through financial markets.¹ The book—which argued that stock exchanges (exchanges) allowed so-called high-frequency traders (HFTs)² to gain an unfair transactional advantage by paying for, obtaining, and trading on market data faster than other investors—spawned passionate reactions from both HFT supporters and detractors.³ A litany of *Flash Boys*-inspired lawsuits soon followed.⁴ Though specific allegations varied, most plaintiffs argued that these exchanges favored their HFT customers by offering them—and only them—specialized products and services, allowing those individuals to rake in revenues while plaintiffs footed the bill through higher securities purchase (or lower securities sale) prices.⁵ These plaintiffs claimed that the exchanges' ac-

¹ MICHAEL LEWIS, *FLASH BOYS: A WALL STREET REVOLT* (2014); see also Dominic Rushe, *Michael Lewis: 'I Knew Flash Boys Would Be a Bombshell,'* THE GUARDIAN (Apr. 3, 2015), <https://www.theguardian.com/business/2015/apr/03/michael-lewis-i-knew-flash-boys-would-be-a-bombshell> [<https://perma.cc/NRH6-XUEF>] (quoting Michael Lewis as stating that the public's reaction to *Flash Boys* "was louder than anything [he] had experienced").

² HFT eludes any precise definition. See, e.g., Maureen O'Hara, *High Frequency Market Microstructure*, 116 J. FIN. ECON. 257, 258 (2015) ("High frequency trading is a misnomer, a seemingly precise term used to describe a large and diverse set of activities and behavior."); see also Michael Morelli, *Regulating Secondary Markets in the High Frequency Age: A Principled and Coordinated Approach*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 79, 93 (2016) ("Although many HFT strategies share common characteristics, HFT has no official definition."). For its part, the SEC offers a characteristic-based description of HFT. Concept Release on Equity Market Structure, 75 Fed. Reg. 3594, 3606 (Jan. 14, 2010) (codified at 17 C.F.R. pt. 242). But even the SEC admits that "high frequency trading . . . is relatively new and is not yet clearly defined." *Id.* at 3606.

³ Compare Bill Alpert, *Study Backs Barron's Critique of Flash Boys*, BARRON'S (Sept. 3, 2016), <https://www.barrons.com/articles/study-backs-barrons-critique-of-flash-boys-1472877853> [<https://perma.cc/N62Y-D8QQ>], and Johannah Ladd, *Flash Boys: A View from the Inside*, FIA (May 16, 2014), <https://www.fia.org/epta/articles/flash-boys-view-inside-0> [<https://perma.cc/6PUZ-KFUM>], with Michael Lewis, *Michael Lewis Reflects on His Book Flash Boys, a Year After It Shook Wall Street to Its Core*, VANITY FAIR (Mar. 15, 2015), <https://www.vanityfair.com/news/2015/03/michael-lewis-flash-boys-one-year-later> [<https://perma.cc/6WEC-TD8X>], and Steve Kroft, *Is the U.S. Stock Market Rigged?*, 60 MINUTES (Aug. 17, 2014), <https://www.cbsnews.com/news/michael-lewis-stock-market-rigged-flash-boys-60-minutes/> [<https://perma.cc/5DGP-EHEV>].

⁴ See generally, e.g., Class Action Complaint, *Janier v. BATS Exch., Inc.*, 105 F. Supp. 3d 353 (S.D.N.Y. 2015) (No. 14-cv-3745) (filed May 23, 2014); Complaint for Violation of the Federal Securities Laws, *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330 (S.D.N.Y. 2015) (No. 14-cv-5797) (filed July 28, 2014); Amended Complaint, *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, No. 14-MD-2589 (S.D.N.Y. filed Feb. 06, 2015); Complaint, *Flynn v. Bank of Am. Corp.*, No. 14-cv-4321 (S.D.N.Y. filed June 13, 2014); Complaint, *Harel Ins. Co. v. BATS Glob. Mkts. Inc.*, No. 14-cv-3608 (S.D.N.Y. filed May 20, 2014); Complaint, *Am. Eur. Ins. Co. v. BATS Glob. Mkts. Inc.*, No. 14-cv-3133 (S.D.N.Y. filed May 2, 2014); Complaint, *City of Providence, R.I. v. BATS Glob. Mkts., Inc.*, No. 14-cv-2811 (S.D.N.Y. filed Apr. 18, 2014); Complaint, *Braman v. CME Grp. Inc.*, No. 14-cv-2646 (N.D. Ill. filed Apr. 11, 2014).

⁵ See generally *supra* note 4 (citing cases where exchanges argued that plaintiffs favored HFT customers).

tions amounted to “an unlawful manipulative scheme”⁶ that violated the most prominent antifraud provisions in federal securities law⁷—Section 10(b) of the Securities Exchange Act of 1934⁸ (Exchange Act) and Rule 10b-5, the Securities & Exchange Commission’s (SEC or Commission) implementing regulation.⁹

On the surface, these lawsuits have little in common with recent Supreme Court decisions on administrative delegation and deference.¹⁰ Plaintiffs’ hyper-technical claims seem divorced from arcane constitutional questions about administrative agencies’ operation and structure. But a closer look portends a potentially dramatic shift in the Court’s views toward core assumptions justifying the SEC’s broad regulatory authority over day-to-day securities-market activities. Consequently, the Court’s reimagining of the administrative state risks upending an intricate and calibrated regulatory structure for reasons unrelated to that structure’s underlying policy goals or general effectiveness. Scholars, practitioners, and the SEC should therefore expect lower courts to start revisiting long-thought-settled securities-law principles and investor expectations. The consequences of this sea change may prove surprising for all involved; as such, this Article warns that financial markets’ enduring strength and effectiveness will remain at risk unless judges and policymakers acknowledge and respond to these trends in a cautious, forthright, and reasoned way.

The SEC’s—and the Supreme Court’s—historical approach to securities matters highlights the stakes.¹¹ Since the Commission’s establishment in the 1930s, the Supreme Court has largely respected the SEC’s authority to police

⁶ See, e.g., *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, 390 F. Supp. 3d 432, 438–39 (S.D.N.Y. 2019).

⁷ Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 540 (2011) (“[Rule 10b-5] can make a plausible claim to being the most consequential piece of American administrative law.”); Evan Hill, *The Rule 10b-5 Suit: Loss Causation Pleading Standards in Private Securities Fraud Claims After Dura Pharmaceuticals, Inc. v. Broudo*, 78 FORDHAM L. REV. 2659, 2666 (2010) (“Section 10(b) of the ‘34 Act is the foremost antifraud provision in U.S. securities law and is utilized through its primary mechanism of enforcement, SEC Rule 10b-5.”). Rule 10b-5 can also form the basis of civil and administrative actions by the SEC and criminal actions by the Department of Justice. 15 U.S.C. § 78u (authorizing SEC actions to enforce rules under the Exchange Act); *id.* §78ff (providing for criminal fines and imprisonment).

⁸ 15 U.S.C. § 78j(b). Section 10(b) makes it unlawful “[t]o use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” Emps.’ Ret. Sys. of Gov’t of the Virgin Islands v. Blanford, 794 F.3d 297, 304–05 (2d Cir. 2015) (quoting 15 U.S.C. § 78j(b)).

⁹ 15 U.S.C. § 78j(b). Rule 10b-5 broadly prohibits: employing any device or scheme to defraud; making a false statement of material fact; making misleading statements due to omitted material facts; or, engaging in any fraudulent practice regarding the purchase or sale of securities. 17 C.F.R. § 240.10b-5 (2022).

¹⁰ See *infra* Part II (discussing recent U.S. Supreme Court jurisprudence in the area of Administrative Law).

¹¹ See *infra* Parts I–II (discussing the history of securities regulation).

securities markets.¹² The Court, for example, frequently endorsed lower-court decisions that expanded Rule 10b-5's coverage over many securities activities.¹³ This latter trend, however, began ebbing in the 1970s.¹⁴ Justice Lewis Powell—who practiced securities and corporate law for three decades before joining the Court—harbored deep skepticism toward judicially created private causes of action.¹⁵ He believed that Rule 10b-5 (and other implied causes of action within securities law) had created a securities-litigation crisis.¹⁶ At the time, other members of the Court frequently deferred to Justice Powell's views on securities matters; of the forty-one securities-law cases in which he participated on the merits, Justice Powell wrote twelve majority opinions and dissented only once.¹⁷ But a reprieve of sorts followed Justice Powell's retirement in 1987.¹⁸ With no one replacing his incisiveness on securities matters, the Court's approach has since been described as “directionless,”¹⁹ “random[],”²⁰

¹² See *infra* Part II (discussing U.S. Supreme Court cases examining securities markets).

¹³ See Robert John Grub III, *Attorneys, Accountants, and Bankers, Oh My! Primary Liability for Secondary Actors in the Wake of Stoneridge*, 62 VAND. L. REV. 275, 283 (2009) (citing *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798, 802 (E.D. Pa. 1947)) (concluding for the first time that Rule 10b-5 contained an implied private right of action for securities fraud); see also *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 144 (2011) (describing private Rule 10b-5 actions as “settled”); *Basic, Inc. v. Levinson*, 485 U.S. 224, 230–31 (1988) (“[Caselaw, congressional] acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5”); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (recognizing that Rule 10b-5's implied private right of action was established “beyond peradventure”); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (recognizing Rule 10b-5's implied private right of action); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (describing Rule 10b-5 as “a legislative acorn” that grew into “a judicial oak”).

¹⁴ See Adam C. Pritchard, *Justice Lewis F. Powell, Jr. and the Counterrevolution in Federal Securities Laws*, 52 DUKE L.J. 841, 866 (2003) (characterizing three U.S. Supreme Court cases—*Blue Chip Stamps*, 421 U.S. 723, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977)—as establishing the U.S. Supreme Court's intention to “reverse the expansion of Rule 10b-5”). Some commentators have opined that the Court “came to see at least some investors as essentially puppets of lawyers who filed securities actions irrespective of their merit simply to reach a settlement and collect a fee.” See DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, *SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS* 24 (3d ed. 2012).

¹⁵ See Adam C. Pritchard & Robert B. Thompson, *The Future of Securities Law in the Supreme Court*, 2021 COLUM. BUS. L. REV. 881, 892; see also Pritchard, *supra* note 14, at 865 (discussing Justice Powell's skepticism towards “judicially created private causes of action not specifically authorized by Congress”).

¹⁶ See Pritchard, *supra* note 14, at 865.

¹⁷ *Id.* at 858–59.

¹⁸ See Pritchard & Thompson, *supra* note 15, at 892–93.

¹⁹ *Id.* at 884.

²⁰ Adam C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 143 (2011).

and “indifferen[t].”²¹ The Court’s attitude toward Rule 10b-5 “became neither consistently expansive nor restrictive.”²²

Despite this inattentiveness, the Supreme Court’s growing skepticism toward administrative decision-making suggests that securities law may soon gain a new rudder. The Court’s renewed commitment to rigid separation-of-powers protections between the executive and legislative branches strikes at a core premise underlying many areas of securities law—namely, a belief that the SEC can conduct the “nuanced . . . evidentiary evaluations necessary to separate the permissible [securities activities] from the impermissible” more accurately and efficiently than non-expert judges and juries.²³ This belief has only grown more important as rapid advances in social and information technologies heighten overall market complexity and fragility.²⁴ The Court’s recent administrative law decisions, however, imply that this premise carries far less persuasive weight than it once did. As a result, this development risks undercutting the securities laws’ effectiveness as an efficient, stabilizing legal framework and impeding the SEC’s ability to develop the expertise it needs to make sound policy judgments in support of that framework.

Consider one lawsuit—*City of Providence v. BATS Global Markets, Inc.* (*City of Providence*)—presaging this shift.²⁵ Reflecting the *Flash Boys* thesis, *City of Providence* involved a class of institutional-investor plaintiffs alleging that a group of stock exchanges developed specialized products and services, sold them to HFTs at unaffordable rates regular investors could not pay, and “failed to publicly disclose the full or cumulative effects that the products and services have on the market.”²⁶ After a meandering eight-year odyssey through

²¹ Pritchard & Thompson, *supra* note 15, at 884.

²² *Id.*

²³ See *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 281 (2007); see also *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 85 (D.N.J. 2001) (describing federal securities class actions as “inherent[ly] complex[]”).

²⁴ See generally Michael Morelli, *Managing Relative Regulatory Inefficiencies in Complex Financial Systems*, 25 UNIV. PA. J. BUS. L. 705 (2023) (discussing how increasingly complex regulatory mechanisms have exacerbated regulatory inefficiencies); David A. Wishnick, *Reengineering Financial Market Infrastructure*, 105 MINN. L. REV. 2379, 2384 (2021) (arguing that “devices, operating protocols, and technical standards constituting financial market infrastructure exert a . . . governing force . . . by making certain activities more or less difficult to undertake, or more or less visible to regulatory authorities”).

²⁵ See *City of Providence, R.I. v. BATS Glob. Mkts., Inc.*, No. 14-CV-2811, 2022 WL 902402, at *1 (S.D.N.Y. Mar. 28, 2022).

²⁶ See *id.* at *1–2 (citing *City of Providence, R.I. v. BATS Glob. Mkts., Inc.*, 878 F.3d 36, 40 (2d Cir. 2017) (internal quotations omitted)). Plaintiffs focused on three products and services: (1) *co-location services*, where an exchange “sells customers the right to place their servers in close physical proximity to the Exchange’s own servers for a fee,” thereby “enabl[ing] these customers to reduce their ‘latency’ period—the amount of time it takes for them to receive information about changes in the market and to send trading signals to the Exchange—by reducing the physical distance that those signals have to travel”; (2) *proprietary data feeds*, which provide “‘enhanced’ or ‘direct’ data feeds”

several courts,²⁷ the case concluded when a district court judge granted the exchanges' motion for summary judgment on Article III standing grounds.²⁸ Unfortunately, *City of Providence*'s anticlimactic denouement left the most significant question remaining in the lawsuit unanswered: whether *any* plaintiff, even if they had standing, could bring these claims. Specifically, in a separate motion for summary judgment, the exchanges invoked the Supreme Court's 2007 decision in *Credit Suisse Securities (USA) LLC v. Billing* (*Billing*), arguing that "the regulatory structure of the securities laws" precluded the plaintiffs' Rule 10b-5 claims because the SEC had already approved the challenged products and services and found them lawful under federal securities law.²⁹

The apex of a forty-year line of precedent, *Billing* crystallized various factors courts consider when assessing whether the federal securities laws implicitly preclude private antitrust claims—a concept called implied antitrust immunity.³⁰ This so-called *Billing* test aligned with the Court's treatment of implied antitrust immunity outside the securities context by instructing lower courts to examine four factors, all of which display judicial respect for the SEC's expertise in securities matters: (1) whether the SEC has authority to supervise the securities activities in question; (2) whether the SEC regularly exercises that authority; (3) whether conflicting guidance, requirements, duties, privileges, or standards of conduct would arise if both sets of laws remained effective; and (4) whether any such possible conflict would affect securities practices that "lie squarely within an area of financial market activity that the securities law seeks to regulate."³¹

to subscribing customers that "generally provide more information at faster speeds than the 'consolidated' data feed to which all investors seeking to trade on a given Exchange have access"; and (3) near-exclusive access to *complex order types*, which are "pre-programmed commands that instruct an Exchange how to handle a particular buy or sell order." *Id.* at *3–4 (internal citations omitted).

²⁷ See, e.g., *City of Providence, R.I.*, 878 F.3d 36; *People ex rel. Schneiderman v. Barclays Cap. Inc.*, 1 N.Y.S.3d 910 (Sup. Ct. 2015); *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, 67 F. Supp. 3d 1375 (J.P.M.L. 2014).

²⁸ *City of Providence, R.I.*, 2022 WL 902402, at *20. The institutional-investor plaintiffs initially appealed but later submitted notices of voluntarily dismissal. Order Granting Motion for Voluntary Dismissal of Appeal, *City of Providence, R.I. v. BATS Glob. Mkts., Inc.*, No. 22-920 (2d Cir. granted June 13, 2022) (order granting motion to dismiss appellees Chicago Stock Exchange, Inc., Direct Edge ECN, L.L.C., New York Stock Exchange, NYSE Arca, Inc., Barclays Capital, Inc., and BATS Glob. Markets, Inc.); Order Granting Motion for Voluntary Dismissal of Appeal, *City of Providence, R.I. v. BATS Glob. Mkts., Inc.*, No. 22-920 (2d Cir. granted May 12, 2022) (order granting motion to voluntarily dismiss appellees NASDAQ Stock Market L.L.C. and NASDAQ OMX BX, Inc.).

²⁹ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007); Memorandum of Law in Support of Motion for Summary Judgment on Grounds of Preclusion at 11, *City of Providence, R.I.*, 2022 WL 902402 (No. 14-CV-2811).

³⁰ *Billing*, 551 U.S. at 274–76.

³¹ *Id.* at 275–76.

Billing reflected the Court's belief that judges were ill-equipped to police increasingly intricate day-to-day securities market activities through antitrust mechanisms.³² The exchanges in the *City of Providence* litigation, however, sought to stretch the *Billing* test even further by arguing that it applied outside the antitrust context.³³ The Exchanges insisted that the *Billing* test applied whenever any provision of federal law—for example, Rule 10b-5's private right of action—conflicted with other provisions establishing a defined regulatory structure—for example, those granting the SEC broad regulatory authority over the exchanges' products and services—even when those provisions were in the same statutory scheme.³⁴

Although a survey of all securities law lies beyond this Article's scope, the exchanges' invocation of the *Billing* test provides a useful vehicle for assessing how recent Supreme Court trends in administrative law may affect long-accepted doctrines in securities law and how lower courts might eventually rule when assessing arguments similar to those pressed in *City of Providence*.

On the one hand, the *Billing* test recognizes the “fine securities-related lines separating the permissible from the impermissible” and the risk of conflicting court decisions given the absence of a judge or jury’s “securities-related expertise.”³⁵ On the other hand, recent opinions in *Kisor v. Wilkie*, *West Virginia v. EPA*, and other cases showcase the Supreme Court's renewed commitment to rigid separation-of-powers principles, preservation of political input in administrative processes, and judicial resolution of legal questions.³⁶ Some scholars claim that these recent opinions form patches in a pattern of judicial “skepticism about the legitimacy of agency power”³⁷—or even evidence that the current conservative majority is pursuing its own policy goals

³² *Id.* at 283.

³³ Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 29, at 11–12.

³⁴ *Id.* at 12.

³⁵ See *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 281–82 (2007).

³⁶ See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (plurality opinion); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *infra* Part II (discussing *Billing*'s interaction with these decisions).

³⁷ See, e.g., Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 630 (2021) (lamenting recent Supreme Court decisions such as *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) and *Lucia v. SEC*, 138 S. Ct. 2057 (2018) that “indulg[e] broad presidential power while suggesting agencies err primarily by overregulating”). Other cases identified by Freeman and Jacobs in this line of Supreme Court jurisprudence include *Michigan v. EPA*, 576 U.S. 743 (2015), *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). Freeman & Jacobs, *supra* at 630; see also Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022) (noting that recent Supreme Court decisions “annex[] enormous interpretive power to the judiciary by enunciating a standard for substantive legitimacy that is so malleable that, at present, it can be said only to mean ‘just what [the Court] choose[s] it to mean—neither more nor less’”); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–7 (2017) (labeling concurrent opposition to bureaucracy and enthusiasm for presidential power as hallmarks of “contemporary anti-administrativism”).

by “simultaneously stripping power from every political entity *except* the Supreme Court itself.”³⁸ This Article offers a more nuanced take. It argues that these decisions do not embody mere anti-administrative dogma or legal-realist imperialism; rather, they reflect the Supreme Court’s pragmatic concerns about modern administrative agencies’ capacity to apply effectively (or act within) their expertise in a manner free from political bias or pressure. The Court’s opinions also reflect the Justices’ near-unanimous view—albeit to differing degrees—that lower courts and Congress should exercise stronger hands over matters historically reserved to agency discretion. Taken together, these changes imply that the Court could soon view the *Billing* test (and other doctrines like it) as relics from a bygone technocratic era.

These new trends ring historical bells; indeed, they echo deep-rooted debates on governmental structure, accountability, and financial institutions’ role in furthering the nation’s welfare. At the Founding, Jeffersonians raised concerns about the political accountability of banks.³⁹ Fifty years later, Andrew Jackson invoked similar themes when refusing to charter the Second Bank of the United States.⁴⁰ And “[a]s the rest of the nineteenth century added more bureaucratic complexity to the reach of the American state and the early twentieth century accelerated it, concerns about policy drift became ubiquitous.”⁴¹ The SEC proved no exception. The Commission emerged out of a congressional desire to insulate securities markets—and protect the public—from potentially disruptive, corruptive, or nefarious business interests.⁴² But even at the height of the New Deal, lawmakers accounted for political tensions inherent to the SEC’s expertise-based structure. “[B]oards . . . who are experts in details rarely agree among themselves,” the Exchange Act’s House Report observed, “and in their very expertness with the trees seldom perceive the woods of broad public policy.”⁴³ Instead, “[t]he well-learned lesson of democratic

³⁸ See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 97 (2022); see also Benjamin C. Skillin, Note, *Major Questions Require Major Coordination: Enhancing Regulatory Coordination to Combat Nondelegation and Anti-Deference Judicial Scrutiny*, 64 B.C. L. REV. 1283, 1330 (2023) (“The Supreme Court has utilized the doctrine in conjunction with an anti-Chevron push to halt regulatory rules that do not fit its political skew—in effect creating policy choices of its own.”).

³⁹ RON CHERNOW, ALEXANDER HAMILTON 349–55 (2004).

⁴⁰ DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815–1848, at 379–85 (2007).

⁴¹ Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 642–43 (2021).

⁴² See 78 CONG. REC. 2264–70 (1934) (statement of Sen. Duncan U. Fletcher, Chairman of the Senate Committee on Banking and Currency, introducing legislation that became the Securities Exchange Act of 1934) (“The purpose of the bill is to insure to the public that the securities exchanges will be fair and open markets.”).

⁴³ H.R. REP. NO. 73-1383, at 16 (1934).

government . . . ‘experts’,” the House Report cautioned, “is that they should be kept on tap but not on top.”⁴⁴

Despite this historical bargain between expertise and accountability, the Supreme Court’s de-facto reassertion of judicial authority over administrative decision-making will reverberate throughout modern markets. *Billing* and its predecessors concluded that the marginal benefits of antitrust enforcement did not outweigh the resulting costs to the SEC’s expert administration of the corresponding regulatory framework.⁴⁵ Lower courts proceeded to preclude many private antitrust claims in the securities-law context, thereby curtailing antitrust law’s ability to complement existing regulatory efforts.⁴⁶ Yet the Court’s growing skepticism toward agencies’ applications of administrative processes—buoyed by an increasing faith in the judiciary’s ability to oversee complex matters—seems poised to generate an antitrust resurgence. More plaintiffs will question (and more judges will consider) whether trading policies and practices like those at issue in *City of Providence* are anticompetitive or exclusionary.⁴⁷ Following *Kisor*, *West Virginia*, and other related opinions, judges are more likely to treat private antitrust remedies as they have historically treated private Rule 10b-5 litigation—ex post “supplement[s]” to the SEC’s ex ante regulatory choices.⁴⁸

⁴⁴ *Id.* These concerns help explain why the SEC is structured as a commission where only three of its five commissioners can belong to the same political party. 15 U.S.C. § 78d(a); see also MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 232 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946) (“Under normal conditions, the power position of a fully developed bureaucracy is always overpowering. The ‘political master’ finds himself in the position of the ‘dilettante’ who stands opposite the ‘expert,’ facing the trained official who stands within the management of administration.”).

⁴⁵ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 283 (2007).

⁴⁶ Samuel N. Weinstein, *Financial Regulation in the (Receding) Shadow of Antitrust*, 91 TEMP. L. REV. 447, 467 (2019) (“In cases involving financial services, however, and especially in the securities-law context, courts have relied on *Credit Suisse* to find antitrust immunity under certain circumstances.”).

⁴⁷ *City of Providence, R.I. v. BATS Glob. Mkts., Inc.*, No. 14-CV-2811, 2022 WL 902402 (S.D.N.Y. Mar. 28, 2022); cf. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 598–99 (2016) (taking a “pragmatic” approach to finality of agency decision-making, emphasizing that lower courts can review agency decisions under the APA even if they are made relatively early in the decision-making process so long as the decisions have “appreciable” consequences); *Sackett v. EPA*, 566 U.S. 120, 130 (2012) (“The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.”).

⁴⁸ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (plurality opinion); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); cf. *Musick, Peeler & Garrett v. Emps. of Wausau*, 508 U.S. 286, 291 (1993); see also, e.g., Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 728 (2011) (“Regulation will . . . often remain on the books even if the regulatory agency makes a reasoned finding that exercise of its regulatory authority will be unhelpful and decides it would be better to forebear to the extent it has discretion to do so.”).

Of course, these trends could produce positive effects in certain securities markets and for select securities activities. Some observers express doubts, for example, about whether the SEC possesses an “ascertainable body of knowledge”⁴⁹ to regulate the current market environment.⁵⁰ And although the SEC may account for certain types of competition-related considerations when taking regulatory action, it does not necessarily follow that the Commission or the securities laws adequately account for all types of anticompetitive harm. In this way, a narrower *Billing* test might mitigate against issues arising from administrative forbearance; for example, by empowering private litigants, through antitrust litigation, to fill in deficiencies in the SEC’s public implementation and enforcement of the securities laws.

At the same time, the Supreme Court has often perceived private antitrust remedies as an overly stringent impediment to entrepreneurial innovation.⁵¹ As a result, some judges may worry that a narrower *Billing* test could unsettle established market expectations, undermine financial stability, and “chill the very conduct the antitrust laws are designed to protect.”⁵² If so, these potential outcomes will also concern policymakers seeking to encourage the development and adoption of novel financial technologies, instruments, and practices.

⁴⁹ See FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 145 (1930).

⁵⁰ See, e.g., John Polise, *A Bridge Too Far: A Critical Analysis of the Securities and Exchange Commission’s Approach to Equity Market Regulation*, 11 *BROOK. J. CORP. FIN. & COM. L.* 285, 317 (2017) (“[W]hen faced with an issue of equity market structure, the Commission took an aggressive approach, using its authority . . . to adopt a set of precise, prescriptive rules regulating the handling of individual orders. This was a foray into an area where the Commission had not traditionally ventured and represented a stretch of authority into an area where the Commission had no previous demonstrated expertise.”); Joan MacLeod Heminway, *The Best of Times, the Worst of Times: Securities Regulation Scholarship and Teaching in the Global Financial Crisis*, 5 *J. BUS. & TECH. L.* 59, 62–63 (2010) (“[Q]uestions abound, especially as to the capacity of our system to propose and manage lasting positive change. Are our regulators up to the task? What can they regulate, and what is beyond their capacity for regulation?”); Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 *VA. L. REV.* 785, 811 (2009) (“Some commentators have attributed the SEC’s regulatory failures to the unwillingness of SEC staff to be sufficiently vigilant in dealings with ‘prominent Wall Street insiders.’ Others blame demoralization of the staff of an agency that is more concerned with deregulation than with active oversight.”); Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC’s Regulatory Philosophy, Style, and Mission*, 2006 *U. ILL. L. REV.* 975, 999 (suggesting the SEC may lack the expertise needed to regulate complex derivatives); see also Sara Hansard, *Lack of SEC Enforcement Called Culpit in Lax Oversight*, *INV. NEWS* (Mar. 8, 2009), <https://www.investmentnews.com/lack-of-sec-enforcement-called-culpit-in-lax-oversight-20499#:~:text=By%20Bloomberg-,Scandals%20in%20the%20financial%20markets%20over%20the%20past%20several%20years,in%20Washington%20on%20Feb%205> [<https://perma.cc/3EJH-QR5R>] (“Scandals in the financial markets over the past several years are the result of enforcement failures and a lack of regulators with industry-specific knowledge, not a need for increased regulation.”).

⁵¹ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 355 (4th ed. 2013) (“[W]hile the Court is more skeptical about agency regulation than it was in the 1970s, its skepticism about the use of antitrust litigation is even greater.”).

⁵² See *Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 400 (2004).

These consequences could also affect investors' ability to pursue fraud-related claims under Rule 10b-5. A narrower *Billing* test—at least as described by the exchanges and the SEC in *City of Providence*—also effectively *broadens* Rule 10b-5's implied private right of action.⁵³ Should that happen, lower courts would come face-to-face with three counterintuitive consequences. First, judges identifying with Justice Powell's distrust of implied rights of action will find themselves facing outcomes that seemingly expand these rights of action absent express statutory language or other indications of congressional intent. Second, judges would potentially find themselves acting in a law-making capacity, raising separation-of-powers concerns distinct from, but no less critical than, those discussed in *Kisor* and *West Virginia*.⁵⁴ Third, judges could render rulings that unintentionally disturb foundational securities law doctrines and, by consequence, increase overall securities-market risk—a concern that informed the Court's decision to establish the *Billing* test in the first place.⁵⁵ In short, judges may soon face a legal hydra—either they narrow Rule 10b-5's implied private right of action or they recognize a broad, but still implied, immunity from private securities-based claims. And how they resolve these conflicting questions could spawn knock-on effects across securities markets.

With these trends and possible consequences identified, the Article proceeds as follows. Part I discusses the *Billing* test's origin, the policy concerns inspiring its development, and lower courts' later application of the test to private claims brought under Section 10(b) and Rule 10b-5.⁵⁶ Part II compares the principles underlying the *Billing* test to recent Supreme Court decisions on administrative deference and accountability.⁵⁷ Finally, Part III suggests that the Supreme Court is unlikely to endorse a robust *Billing* test in future cases, though several factors—including the Supreme Court's vacillating views toward antitrust remedies, their applicability to financial activities, and the test's interplay with Rule 10b-5's private right of action—may point to different outcomes in specific cases.⁵⁸ To balance these competing considerations, the Article argues that courts should alter—rather than replace or rescind—the *Billing* test by refining its factors to reflect judicial themes emerging from *Kisor*, *West Virginia*, and other related opinions. Specifically, this Article suggests that courts should assess whether the SEC—or any other market regulator—has brought its comparative expertise to bear before concluding that implied im-

⁵³ Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 29, at 11–13.

⁵⁴ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (plurality opinion); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

⁵⁵ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 273, 282–83 (2007).

⁵⁶ See *infra* notes 59–207 and accompanying text.

⁵⁷ See *infra* notes 208–311 and accompanying text.

⁵⁸ See *infra* notes 312–399 and accompanying text.

munity of any sort applies. Framed this way, the *Billing* test becomes a tailored check on regulatory decision-making that does not directly dictate *how* agencies assess market issues but *whether* they have done so effectively and free from political interference. It also recognizes—and strives to restrain—judicial efforts to use legal doctrines like the *Billing* test as an indirect means for expanding courts' own power over economic policy decisions.

I. THE *BILLING* TEST

In *Credit Suisse Securities (USA) LLC v. Billing*, the Supreme Court considered whether a “plain repugnancy” existed between antitrust and securities laws such that the latter implicitly precluded the former.⁵⁹ The case centered on marketing arrangements among underwriters of initial public offerings (IPOs).⁶⁰ Plaintiffs alleged that these underwriters required initial IPO investors to: (1) purchase more of the issuer’s shares in the secondary market—a practice called “laddering”; (2) purchase other “less desirable” securities as a condition of their participation in the IPO—a practice called “tying”; and (3) commit to purchasing additional securities in later public offerings—a practice that generated unusually large commissions for the underwriters.⁶¹

Ultimately, *Billing* held that federal securities law impliedly precluded antitrust suits challenging these practices.⁶² Though both SEC regulations and antitrust laws prohibited the activities in question, the Court still found that a conflict existed between them.⁶³ The identified conflict, however, proved novel and controversial.⁶⁴ Unlike earlier cases, the Court did not focus its analysis on whether the securities and antitrust laws were *currently* at loggerheads.⁶⁵ Instead, the Court alluded to the abnormally high risk of *future* conflicts; specifically, how the SEC could change its views on these IPO practices (for example, deeming them permissible pursuant to its authority under the securities

⁵⁹ See *Billing*, 551 U.S. at 267–68.

⁶⁰ *Id.* at 269. “An IPO presents an opportunity to raise capital for a new enterprise by selling shares to the investing public.” *Id.* at 268. An IPO “immediately infuses capital into a company, which may then use the investors’ funds for any number of purposes, including the development of new products, the expansion of existing facilities, or the establishment of new markets.” John P. Lucas, *Pruning the Antitrust Tree: Credit Suisse Securities (USA) LLC v. Billing and the Immunization of the Securities Industry from Antitrust Liability*, 59 MERCER L. REV. 803, 804 (2008).

⁶¹ *Billing*, 551 U.S. at 267, 269–70.

⁶² See *id.* at 278–84 (holding that securities law are “clearly incompatible” with the application of the antitrust laws in this context).

⁶³ See *id.* at 281–84.

⁶⁴ See, e.g., Stacey S. Chubbuck, Note, *Securities Law and Antitrust Law: Two Legal Titans Clash Before the United States Supreme Court in Credit Suisse Securities v. Billing*, 62 OKLA. L. REV. 145, 145–46 (2009).

⁶⁵ *Billing*, 551 U.S. at 273.

laws) leading to possible conflicts with antitrust law.⁶⁶ Given the complexity of these issues and the abnormally harmful errors that antitrust courts would likely make when assessing securities-based antitrust claims, the Court doubted that judges and juries had the necessary expertise to isolate “permissible” securities activities from “impermissible” securities fraud or abuse.⁶⁷ “And the threat of antitrust mistakes”—including “results that stray outside the narrow bounds that plaintiffs seek to set”—meant that practitioners would “act in ways that will avoid not simply conduct that the securities law forbids . . . but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).”⁶⁸ This possibility, the Court concluded, “would threaten serious harm to the efficient functioning of the securities markets.”⁶⁹

This Part traces the decades-long road to *Billing* and discusses how lower courts have applied its antitrust immunity test in later contexts. Section A of this Part discusses cases examining antitrust immunity that were decided before *Billing*.⁷⁰ Section B then discusses the Supreme Court’s ruling in *Billing*.⁷¹ Finally, Section C discusses developments following *Billing*.⁷² Viewed together, these cases reveal four principles animating courts’ historical approach to implied antitrust immunity:

1. Courts recognize that exchanges play a unique and important role in the country’s economic well-being, acting in a role akin to public utilities. With that said, courts also recognize that exchanges have a checkered history effectively employing self-regulatory policies.
2. The *Billing* line of cases reveals growing respect for the SEC’s comparative expertise over the administration of securities laws.
3. These cases also display a diminishing belief in judges’ and juries’ ability to monitor securities market activities effectively through antitrust laws.
4. *Billing* and its progeny continue to express concern that antitrust liability could weaken the stability and predictability of securities laws, thereby inhibiting financial markets’ economic and social functions.

⁶⁶ *Id.*

⁶⁷ *Id.* at 279–84.

⁶⁸ *Id.* at 282.

⁶⁹ *Id.* at 283.

⁷⁰ See *infra* notes 73–153 and accompanying text.

⁷¹ See *infra* notes 154–186 and accompanying text.

⁷² See *infra* notes 187–207 and accompanying text.

A. Pre-Billing Implied Antitrust Immunity Cases

Before *Billing*, the Supreme Court decided three cases involving implied antitrust immunity under the securities laws: *Silver v. New York Stock Exchange* in 1963, *Gordon v. New York Stock Exchange* in 1975, and *United States v. National Ass'n of Securities Dealers* in 1975.⁷³

1. Silver v. New York Stock Exchange

In *Silver*, a broker-dealer alleged that the New York Stock Exchange (NYSE) and its members violated antitrust laws by collectively barring him from the exchange's internal communication network.⁷⁴ Exchange members used the communication network to transmit offers to buy and sell securities in the over-the-counter market.⁷⁵ The broker-dealer initially set up their own private communication connections to other exchange members.⁷⁶ But the broker-dealer's volume (and profits) dropped considerably after NYSE instructed its members to disconnect their connections from their systems.⁷⁷

After two conflicting lower court decisions, the Supreme Court took up the case.⁷⁸ The Supreme Court acknowledged that NYSE's actions would normally constitute prima facie violations of the Sherman Act.⁷⁹ Before reaching that outcome, however, the Court considered whether the presence of a parallel regulatory scheme under the Exchange Act altered its standard analysis.⁸⁰ Citing to legislative history comparing exchanges to public utilities, the Court acknowledged that they formed "indispensable mechanism[s] through which corporate securities can be bought and sold."⁸¹ At the same time, the Court cited the Exchange Act's continued reliance on self-regulatory principles, whereby exchanges set their own rules of practice and policed their members'

⁷³ *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 661 (1975); *United States v. Nat'l Ass'n Sec. Dealers*, 422 U.S. 694 (1975).

⁷⁴ *Silver*, 373 U.S. at 342–43.

⁷⁵ *Id.* An over-the-counter market is a "market for securities that are not traded on an organized exchange." *Over-the-counter market*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁷⁶ *Silver*, 373 U.S. at 244–45.

⁷⁷ *Id.*

⁷⁸ *Silver v. N.Y. Stock Exch.*, 196 F. Supp. 209, 210 (S.D.N.Y. 1961), *rev'd*, 302 F.2d 714 (2d Cir. 1962), *rev'd*, 373 U.S. 341 (1963).

⁷⁹ *See Silver*, 373 U.S. at 347–48 (stating that "concerted refusals by traders to deal with other traders . . . have long been held to be in the forbidden category" of "injurious" trade restraints (citing *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959))).

⁸⁰ *Silver*, 373 U.S. at 349 (recognizing the difficulty in reconciling the "pursuit of the antitrust aim of eliminating restraints on competition" with the Exchange Act's underlying "public policy contemplating that securities exchanges will engage in self-regulation which may well have anti-competitive effects").

⁸¹ *Id.* at 349–50 (citing H.R. REP. NO. 73-1383, at 15 (1934)).

conduct.⁸² Though the Exchange Act arose, in part, out of the exchanges' "inability and unwillingness to curb abuses" before the Great Depression, the Court cited other legislative history stressing that primary regulatory and supervisory responsibility should remain "with the exchanges themselves."⁸³ Meanwhile, the Exchange Act authorized the SEC to step in "only where [the exchanges] fail adequately to provide protection to investors."⁸⁴ The Court therefore viewed the Exchange Act as imposing duties on exchanges, with the SEC retaining authority to approve or order changes to specific exchange rules and policies in limited circumstances.⁸⁵

The SEC's limited authority over the exchange activity proved decisive. After noting that the Exchange Act contained no express exemption from anti-trust laws, the Court emphasized the "cardinal principle of construction that repeals by implication are not favored."⁸⁶ The Court then reasoned that "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."⁸⁷ At the time, the Exchange Act required exchanges to register with the SEC and submit copies of their rules.⁸⁸ Although the SEC had the power to disapprove the exchanges' rules, it lacked authority to review the exchanges' application of those rules.⁸⁹ Given the SEC's limited authority and its perceived inability to account for antitrust concerns when exercising that limited authority, the Court declined to read an implied repeal into the Exchange Act.⁹⁰ Instead, the Court reasoned that the Exchange Act's scope was "not sufficiently pervasive" to warrant "a total exemption from the antitrust laws."⁹¹ Therefore, the Court believed that the securities laws could not perform a sufficiently similar anti-trust role, implying that the judiciary needed to take the initiative by applying

⁸² *Id.* at 351–52.

⁸³ *Id.* (citing S. REP. NO. 73-792, at 13). "Worsening economic conditions" since passage of the Securities Act of 1933 had changed the political climate to "a considerable degree," making the Roosevelt Administration "more inclined to seek compromises" when enacting the Securities Exchange Act of 1934. MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, *FINANCIAL REGULATION: LAW AND POLICY* 459 (3d ed. 2021).

⁸⁴ *Silver*, 373 U.S. at 351–52; *see* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 847–48 (2d Cir. 1968) (noting that Congress also enacted the Exchange Act to ensure that permissible trading practices did not give unjustified advantages to certain investors).

⁸⁵ *Silver*, 373 U.S. at 352–53.

⁸⁶ *Id.* at 357 (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 357–58.

⁸⁹ *Id.*

⁹⁰ *Id.* at 357.

⁹¹ *Id.* at 360–61.

antitrust laws to securities activities.⁹² This outcome aligned with other contemporary cases reasoning that self-regulatory arrangements in different industries could restrain competition to the benefit of those who set the standards and to the detriment of the public.⁹³

Despite its belief in the virtues of antitrust law, the Court kept its holding narrow. “Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling [for example, exchange self-regulation], a different case would arise.”⁹⁴ Still, the Court suggested that even if the SEC retained adequate jurisdiction over exchanges’ self-regulatory activities, the Commission needed to justify its decision-making by selecting or approving policies that least restrained competition.⁹⁵ And importantly, the Court assumed that judges would retain jurisdiction to review these policies.⁹⁶

Silver grew out of implied antitrust immunity decisions rendered in other industries. Between 1939 and 1963, the Supreme Court considered implied antitrust immunity six times,⁹⁷ but only granted it in one case: *Pan American*

⁹² *Id.* at 358 (“There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulatory ends.”).

⁹³ *See, e.g.,* *Radiant Burners, Inc. v. People Gas Light & Coke Co.*, 364 U.S. 656, 659–60 (1961); *Fashion Originators’ Guild of Am., Inc. v. Fed. Trade Comm’n*, 312 U.S. 457, 467–68 (1941). *But see* *Bd. of Trade of the City of Chi. v. United States*, 246 U.S. 231, 241 (1918) (upholding price controls over various grains, reasoning that the rule was narrow in scope and resulted in numerous social benefits; namely, the creation of a centralized public market).

⁹⁴ *Silver*, 373 U.S. at 358 n.12, 360.

⁹⁵ *Id.* at 357–60.

⁹⁶ *Id.* at 358 n.12 (“Were there Commission jurisdiction and ensuring judicial review for scrutiny of a particular exchange ruling . . . a different case would arise . . .”). But as commentators noted at the time, this assumption “breaks down because the SEC [was] not required to find that exchange self-regulation meets any standard and if the SEC [chose] not to act, there [was] nothing for the court to review.” Note, *The Back Office Problem and the Antitrust Laws*, 69 COLUM. L. REV. 299, 307–08 (1969).

⁹⁷ *See, e.g.,* *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (discussed below); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 351–52 (1963) (holding that a bank merger approved by the Comptroller of the Currency was not impliedly immune from antitrust law because the Comptroller’s regulatory authority did not *require* them to enforce competition and because the banking industry was not subject to “all-pervasive” regulation); *California v. Fed. Power Comm’n*, 369 U.S. 482, 485–86 (1962) (denying implied antitrust immunity because the agriculture industry was not subject to “pervasive” regulation and the regulator was not required to consider competition); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 340–46, 351 (1959) (concluding that agreement to exchange radio stations to obtain market power in the broadcasting industry was not impliedly immune from antitrust laws because the industry was not subject to pervasive regulation, the underlying statute did not intend for regulatory approval to displace antitrust laws, and the regulator was not required to specifically consider competition); *Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 456 (1945) (holding that defendants’ conspiracy to fix interstate railroad rates was not impliedly immune from antitrust scrutiny because the Interstate Commerce Commission had no authority to enjoin such conspiracies); *United States v. Borden Co.*, 308 U.S. 188, 200–01, 205–06 (1939) (concluding that defendants’ efforts to control the price and quantity of milk in the Midwest were not impliedly immune from antitrust laws because the statutory regime only immunized those agreements that the Secretary

World Airways, Inc. v. United States (Pan American).⁹⁸ Decided the same year as *Silver*, *Pan American* involved allegations that two airlines and a steamship company had violated antitrust laws by dividing up transportation routes between them in Central and South America.⁹⁹ The Court held that the relevant statute—the Civil Aeronautics Act of 1938—had created a “pervasive” regulatory scheme in the transportation industry.¹⁰⁰ In doing so, Congress intended to alter what *previously* had been a competitive system.¹⁰¹ This intention distinguished *Pan American* from *Silver*, which had held that the Exchange Act reflected a (partial) congressional intent to make exchange practices *more* competitive.¹⁰² The Court also found it significant in *Pan American* that Congress had given the Civil Aeronautics Board (CAB) broad powers to approve, modify, or prohibit the defendants’ conduct.¹⁰³ Again, the CAB’s authority differed from the SEC’s authority as it existed in *Silver*, which the Court viewed as far more limited.¹⁰⁴ *Pan American* therefore worried that the regulatory and anti-trust regimes could clash if private antitrust claims were allowed to proceed.¹⁰⁵

2. *Gordon v. New York Stock Exchange*

The Court found a different case twelve years later in 1975. In *Gordon v. New York Stock Exchange*, a class of investors alleged that several exchanges’ use of fixed brokerage commission rates for smaller transactions—a system where all stockbrokers agreed to charge the same rate for executing transactions of a certain size—violated the Sherman Act.¹⁰⁶ In response, the exchanges noted how the SEC directly supervised these practices pursuant to then-recent amendments to the Exchange Act.¹⁰⁷ Based on the SEC’s increased au-

of Agriculture had already approved, meaning the regulatory scheme did not “impinge[] upon the prohibitions and penalties of the Sherman Act”).

⁹⁸ *Pan Am. World Airways, Inc.*, 371 U.S. at 312.

⁹⁹ *Id.* at 298; *Silver*, 373 U.S. at 341.

¹⁰⁰ *Pan Am. World Airways, Inc.*, 371 U.S. at 300–01; see also Civil Aeronautics Act of 1938 Pub. L. No. 75-706, 52 Stat. 973 (codified as amended at 49 U.S.C. §§ 401–682).

¹⁰¹ *Pan Am. World Airways, Inc.*, 371 U.S. at 300–01.

¹⁰² *Silver*, 373 U.S. at 364.

¹⁰³ See *Pan Am. World Airways, Inc.*, 371 U.S. at 305–06 (discussing the broad powers given to the CAB over airline conduct). While recognizing that the CAB had “no power to award damages or to bring criminal prosecutions,” the Court nevertheless held that the alleged acts were immune from antitrust scrutiny because they formed “precise ingredients” of the CAB’s regulatory authority. *Id.* at 305, 311. Specifically, the agency could grant certificates allowing airlines to operate on certain routes, modify or deny such certificates, and disallow affiliations between carriers. *Id.* at 305.

¹⁰⁴ *Silver*, 373 U.S. at 358–59.

¹⁰⁵ *Pan Am. World Airways, Inc.*, 371 U.S. at 310.

¹⁰⁶ *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 661 (1975).

¹⁰⁷ See *id.* (describing respondents’ arguments that the “challenged actions were subject to the overriding supervision of the Securities and Exchange Commission”).

thority over these practices, the exchanges argued that the securities laws impliedly precluded the investors' antitrust claims.¹⁰⁸

Echoing *Silver*, the Court reiterated its view that an implied repeal of antitrust laws arises only when a "plain repugnancy between the antitrust and regulatory provisions" exists.¹⁰⁹ As amended, the Exchange Act generally prohibited fixed commission rates.¹¹⁰ But the amendments also empowered the SEC to make exceptions that allowed exchanges to fix commissions, provided that the rates reflected the brokers' costs and did not unnecessarily burden competition.¹¹¹ And the Court emphasized that the SEC had exercised this authority, citing how the SEC had continuously reviewed rate-fixing practices over the preceding fifteen years.¹¹² Therefore, the Court held that the securities laws impliedly precluded plaintiffs' antitrust claims.¹¹³ It distinguished *Gordon* from *Silver* on these collective grounds: namely, that the Exchange Act gave the SEC authority to regulate the conduct at issue, that this authority required the SEC to account for antitrust considerations, and that the SEC had actively exercised this authority.¹¹⁴ The Court also invoked policy considerations first announced in *Pan American*, noting its concern that imposing antitrust liability in these circumstances "would . . . subject the exchanges and their members to conflicting standards" of conduct.¹¹⁵

Like *Silver*, *Gordon* relied heavily on legislative history to elevate its understanding of the Exchange Act.¹¹⁶ In the Court's view, this history revealed a clear congressional intent to empower the SEC's ability to monitor and approve policies surrounding fixed commission rates.¹¹⁷ The Court's analysis

¹⁰⁸ See *id.* (detailing respondents' assertion that the Securities and Exchange Commission's role in supervising the activities at issue meant that they were not subject to antitrust laws).

¹⁰⁹ *Id.* at 682 (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350–51 (1963)); *Silver*, 373 U.S. at 357.

¹¹⁰ *Gordon*, 422 U.S. at 680.

¹¹¹ *Id.*

¹¹² *Id.* at 682–85.

¹¹³ *Id.* at 691.

¹¹⁴ *Id.* at 683–85.

¹¹⁵ *Id.* at 689–90. In his concurrence, Justice Douglas noted that "[t]he mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing those rates from antitrust challenges." *Id.* at 691–92 (Douglas, J., concurring). "Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended." *Id.* at 692. Justice Stewart's separate concurrence raised similar themes: "The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants." *Id.* (Stewart, J., concurring).

¹¹⁶ See *id.* at 663–67 (majority opinion) (discussing the legislative background behind the enactment of the Securities Exchange Act); *Silver*, 373 U.S. at 351–53 (describing Congress's intent in enacting the Securities Exchange Act).

¹¹⁷ See *Gordon*, 422 U.S. at 663–67 (emphasizing the legislative intent behind the Securities Exchange Act that animated its "general policy of self-regulation").

also reflected an increasingly negative attitude toward self-regulation.¹¹⁸ *Silver* preserved antitrust liability due to inadequate federal regulatory authority over exchange practices, recognizing the exchanges' own spotty history with adequate self-regulation. Once Congress endowed the SEC with more authority to monitor exchange practices and supervise the exchanges' implementation of related self-regulatory policies, the *Gordon* Court found antitrust liability both redundant and potentially dangerous.¹¹⁹ Relying on the SEC's expertise, Congress's trust in the SEC, and the attention and diligence demonstrated by both federal entities, *Gordon* declined to disrupt the administration of a comprehensive regulatory regime.¹²⁰ A similar theme emerged in the Court's analysis of whether a "plain repugnancy" existed between securities law and antitrust law.¹²¹ Whereas *Silver* grounded its conflict analysis in preserving the Exchange Act's effectiveness, *Gordon* centered its conflict analysis on whether antitrust enforcement would disrupt the SEC's administration of the overall regulatory framework.¹²² Emphasizing the change, the Court expressly rejected lower court approaches that required factual proof that imposing antitrust liability against the exchanges would frustrate the purposes of the Exchange Act.¹²³ In other words, *Gordon* reflected the Court's growing confidence in the SEC's ability to monitor and regulate exchange activities without court intervention via private antitrust lawsuits.

Gordon's outcome stood in tension with the intellectual swing taking place in Congress at the time. George Stigler's *The Theory of Economic Regulation*, published in 1971, put forward a theoretical account of the competitive harms potentially resulting from the combined self-interest of regulators and regulated parties.¹²⁴ Following its publication, "[p]oliticians from both major

¹¹⁸ *Id.* at 692 (Douglas, J., concurring).

¹¹⁹ *Id.* at 685–90 (majority opinion).

¹²⁰ *Id.* In distinguishing *Gordon* from *Philadelphia National Bank*—another case rejecting implied antitrust immunity claims in the banking space—the Court noted that *Philadelphia National Bank* had:

[T]wo factors pointed against antitrust immunity: (1) congressional intent in the Bank Merger Act not to immunize activities from antitrust legislation, and (2) the lack of conflict between the Bank Merger Act and Clayton Act standards. Also, there was an absence of continuing oversight by the Comptroller General of the Currency. These factors are not present in, and are inapplicable to, the case at bar.

Id. at 689 n.14; see also *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350–52 (1963).

¹²¹ *Gordon*, 422 U.S. at 682.

¹²² *Id.* at 666–67, 686–88; *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357–58 (1963).

¹²³ *Gordon*, 422 U.S., at 686–87 (discussing *Thill Sec. Corp. v. N.Y. Stock Exch.*, 433 F.2d 264, 270 (7th Cir. 1970) (holding that "it must be established that subjecting the antirebate rule to antitrust attack will frustrate the purpose of the Securities Exchange Act or make it substantially ineffective")).

¹²⁴ George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.").

parties concluded that many regulated industries were insufficiently competitive, to the detriment of consumers.”¹²⁵ These shifting currents led Congress to ease price restrictions in several areas, including the airline, trucking, and telecommunications industries.¹²⁶

Given this emerging consensus, *Gordon*’s conclusion that the Exchange Act gave the SEC authority to set commission-rate policies—and insulate firms from private antitrust claims relating to those policies—seems perplexing.¹²⁷ But historical context provides some answers; namely, how the Court viewed contemporary legislation as militating against competition-related concerns. Just three weeks before the Supreme Court issued *Gordon*, Congress passed the Securities Act Amendments of 1975 (1975 Amendments).¹²⁸ These amendments fundamentally changed the SEC’s relationships with securities markets by instructing the agency to foster a “national market system” that encouraged, among other things, “economically efficient executions” and “fair competition among market participants.”¹²⁹ Though largely the product of intense SEC lobbying—the SEC had released several reports in the preceding years recommending that Congress grant it more authority to shape and supervise secondary market structure¹³⁰—the 1975 Amendments nevertheless de-

¹²⁵ Paul G. Mahoney, *Equity Market Structure Regulation: Time to Start Over*, 10 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 10 (2020).

¹²⁶ See generally MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 1 (1985) (detailing the easing of regulatory price and entry restrictions in the airline, trucking, and telecommunications industries); Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (emphasizing the competitive benefits of establishing a “national securities market system” for trading securities). The 1975 Securities Act Amendments reference “competition” 19 times, and the preamble declares a legislative desire “to remove barriers to competition” in the Exchange Act. Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

¹²⁷ See *Gordon*, 422 U.S. at 681–82. Interestingly, the United States, as amicus curiae, argued that Congress did not intend to give the SEC such authority. Brief for United States as Amicus Curiae at 37, *Gordon*, 422 U.S. 659 (“The statutory language itself does not require a fixed commission system. It says only that the SEC may require changes in rules respecting ‘the fixing of reasonable rates of commission.’”).

¹²⁸ Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

¹²⁹ 15 U.S.C. § 78k-1.

¹³⁰ SEC, STUDY OF UNSAFE AND UNSOUND PRACTICES OF BROKERS AND DEALERS, H.R. DOC. NO. 92-231 (1971); SEC, STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE FUTURE OF SECURITIES MARKETS (1972). See generally SEC, POLICY STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE STRUCTURE OF A CENTRAL MARKET SYSTEM (1973). In December 1971, the SEC published its Study of Unsafe and Unsound Practices of Broker Dealers. SEC, STUDY OF UNSAFE AND UNSOUND PRACTICES OF BROKERS AND DEALERS, *supra* at 13–14. Among other topics, the SEC criticized exchanges’ ability to supervise their members, noting that they had neither identified emerging issues nor hatched coherent plans to resolve them. *Id.* at 3–4. For these reasons, the Commission sought more authority over the processing of securities transactions, the rulemaking authority of exchanges and other self-regulatory organizations (SROs), the enforcement of SRO rules, and the administration of disciplinary proceedings conducted by SROs. *Id.* at 5. Similarly, in 1972, the SEC announced its intention to pursue the creation of a market involving “a system of communications by which the various elements of the marketplace, be they exchanges or

clared a legislative intent to remove anticompetitive obstacles in securities markets.¹³¹ The House Report noted that markets were “stunted and distorted” by trading practices that had “unnecessarily erected barriers to competition [and] insulated markets.”¹³² The Senate Report similarly opined that “new legislation [was] necessary in order to assure investors . . . that securities markets [were] vigorous and efficient” and that “many types of market makers [were] necessary” to ensure markets remained sufficiently competitive.¹³³ With these remedial goals in mind, the 1975 Amendments gave the SEC more authority to review and approve stock exchanges’ rules of conduct and to discipline them for failing to enforce those rules or otherwise fulfill their regulatory responsibilities.¹³⁴ And, with respect to fixed commission rates, *Gordon* observed that these amendments gave the SEC power to set such schedules only if the Commission found that fixed rates were “reasonable in relation to [the] costs [of providing the] service [for which such fees are charged]” and would “not impose any burden on competition not necessary or appropriate.”¹³⁵

Gordon also recognized the changing political headwinds. The 1975 Amendments further entrenched competition-related principles within the securities laws—albeit ones centered on transaction prices and fees—and Con-

over-the-counter markets, are tied together.” SEC, STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE FUTURE OF SECURITIES MARKETS, *supra* at 8. According to the SEC, this system would create a centralized market structure that assured customers they would receive the “best execution” price for a security wherever it traded. SEC statements in later years echoed these views, evincing the Commission’s march toward establishing a market system free from NYSE’s tight control over NYSE-listed securities. *See id.* at 7 (“In order to maximize the depth and liquidity of our markets, so that securities can be bought and sold at reasonable, continuous, and stable prices, and to ensure that each investor will receive the best possible execution of his order, regardless of where it originates, it is generally agreed that action must be taken to create a single central market of listed securities.”). *See generally also* SEC, POLICY STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE STRUCTURE OF A CENTRAL MARKET SYSTEM (1973) (discussing structural mechanisms to improve securities markets). Some have questioned “whether the aggressive approach by the Commission was aimed less at creating an optimal market structure and more at weakening the NYSE’s dominant position.” *See* Polise, *supra* note 50, at 308 (discussing the SEC’s evolving approach to securities regulations in the early 1970s).

¹³¹ *See* Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97; *see also* Mahoney, *supra* note 125, at 10 (“Politicians from both major parties concluded that many regulated industries were insufficiently competitive, to the detriment of consumers.”); Stigler, *supra* note 124, at 3 (“A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”).

¹³² H.R. REP. NO. 94-123, at 49 (1975).

¹³³ S. REP. NO. 94-75, at 2, 14 (1975); Brief of Appellee at 17, *Scattered Corp. v. Chi. Stock Exch.*, 98 F.3d 1004 (7th Cir.1996) (No. 95-03598).

¹³⁴ 15 U.S.C. § 78s(a) (setting forth procedures for approval of SRO rules, giving the SEC authority to influence the development of market structures at each exchange); *id.* §78s(h) (giving the SEC authority to sanction SROs and their officers and directors for failing to enforce their own rules and federal securities laws).

¹³⁵ *See Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 679–80 (1975) (citing 15 U.S.C. § 78f(e)(1)(B)(ii)).

gress directed the SEC's new powers toward increasing such competition within securities markets. At the same time, other Supreme Court decisions increasingly perceived antitrust law as a blunt tool that ignored actual economic realities by myopically focusing on perceived market concentration issues.¹³⁶ Scholars also advocated for years that economic efficiency should replace market power as the sole standard for antitrust policy.¹³⁷ Accepting these rising tides, *Gordon* seemed reluctant to disrupt the start of a new regulatory experiment by allowing potentially duplicative (and, in its view, misguided) private antitrust litigation to proceed absent exceptional circumstances.

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

The Supreme Court again addressed implied antitrust immunity in *Gordon*'s companion case *United States v. National Ass'n of Securities Dealers, Inc. (NASD)*.¹³⁸ There, the government alleged that the NASD,¹³⁹ mutual funds, and broker-dealers conspired to restrict the sale and fix the resale price of various mutual fund shares.¹⁴⁰ The government claimed that these actions artificially inhibited the growth of a secondary market in mutual fund securities.¹⁴¹ The government further argued that these practices forced investors to

¹³⁶ See, e.g., *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 38–41, 59 (1976) (declining to impose antitrust liability where television manufacturer had limited competition among its dealers by dividing country into sales territories and holding that the government needed to prove the conduct was illegal under antitrust law and had not done so); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 510–11 (1974) (allowing merger of coal mining companies over the government's objection, holding that resulting market share was not sufficient evidence of an antitrust violation).

¹³⁷ See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 3–7 (1976) (arguing that economic efficiency should be the sole standard of antitrust policy); Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 11 (1966) (arguing that the legislative histories of the antitrust statutes did not reveal any claim that Congress intended the courts to sacrifice consumer welfare to any other goal).

¹³⁸ 422 U.S. 694 (1975).

¹³⁹ *Id.* at 701.

The NASD is registered under [section] 15A of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3, the so-called Maloney Act of 1938. The Maloney Act supplements the [SEC]'s regulation of the over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers. The Act provides that associations may register with the Commission pursuant to specified terms and conditions, and authorizes them to promulgate rules designed to prevent fraudulent and manipulative practices; to promote equitable principles of trade; to safeguard against unreasonable profits and charges; and generally to protect investors and the public interest. The Act also authorizes the SEC to exercise a significant oversight function over the rules and activities of the registered associations.

Id. at 700–01 n.6 (internal citations omitted).

¹⁴⁰ *Id.* at 701–03.

¹⁴¹ *Id.*

pay non-competitive prices for mutual fund shares.¹⁴² Similarly, the government alleged that the mutual funds had also prohibited broker-dealers from selling shares to other broker-dealers, thereby inhibiting the secondary market's growth even further.¹⁴³

NASD mirrored *Gordon* in most respects. Like in *Gordon*, the Court found that the securities laws impliedly immunized the defendants from antitrust liability.¹⁴⁴ The Court noted that the Investment Company Act authorized mutual funds to impose restrictions on sales of their shares so long as they comply with SEC regulations.¹⁴⁵ Unlike in *Gordon*, however, the SEC had never exercised its authority to regulate these activities, such as issuing standards that allowed these types of restrictions.¹⁴⁶ Nevertheless, the Court concluded that the SEC's decision *not* to impose restrictions qualified as an exercise of its discretionary authority rather than an abdication of its oversight responsibilities.¹⁴⁷ In so concluding, the Court determined that the statutorily mandated regulation of the NASD constituted a "pervasive regulatory scheme."¹⁴⁸ Therefore, imposing antitrust liability would impermissibly inhibit the regulatory scheme's overall effectiveness by subjecting parties to standards that are redundant and inconsistent.¹⁴⁹

NASD also endorsed *Gordon*'s respect for the SEC's expert oversight of securities matters. The Court continued to frame its "repugnancy" analysis as a conflict between antitrust laws and the SEC's authority by reasoning that implied antitrust immunity furthered the SEC's ability to monitor mutual fund activities "free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws."¹⁵⁰ And like *Gordon*, *NASD* invoked the SEC's "broad," "extensive," and "pervasive" supervisory authority under various securities laws.¹⁵¹ Still, *NASD* went further than—and perhaps stood in tension with—*Gordon* by concluding that a conflict between antitrust law and securities law can exist even if the SEC has not

¹⁴² See *id.* (detailing the government's allegations in *NASD*).

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 734 (holding that "implied repeal of the antitrust laws is 'necessary to make the [regulatory scheme] work' (citation omitted)).

¹⁴⁵ *Id.* at 722.

¹⁴⁶ *Id.* at 721.

¹⁴⁷ See *id.* at 728 ("The Commission's acceptance of fund-initiated restrictions for more than three decades hardly represents abdication of its regulatory responsibilities.").

¹⁴⁸ *Id.* at 735.

¹⁴⁹ See *id.* ("In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated.").

¹⁵⁰ *Id.* at 719, 734. The Court expressly endorsed the SEC's representation that "its authority w[ould] be compromised seriously" should antitrust liability have attached to the mutual funds' activities. *Id.* at 729.

¹⁵¹ See *id.* at 732, 734–35.

taken any affirmative action in the field and the existing regulatory regime does not specifically address antitrust concerns.¹⁵² Justice White seized on this contradiction in his dissent, warning that implied antitrust immunity would “become[] the rule where a regulatory agency has authority to approve business conduct whether or not the agency is directed to consider antitrust factors in making its [regulatory] decisions and whether or not there is other evidence that Congress intended to displace judicial with administrative antitrust enforcement.”¹⁵³ Thus, *NASD* marked a new direction for implied antitrust immunity; one that seemingly elevated principles of regulatory uniformity and stability over *Silver*’s antitrust concerns.

B. Credit Suisse Securities (USA) LLC v. Billing

Implied antitrust immunity over securities activities lay dormant for more than thirty years until the Supreme Court’s 2007 *Credit Suisse Securities (USA) LLC v. Billing* decision.¹⁵⁴ In that case, the Court addressed whether implied antitrust immunity extended beyond exchanges (*Silver* and *Gordon*) and exchange members (*NASD*) to cover the conduct of most market participants.¹⁵⁵ Specifically, the investor-plaintiffs alleged that various IPO-related agreements between a group of investment banks violated antitrust laws.¹⁵⁶ In addressing the investment banks’ implied antitrust immunity defense, the Court refined its precedents into four “critical” factors relevant for determining whether a “clear repugnancy” between securities and antitrust laws exists:

(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; . . . (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct, [and] (4) . . . [whether] the possible conflict affected

¹⁵² See *id.* at 721–22 (finding that the SEC’s intrinsic power was irreconcilable with antitrust laws).

¹⁵³ *Id.* at 736 (White, J., dissenting).

¹⁵⁴ 551 U.S. 264 (2007).

¹⁵⁵ 15 U.S.C. §§ 78a–78pp; see *Billing*, 551 U.S. at 267–70.

¹⁵⁶ *Billing*, 551 U.S. at 267.

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

practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.¹⁵⁷

Reflecting *Silver*, *Gordon*, and *NASD*'s respect for financial market regulation, the Court concluded that factors one, two, and four had clearly been met.¹⁵⁸ As to the first factor, the Court recognized that the SEC had authority to supervise "virtually every aspect of the practices in question" *vis-à-vis* its power to "regulate the process of bookbuilding, solicitations of 'indications of interest,' and communications between underwriting participants and their customers" as well as its authority to prohibit "fraudulent, deceptive, or manipulative" practices.¹⁵⁹ As to the second factor, the SEC "continuously exercised its legal authority" by defining appropriate underwriting sales practices through regulation and bringing actions against underwriters who violate those provisions.¹⁶⁰ And as for the fourth factor, the Court echoed *Silver*'s characterization of exchanges, stressing that the IPO process "is central to the proper functioning of well-regulated capital markets" and "lie[s] at the very heart of the securities marketing enterprise."¹⁶¹

The Court's analysis of the third factor has proven more controversial.¹⁶² In assessing that the *risk* of conflicting guidance was high, the Court implied that the SEC could address securities-related concerns more effectively than non-expert judges and juries could through antitrust litigation.¹⁶³ The Court made this representation despite SEC-issued guidance disapproving of the investment banks' conduct, meaning no *actual* conflict between securities and antitrust law existed in the case. It reasoned that even if the SEC disapproved of the investment banks' actions, the Commission could change its position in the future.¹⁶⁴ More importantly, the Court viewed antitrust liability as likely leading to inconsistent outcomes.¹⁶⁵ Allowing these actions to go forward

¹⁵⁷ *Id.* at 275–76.

¹⁵⁸ *Id.* at 277.

¹⁵⁹ *Id.* at 276–77.

¹⁶⁰ *Id.* at 277.

¹⁶¹ *Id.* at 276.

¹⁶² See, e.g., Justin Lacour, Note, *Unclear Repugnancy: Antitrust Immunity in Securities Markets After Credit Suisse Securities (USA) LLC v. Billing*, 82 ST. JOHN'S L. REV. 1115, 1141–44 (2008); Luitgard W. Lina Chambers, Note, *A New Supreme Court Securities Jurisprudence? How Credit Suisse Securities (USA) LLC v. Billing Eviscerates the Role of Antitrust in Securities Law, Resurrects the Primary Jurisdiction Doctrine, and Leaves Retail Investors Out in the Cold*, 44 HOUS. L. REV. 1131, 1159 (2007).

¹⁶³ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 279 (2007). In *Gordon*, the SEC had "taken an active role in review of proposed rate changes" without rejecting the rate practices being challenged. 422 U.S. 659, 685 (1975). And in *NASD*, the SEC had not expressed whether it approved or disapproved of the challenged conduct. 422 U.S. 694, 721 (1975).

¹⁶⁴ *Billing*, 551 U.S. at 280–82.

¹⁶⁵ *Id.* at 282.

“threaten[ed] serious securities-related harm” due to “unusually serious legal line-drawing problems.”¹⁶⁶ “[E]vidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical.”¹⁶⁷ Given “the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible,” the Court concluded that it would “prove difficult for . . . different [lower] courts to reach consistent results.”¹⁶⁸ Although these issues often arose in other antitrust cases, they convinced the Court that antitrust liability over these securities claims would lead underwriters to “act in ways that [would] avoid not simply conduct that the securities law forbids . . . but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).”¹⁶⁹

Other factors heightened the Court’s sensitivity to adverse consequences stemming from conflicting standards of conduct. First, the Court recognized that IPOs were fundamentally important for the “effective functioning of capital markets,” making “the securities-related costs of mistakes . . . unusually high.”¹⁷⁰ Second, aggrieved investors could file securities law disputes and receive damages, meaning private antitrust remedies were unnecessary (or even excessive given the availability of treble damages).¹⁷¹ To that end, the Court observed that the Exchange Act required the SEC to account for “competitive considerations when it creates securities-related policy and embodies it in rules and regulations.”¹⁷² Third, the Court worried that the complexity inherent to securities law issues and the diffuse nature of the federal judicial system—where “antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries”—presented an increased danger that lower courts would not analyze like cases in similar ways.¹⁷³ Looking down the road, the Court stressed that conflicting decisions could impose significant social costs on securities

¹⁶⁶ *Id.* at 279.

¹⁶⁷ *Id.* at 281.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 282.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 283.

¹⁷² *Id.* The Court cited statutory provisions regulating the SEC’s rulemaking capabilities in support of this argument. *Id.* Under the Exchange Act, the SEC must consider whether a rulemaking action “will promote efficiency, competition, and capital formation.” 15 U.S.C. § 77b(b). Moreover, the SEC cannot adopt a rule or regulation that “impose[s] a burden on competition” that is “not necessary or appropriate in furtherance of the purposes of [Title 15 U.S.C. §§ 78a–78rr.]” without disclosing the reasons for imposing such a burden. *Id.* § 78w(a)(2).

¹⁷³ *Billing*, 551 U.S. at 281–82.

markets.¹⁷⁴ These concerns mirrored amicus briefs submitted by exchanges and other industry participants, many of which fixated on the SEC's ability to provide "flexib[le]" and "tailor[ed]" solutions to industry issues.¹⁷⁵ Given these risks, the Court asked, "who but the SEC itself could [draw appropriate lines] with confidence?"¹⁷⁶

Billing effectively elevated securities law over antitrust concerns. The opinion contrasted sharply with *Silver*, where the Court framed implied antitrust immunity as the exception rather than the rule.¹⁷⁷ *Billing*, however, flipped that presumption by implying that securities regulation has become so

¹⁷⁴ See generally *id.* at 282 ("[T]hese factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, i.e., results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages). And therein lies the problem."). The Supreme Court also noted that Congress had recently "tightened the procedural requirements that plaintiffs must satisfy" when filing securities class actions through the Private Securities Litigation Reform Act of 1995 and Securities Litigation Uniform Standards Act of 1998. *Id.* at 284 (citing Private Securities Litigation Reform Act of 1995, 109 Stat. 737; Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227). In the Court's view, allowing plaintiffs' antitrust claims to proceed "risk[ed] circumventing these requirements by permitting [them] to dress what is essentially a securities complaint in antitrust clothing." *Id.*

¹⁷⁵ See, e.g., Motion of NYSE Grp., Inc. for Leave to File Brief Amicus Curiae in Support of Petitioners and Brief Amicus Curiae at 3, *Billing*, 551 U.S. 264 (No. 05-1157), 2007 WL 173673, at *3 ("[T]he Exchange Act provides the SEC with substantial flexibility and discretion to tailor appropriate solutions to industry issues, and to change its policies as circumstance, and/or its regulatory analysis, evolve."); Motion for Leave to File Brief as Amici Curiae and Brief of the Securities Industry and Financial Markets Ass'n et al. as Amici Curiae in Support of Petitioners at 2, *Billing*, 551 U.S. 264 (No. 05-1157), 2007 WL 160779, at *2 ("To let twelve courts of appeals and countless juries apply an all-things-considered test would result in the exact opposite of the uniform regulation Congress deemed desirable in this vital area of economic activity."); Motion for Leave to File Amicus Curiae Brief and Brief of the National Ass'n of Sec. Dealers, Inc., as Amicus Curiae Supporting Petitioners at 3, *Billing*, 551 U.S. 264 (No. 05-1157), 2007 WL 160777, at *3 ("This Court should reverse the Second Circuit's decision to ensure that the reticulated securities regulatory regime established by Congress, and the rules issued by the NASD and approved by the SEC, are not undermined by antitrust claims that impose inconsistent obligations on market participants and that are decided by juries lacking the SEC's and NASD's specialized knowledge of the securities markets."); Motion for Leave to File and Brief of the Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 23, *Billing*, 551 U.S. 264 (No. 05-1157), 2007 WL 173674, at *23 ("While the Commission draws on its experience over time to carefully tailor enforcement objectives and remedies, the antitrust law's single-minded focus on competition and the prospect for treble damages can lead to confusion and market disruption."); Motion of W.R. Hambrecht + Co., LLC, for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of Petitioners at 12-13, *Billing*, 551 U.S. 264 (No. 05-1157), 2007 WL 173672, at *12-13 ("[T]he precise, expert line-drawing required in this area to distinguish between permissible, authorized conduct and impermissible, illegal conduct is, we submit, better left to the regulatory agency with the desired expertise, rather than relegated to private actions, juries, and courts wielding the blunt instrument of treble damages under [section] 4 of the Clayton Act.").

¹⁷⁶ *Billing*, 551 U.S. at 281.

¹⁷⁷ *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963).

pervasive, complicated, and important to the nation's economic welfare that securities-based antitrust liability has nearly become a dead letter.¹⁷⁸ Although *Billing* and *Gordon* both fretted that antitrust courts would prohibit too much conduct and “chill” important economic activity, each opinion offered slightly divergent explanations for the source of that concern.¹⁷⁹ In *Gordon*, the Court opined that this risk arose from competing priorities; antitrust courts would solely consider competition, whereas the SEC incorporates competition as one of several factors in its multidimensional analysis.¹⁸⁰ *Billing*, however, took a different path by focusing its implied immunity analysis on judicial (in)competence when evaluating relevant evidence and applying SEC regulations.¹⁸¹ In this sense, *Billing* conflicted with *Gordon*'s declaration that “the determination of whether implied repeal of the antitrust laws is necessary to make . . . [a regulatory regime] work is a matter for the courts, and in particular, for the courts in which the antitrust claims are raised.”¹⁸²

Billing went further than *Gordon* and *NASD* in other important ways. By extending implied antitrust immunity to securities market participants, *Billing* departed from *Silver*, *Gordon*, and *NASD*'s unstated view that exchanges' and exchange members' status as quasi-public utilities could justify (at least in part) their special treatment under antitrust law.¹⁸³ Some commentators have suggested that this extension fit within “a series of cases by the Court [designed] to limit litigation,”¹⁸⁴ generally, or to antitrust litigation, specifically.¹⁸⁵ This reading overlooks common themes running through *Silver*, *Gordon*, and *NASD* and reaffirmed in *Billing*. Read together, these opinions recognize that securities markets provide uniquely important services and operate in increasingly complicated ways. The decisions acknowledge how Congress has repeatedly expanded the SEC's authority over securities markets and securities activities. They also concede that securities-based antitrust questions are uniquely

¹⁷⁸ *Billing*, 551 U.S. at 280.

¹⁷⁹ *Id.* at 281–82; *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975).

¹⁸⁰ *Gordon*, 422 U.S. at 689–90.

¹⁸¹ *Billing*, 551 U.S. at 281–82.

¹⁸² See *Gordon*, 422 U.S. at 686 (stating that, as a “threshold matter,” determining whether the Exchange Act necessitated an “implied repeal of the antitrust laws” was a judicial function).

¹⁸³ *Billing*, 551 U.S. at 285.

¹⁸⁴ See, e.g., Lacour, *supra* note 146, at 1149–50 (“Indeed, *Billing* . . . [is] best understood as part of a series of cases brought by the Court to limit litigation.”).

¹⁸⁵ See Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of “Plain Repugnancy,”* 45 GONZ. L. REV. 437, 475, 481 (2010) (“[The Court] regards antitrust litigation as frequently extortive, wasteful, unnecessary, and costly. Conversely, it seems to regard federal securities law a sounder public policy, notwithstanding the rather high-profile and catastrophic recent failures of that legal regime.”).

susceptible to conflicting standards and outcomes that could undermine economic stability and lead to substantial social costs.¹⁸⁶

C. Post-Billing Caselaw and Developments

Two years after *Billing*, the Second Circuit became one of the first appellate courts to apply its four-factor test.¹⁸⁷ In *Electronic Trading Group v. Bank of America Securities LLC (ETG)*, a class of short sellers claimed that various prime brokers violated the Sherman Act by arbitrarily designating select securities as hard-to-borrow and then fixing an artificially high price for investors seeking to borrow them.¹⁸⁸ The Second Circuit held that all four factors suggested implied antitrust preclusion.¹⁸⁹ Despite its forerunner status, *ETG*'s analysis of the *Billing* test is unremarkable; after breezing through factors one, two, and four, the Second Circuit concluded that antitrust liability would cause present and future securities conflicts.¹⁹⁰ Antitrust liability would "inhibit con-

¹⁸⁶ See, e.g., Richard M. Brunell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 299 (2012) ("[T]he shift in the approach to immunity also appears to reflect a greater faith in regulators to achieve optimal outcomes and act as an 'effective steward of the antitrust function.'"). For these reasons, commentators' efforts to portray *Billing* as an outlier decision divorced from precedent miss the mark. See, e.g., Marcia Coyle, *A Tough Term for Antitrust Plaintiffs*, NAT'L L.J. (2007), <https://www.law.com/nationallawjournal/almID/900005485046/> [<https://perma.cc/P3SY-3ERP>]. Similar themes also emerge in implied antitrust immunity caselaw outside the securities context. See, e.g., *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409–11 (2004). Consistent with *Billing* and its precedents, this caselaw discerns an overall legislative intent to shield regulated parties from potentially inconsistent antitrust rulings. See, e.g., Jacob A. Kling, Note, *Securities Regulation in the Shadow of Antitrust Laws: The Case for a Broad Implied Immunity Doctrine*, 120 YALE L.J. 910, 922–25 (2011) (arguing that *Billing* is also consistent with the Court's broader implied immunity jurisprudence, including those where courts declined to read regulatory statutes as impliedly repealing antitrust laws); see also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373–74 (1973) (rejecting implied immunity where the legislative history of the Federal Power Act did not reveal a "purpose to insulate electric power companies from the operation of the antitrust laws" and the regulatory agency was required to consider only whether its action was "necessary or appropriate in the public interest"); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 309–10 (1963) (holding that an antitrust complaint alleging a conspiracy among multiple air carriers to divide territories and limit routes should be dismissed even though the Civil Aeronautics Board disapproved of the conduct, reasoning that "[i]f courts were to intrude independently with their construction of the antitrust laws, two regimes might collide"); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 352 (1963) (declining to infer antitrust immunity under the Bank Merger Act because the legislative history "seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected"); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) (declining to find implied antitrust immunity because the Radio and Communications Acts' legislative history revealed Congress's intent not to preempt antitrust enforcement).

¹⁸⁷ *Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC*, 588 F.3d 128 (2d Cir. 2009); Weinstein, *supra* note 46, at 467–71 (discussing *Billing*'s aftermath).

¹⁸⁸ *Elec. Trading Grp.*, 588 F.3d at 132.

¹⁸⁹ *Id.* at 138.

¹⁹⁰ *Id.* at 137.

duct that the SEC permits and that assists the efficient functioning of the short selling market.”¹⁹¹ Additionally, reflecting *Billing*’s forward-looking focus, *ETG* held that “a potential conflict exist[ed] based on the possibility that the SEC w[ould] act upon its authority to regulate the borrowing fees set by prime brokers.”¹⁹² The Second Circuit declined, however, to address the weight accorded to each *Billing* factor “when they point in different directions.”¹⁹³

More recently, the Seventh Circuit faced questions about *Billing*’s applicability to the commodities and futures marketplace.¹⁹⁴ In *U.S. Futures Exchange, L.L.C. v. Board of Trade of Chicago, Inc. (USFE)*, an up-and-coming commodities exchange services provider alleged that several existing exchanges engaged in anticompetitive conduct by delaying the Commodities Futures Trading Commission’s (CFTC) regulatory approval of a new proposed trading venue.¹⁹⁵ The plaintiff also claimed that the defendant-exchanges enacted internal order-routing rules that effectively drained the new proposed trading venue of essential liquidity, dooming it to failure.¹⁹⁶ The Seventh Circuit held that all four *Billing* factors supported a finding of implied antitrust preclusion.¹⁹⁷ Although the concept “has its roots in securities caselaw,” the Seventh Circuit noted that implied immunity “is neither a securities doctrine nor a commodities doctrine. It is an antitrust doctrine. And the question of whether it applies in a given case is answered ably by [*Billing*].”¹⁹⁸ Accordingly, the Seventh Circuit readily applied the *Billing* framework to commodities-based

¹⁹¹ *Id.*

¹⁹² *Id.* at 138.

¹⁹³ *Id.* at n.6.

¹⁹⁴ 953 F.3d 955 (7th Cir. 2020). Some plaintiffs have tried to apply the *Billing* analyses outside the securities context. They have met with mixed success. *See, e.g., In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 496–97 (S.D.N.Y. 2017) (finding *Billing* inapposite because the statute expressly addressed whether it precluded antitrust laws); *Energy Mktg. Servs., Inc. v. Columbia Gas Transmission Corp.*, 639 F. Supp. 2d 643, 652 (S.D. W. Va. 2009) (holding that the Federal Energy Regulatory Commission’s regulatory oversight of the sale and transportation of natural gas in interstate commerce did not conflict enough with the antitrust laws to immunize the owner of an interstate natural gas pipeline from antitrust claims); *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 661 F. Supp. 2d 1172, 1176–83 (D. Nev. 2009) (applying the *Billing* test and concluding that the complaints did not raise “the unusually serious legal line-drawing problems that were present in [*Billing*]” and thus did not warrant immunity from the antitrust laws); *Axcen Scandifarm Inc. v. Ethex Corp.*, 585 F. Supp. 2d 1067, 1076–77 (D. Minn. 2007) (finding no “serious conflict” between the regulations and antitrust claims, so the application of antitrust laws was not precluded). *But see* *Horizons Unlimited v. Santa Cruz-Monterey-Merced Managed Med. Care Comm’n*, No. 14-CV-00123, 2014 WL 3342565, at *9–11 (E.D. Cal. July 2, 2014) (holding that the *Billing* test precluded a monopolization claim against a state-appointed Medicaid managed care provider due to its clear conflict with the Social Security Act).

¹⁹⁵ 953 F.3d 955, 958–59 (7th Cir. 2020).

¹⁹⁶ *Id.*

¹⁹⁷ *See id.* at 967.

¹⁹⁸ *See id.* at 967–68.

claims: “[t]he regulatory setting—securities, commodities, or something else—simply provides the backdrop against which the template is applied.”¹⁹⁹

Following *ETG* and *USFE*, the defendant-exchanges in *City of Providence* tried to stretch the *Billing* test even further by arguing that it applied outside the antitrust context.²⁰⁰ Attempting to thread a narrow needle, the defendant-exchanges argued that a regulatory framework could impliedly preclude *itself*.²⁰¹ Because the Exchange Act required the SEC to review each of the challenged products and services at issue in the case, the exchanges claimed that “the regulatory structure of the securities laws” precluded the plaintiffs’ private Rule 10b-5 claims.²⁰² Although *Billing* involved a conflict between federal securities and antitrust laws, the exchanges echoed *USFE* by asserting that *Billing*’s preclusion framework applied whenever one provision of federal law—for example, Rule 10b-5’s private right of action—conflicted with other provisions of federal law—for example, those granting the SEC broad regulatory authority over the exchanges’ products and services.²⁰³ The SEC supported this argument in an amicus brief, noting that “where a plaintiff challenges actions of an exchange that are in accordance with exchange rules approved by the Commission . . . preclusion or preemption would bar the challenge” because it “would conflict with Congress’s intent that the SEC, with its expertise in the operation of the securities markets, make the rules regulating those markets.”²⁰⁴

Though no court ruled on the exchanges’ *Billing* argument, it represented a stark departure from the doctrine’s narrow antitrust beginnings, a broad endorsement of the SEC’s expertise and regulatory authority, and a remarkable skepticism toward judges’ and juries’ ability to evaluate antitrust concerns in the financial marketplace. For these reasons, the exchanges’ argument will likely face significant headwinds should they raise it in future cases. The Supreme Court “has long recognized that meritorious private [Rule 10b-5] actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions.”²⁰⁵ The only court facing

¹⁹⁹ *Id.* at 968.

²⁰⁰ Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 29, at 17–20.

²⁰¹ *Id.* at 12–13.

²⁰² *Id.* at 11.

²⁰³ *Id.*

²⁰⁴ Brief of the Securities and Exchange Commission, Amicus Curiae at 33–34, *City of Providence, R.I. v. BATS Glob. Mkts.*, 878 F.3d 36 (2d Cir. 2017) (No. 15-3057), 2016 WL 7030327, at *33–34.

²⁰⁵ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see also* *Basic, Inc. v. Levinson*, 485 U.S. 224, 230–31 (1988) (“Judicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act’s requirements.”); *J.I. Case & Co. v. Borak*, 377 U.S. 426, 432 (1964) (noting that private securities

similar arguments has likewise noted how “the private right of action and SEC oversight offer different mechanisms to further the same broad goal: preventing manipulation. Those two different mechanisms complement each other,” meaning “preclusion [was] not warranted.”²⁰⁶ That said, implied preclusion’s future in both the antitrust and Rule 10b-5 contexts will largely depend on *Billing*’s interaction with recent Supreme Court opinions on administrative delegation and deference, discussed below.²⁰⁷

II. RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Recent Supreme Court opinions reveal growing concerns about agencies’ discretionary exercise of administrative power.²⁰⁸ At first glance, these opinions seem far afield from the *Billing* test’s antitrust roots.²⁰⁹ But the Court’s increasingly critical approach to administrative deference and accountability conflicts with nearly every justification underlying that test, including its reliance on administrative expertise, its desire to foster predictable and uniform outcomes, and its recognition that securities-related activities are fundamental to the nation’s economy.²¹⁰ Although several Justices still view agency expertise as a virtue worth preserving—for example, by expressing their belief that expert agencies are more competent than courts or juries when resolving public policy judgments, so long as those judgments fall within the agencies’ expertise (however defined)—the Court at large continues to push for greater judicial scrutiny of administrative decision-making and, by consequence, for more congressional involvement in major public policy decisions. These views span the ideological spectrum; in recent years, even the Court’s liberal wing has tempered its reliance on comparative agency expertise as a justification for broad delegations of agency power.²¹¹

This Part examines two opinions—*Kisor v. Wilkie* and *West Virginia v. EPA*—exemplifying these trends.²¹² Section A examines the Supreme Court’s decision in *Kisor v. Wilkie*.²¹³ Section B examines the Supreme Court’s recent

fraud actions provide “a most effective weapon in the enforcement” of securities laws and are a “necessary supplement to [SEC] action”).

²⁰⁶ *In re Chi. Bd. Options Exch. Volatility Index Manipulation Antitrust Litig. (VIX I)*, 390 F. Supp. 3d 916, 931 (N.D. Ill. 2019).

²⁰⁷ See *infra* Part II.

²⁰⁸ See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (plurality opinion); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

²⁰⁹ Compare *Kisor*, 139 S. Ct. 2400 (discussing a veteran’s eligibility for benefits), and *West Virginia*, 142 S. Ct. 2587 (discussing environmental standards), with *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007) (considering antitrust regulations).

²¹⁰ *Billing*, 551 U.S. at 282–83.

²¹¹ See, e.g., *Kisor*, 139 S. Ct. at 2417 (discussing when agency expertise is relevant).

²¹² See *infra* notes 219–311 and accompanying text.

²¹³ See *infra* notes 219–256 and accompanying text.

decision in *West Virginia v. EPA*.²¹⁴ Both decisions suggest that *Billing*'s reasoning holds less persuasive weight than it once did. But each reflects slightly different reasons why. A recent article from Professors Peter Conti-Brown and David Wishnick helps frame these differences. In the article, Professors Conti-Brown and Wishnick identify four mechanisms through which agencies can develop their bodies of expertise: "input from the public, internal knowledge production, dialogue within the administrative state, and experiments in the field."²¹⁵ From this perspective, the *Kisor* decision—which received support from the Supreme Court's liberal and conservative wings—cast doubt that the agency's decision-making effectively employed its internal knowledge-production and policy-evaluation processes.²¹⁶ The liberal Justices, however, also expressed a belief that express or implied statutory limits—and judicial interpretations of those limits—could effectively legitimize agency decision-making.²¹⁷ On the other hand, the *West Virginia* decision—from which the liberal Justices dissented—suggests that agency expertise (no matter how it develops) *never* justifies broad delegations of statutory authority to decide or manage significant public policy issues.²¹⁸ Under this view, the conservative Justices treated agency expertise as an overly malleable concept that routinely undermines democratic legitimacy.

A. *Kisor v. Wilkie*

Kisor v. Wilkie arose from a veteran's repeated efforts to apply for disability benefits from the Department of Veterans Affairs (DVA).²¹⁹ After the DVA initially denied his claim, Mr. Kisor presented the agency with new materials documenting his disability.²²⁰ The DVA eventually reversed its denial, but limited Mr. Kisor's payments to the date he reapplied for benefits.²²¹ The DVA based its decision on the agency's interpretation of language contained in applicable agency rules.²²² Mr. Kisor challenged the ruling, but the U.S. Court of Appeals for the Federal Circuit upheld the DVA's decision under *Bowles v.*

²¹⁴ See *infra* notes 257–311 and accompanying text.

²¹⁵ Conti-Brown & Wishnick, *supra* note 41, at 645–48.

²¹⁶ See Catherine M. Sharkey, State Farm “*With Teeth*”: Heightened Judicial Review in the Absence of Executive Oversight, 89 N.Y.U. L. REV. 1589, 1592 (2014) (noting that one of the key functions of judicial review of agency action is to “prod[] agencies to . . . buttress[] their internal expertise and capacity” to make reasoned decisions in complex areas of policy).

²¹⁷ See *infra* notes 226–231 and accompanying text (discussing Justice Kagan’s opinion in *Kisor*).

²¹⁸ See *infra* note 278 and accompanying text (discussing broad delegations of statutory authority and Justice Kagan’s dissent).

²¹⁹ 139 S. Ct. 2400, 2409 (2019).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

*Seminole Rock & Sand Co.*²²³ and *Auer v. Robbins*,²²⁴ citing those decisions' rule that courts should defer to agencies' interpretations of ambiguous terms in their own regulations.²²⁵

The Supreme Court took the case but limited its review to whether it should overturn *Seminole Rock* and *Auer*.²²⁶ Although the Court ultimately upheld those decisions, the Justices still took their pound of flesh from the *Seminole Rock/Auer* rule. Justice Kagan's lead plurality opinion—joined by Justices Ginsburg, Breyer (who wrote *Billing*), and Sotomayor—extolled *Seminole Rock*'s and *Auer*'s virtues, emphasizing several reasons courts should presume that Congress, by delegating power to an agency to implement a statute through rulemaking, would also intend to delegate the power to resolve ambiguities in those rules.²²⁷ Echoing *Billing*'s inherent trust in agency expertise, Justice Kagan wrote that "the agency that promulgated a rule is in the 'better position [to] reconstruct' its original meaning."²²⁸ This comparative advantage arises because agencies are (1) more expert and politically accountable than courts,²²⁹ and (2) deference to agency interpretations of their own regulations yields greater uniformity and consistency than diffuse federal courts can reasonably achieve.²³⁰ Congress created each agency to solve problems within its expertise, Justice Kagan wrote, so looking at how an agency interprets its own rule makes sense, especially when the underlying problem requires technical knowledge or a policy-oriented judgment.²³¹

²²³ 325 U.S. 410 (1945).

²²⁴ 519 U.S. 452 (1997).

²²⁵ See *Kisor*, 139 S. Ct. at 2409.

²²⁶ See Petition for Writ of Certiorari at i, *Kisor v. O'Rourke*, No. 18-15, 2018 WL 3239696, at *i ("The questions presented are: 1. Whether the Court should overrule *Auer* and *Seminole Rock*."); *Kisor v. Wilkie*, 139 S. Ct. 657, 657 (2018) (mem.) (granting certiorari) ("Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit granted limited to Question 1 presented by the petition.").

²²⁷ See *Kisor*, 139 S. Ct. at 2412.

²²⁸ *Id.* (quoting *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 152 (1991) (alteration in original)); *id.* at 2413 ("Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, [and] can consider how their experts have handled similar issues over the long course of administering a regulatory program.").

²²⁹ *Id.* at 2410–14.

²³⁰ *Id.* at 2413 ("Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. We have noted Congress's frequent preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation." (citations and internal quotation marks omitted)).

²³¹ *Id.* ("In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often entails the exercise of judgment grounded in policy concerns And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have unique expertise, often of a scientific or technical nature, relevant to applying a regulation to complex or changing circumstances." (citations and internal quotation marks omitted)).

But Justice Kagan's opinion also sets significant limits on *when* courts can apply *Seminole Rock* and *Auer* deference.²³² First, Justice Kagan noted that deference only applied in cases of "genuine[] ambig[ity]." ²³³ To that end, courts should "exhaust all the traditional tools of construction" and "not wave the ambiguity flag just because [they] found the regulation impenetrable on first read."²³⁴ Although agency regulations are frequently complex, they "can often be solved" through careful consideration of "the text, structure, history, and purpose of a regulation."²³⁵ Second, the agency's interpretation must be reasonable; for example, "it must come within the zone of ambiguity the court has identified *after* employing all its interpretive tools."²³⁶ Third, the agency's interpretation must represent the agency's "'authoritative' or 'official'" view and not an "ad hoc statement not reflecting the agency's views."²³⁷ Fourth, the agency's interpretation must reflect the agency's "substantive expertise."²³⁸ The basis for deference "ebbs when the subject matter of the dispute is distant from the agency's ordinary duties or falls within the scope of another agency's authority."²³⁹ Fifth and finally, the agency's interpretation must reflect its "fair and considered judgment."²⁴⁰

Kisor contains striking contrasts to *Billing*. Unlike *Billing*'s full-throated endorsement of the SEC's ability to conduct the "nuanced . . . evidentiary evaluations necessary to separate the permissible [securities activities] from

²³² See *id.* at 2414–17. Crucially, Chief Justice Roberts only voted for this portion of Justice Kagan's opinion, making it the only section receiving five votes. *Id.* at 2424 (Roberts, C.J., concurring in part).

²³³ *Id.* at 2415 (plurality opinion) ("First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. *Auer* does not, and indeed could not, go that far." (citations and internal punctuation omitted)).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 2415–16 (emphasis added).

²³⁷ *Id.* at 2416–17.

²³⁸ *Id.*

²³⁹ *Id.* (internal quotation marks and punctuation omitted).

²⁴⁰ *Id.* at 2417–18. "[M]erely 'convenient litigating position[s]' or 'post-hoc rationalization[s] advanced' to 'defend past agency action[s] against attack'" do not qualify. *Id.* Nor do interpretations that "'create unfair surprise' to regulated parties." *Id.* These situations could arise "when an agency substitutes one view of a rule for another"—meaning that deference is inapplicable when an agency construction conflicts with a prior one—or "without such an explicit interpretive change," including when an agency interpretation imposes retroactive liability on parties for longstanding conduct. *Id.* at 2418 (first citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); and then citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012)).

the impermissible,”²⁴¹ *Kisor*’s limits on agency deference suggest that the Supreme Court believes judges need to actively monitor most administrative decision-making processes.²⁴² The Court’s concerns span the practical—for example, protecting against unreasoned administrative decision-making and ensuring fairness to regulated parties when agencies suddenly change their positions—to the constitutional—for example, checking excessive delegated power to the executive branch and ensuring sufficient political accountability at expert agencies.²⁴³ Although Justice Kagan’s opinion expresses confidence in agencies’ ability to faithfully execute their congressionally delegated responsibilities, it concedes that the judiciary may need to check excessive applications of agency power.²⁴⁴ Justice Gorsuch makes this point more forcefully in his concurrence, warning that *Seminole Rock* and *Auer* “sit[] uneasily” with Article III’s delegation of judicial power to the federal courts and “creates a ‘systemic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.’”²⁴⁵

These considerations seemed an afterthought in *Billing*. In contrast to that decision’s warning that inconsistent outcomes from lower courts could arise in complex areas like securities law, *Kisor* marks the Court’s move toward a stricter view of separation-of-powers principles.²⁴⁶ *Kisor* also exemplifies the Court’s growing belief in lower courts’ ability to review agency decision-making, even in complex areas outside their technical or historical bailiwick. This belief partially explains why *Kisor* requires agencies’ interpretations to “implicate its substantive expertise” to obtain deference; it refuses to accord deference to agency decisions that “merely paraphrase the statutory language” rather than invoke “its expertise and experience.”²⁴⁷ It also suggests that the Court believes agencies increasingly issue regulations that govern activities extending beyond the traditional bounds of their statutory authorities. *Billing* reflects no such concern; it frequently invokes the SEC’s “considerable power to forbid, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect” of securities-related activities as a justification for the Com-

²⁴¹ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 280–81 (2007).

²⁴² *Kisor*, 139 S. Ct. at 2415–18.

²⁴³ See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 16 (2020); see also *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2595 (2019) (Breyer, J., concurring in part and dissenting in part) (noting that deference turns on whether a specific agency decision shows expertise and informed, thorough consideration, not simply because the decision represents a policy question or was made by a politically accountable actor).

²⁴⁴ *Kisor*, 139 S. Ct. at 2418.

²⁴⁵ *Id.* at 2425, 2437 (Gorsuch, J., joined by Thomas, Kavanaugh, & Alito, JJ., concurring).

²⁴⁶ *Billing*, 551 U.S. at 281.

²⁴⁷ *Kisor*, 139 S. Ct. at 2417, 2417 n.5 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)).

mission's application of that power in response to emerging securities practices.²⁴⁸

Unsurprisingly, commentators have invoked *Kisor*'s themes when opining on recent SEC rulemakings.²⁴⁹ Critics of the Commission's proposed climate-disclosure rule, for example, chastised the agency for "acting outside its authority and expertise."²⁵⁰ Others noted that the rule—which would require public companies to provide detailed disclosures on their material climate-related risks, greenhouse gas emissions, and existing targets or plans surrounding emission reductions²⁵¹—poses "serious questions about whether the SEC has the technical expertise to assess climate models and underlying assumptions used in companies' metrics and disclosures."²⁵² Still more drew distinctions between the SEC's traditional "experience and prowess" in setting corporate disclosure policies related to financial performance and its lack of "scientific expertise or experience" concerning how "threats, opportunities, and events from climate change could affect a company's business and financial statements."²⁵³

²⁴⁸ See *Billing*, 551 U.S. at 276–77 (discussing the SEC's "authority to supervise all of the activities here in question").

²⁴⁹ See *infra* notes 250–253 and accompanying text.

²⁵⁰ Ken Paxton et al., Comment Letter on Proposed Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132121-302606.pdf> [<https://perma.cc/62HV-AKEK>] (submitting comments on proposed rule on behalf of Attorneys General of Texas and eleven other states); see also, e.g., Indraneel Chakraborty, Comment Letter on Proposed Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132203-302721.pdf> [<https://perma.cc/H29R-4H6F>] ("Many have identified multiple flaws in these requirements, including the most basic points that the SEC is not well equipped with the requisite technical expertise to handle the type of data and modeling upon which disclosures would be based.").

²⁵¹ See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21, 334–35 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

²⁵² Kevin Cramer et al., Comment Letter on Proposed Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors (Apr. 5, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20122544-278541.pdf> [<https://perma.cc/M586-4DME>]; see also Ken Paxton et al., *supra* note 250 ("The SEC's newly claimed authority over GHG emissions and corporate governance of climate-related risks is beyond the agency's expertise and exceeds the SEC's statutory mandate to protect investors, facilitate capital formation, and foster fair, orderly, and efficient markets.").

²⁵³ See Andrew N. Vollmer, *The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules*, MERCATUS CTR. (Apr. 12, 2022), <https://www.mercatus.org/research/public-interest-comments/sec-lacks-legal-authority-adopt-climate-change-disclosure-rules> [<https://perma.cc/MC4M-LLB7>] ("The SEC and its staff of accountants, lawyers, and economists do not have scientific expertise or experience in these areas, in 'GHG intensity,' or in the indirect emissions upstream and downstream within a company's value chain that should be included in scope 3 GHG emissions. The past work of the SEC and its staff does not qualify them to review the reasonableness or accuracy of these disclosures and does not put them in a position to make reliable and trustworthy judgments that an enforcement investigation or charge should be initiated against a disclosing company.").

Going forward, agencies like the SEC can still expect their expertise to carry some weight in specific cases. As Chief Justice Roberts notes in his concurrence, deference remains appropriate where “[t]he agency thoroughly consider[s] the problem, offer[s] a valid rationale, br[ings] its expertise to bear, and interpret[s] the regulation in a manner consistent with earlier and later pronouncements.”²⁵⁴ *Kisor*, however, portends broader judicial trends whereby the Supreme Court narrowly interprets (1) the scope of agencies’ substantive expertise and (2) the circumstances where that expertise affects courts’ assessments of agencies’ regulatory choices.²⁵⁵

B. *West Virginia v. EPA*

The Supreme Court’s decision in *West Virginia v. EPA* (*West Virginia*) emerged from a tortured political tug-of-war. In 2015, the Environmental Protection Agency (EPA) adopted its so-called Clean Power Plan (CPP).²⁵⁶ The CPP sought to combat climate change by, among other measures, reducing carbon pollution from existing coal power plants and shifting electricity production to wind, natural gas, or solar sources.²⁵⁷ Shortly after the CPP went live, dozens of parties asked for an emergency stay.²⁵⁸ The U.S. Court of Appeals for the D.C. Circuit rejected this request, but the Supreme Court reversed, issued the stay, and prevented the CPP from taking effect.²⁵⁹ The D.C. Circuit heard arguments on the merits, but a change in presidential administrations took place before it could issue a ruling.²⁶⁰ The new administration asked the court to hold the litigation in abeyance pending the EPA’s reconsideration of the CPP.²⁶¹ The D.C. Circuit obliged and dismissed the petitions as moot.²⁶²

Three years later, the EPA repealed the CPP after concluding that the agency had issued the plan “in excess of its statutory authority.”²⁶³ Specific-

²⁵⁴ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring). These factors—and those articulated by Justice Kagan’s plurality opinion—bear a strikingly close resemblance to the factors announced in *Skidmore v. Swift & Co.*, which Justice Gorsuch advocated for in his concurrence. Compare 323 U.S. 134, 140 (1944) (holding that the weight a court should give an agency’s interpretation “depend[s] upon the thoroughness evident in [the interpretation’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”), with *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring) (“Overruling *Auer* would have taken us directly back to *Skidmore*.”).

²⁵⁵ *Kisor*, 139 S. Ct. at 2410–18 (plurality opinion).

²⁵⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2599, 2602 (2022).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2604.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

ly, the EPA found that the CPP conflicted with the agency's authority under Section 111 of the Clean Air Act, which empowered it to determine how best to reduce buildings' air pollutant emissions.²⁶⁴ The EPA concluded that Section 111 allowed the EPA to implement measures applying to power plants' physical premises but not industry-wide measures such as those contemplated in the CPP.²⁶⁵ In support of its reasoning, the EPA noted that CPP represented a "generation-shifting scheme" projected "to have billions of dollars of impact" that would have empowered the agency "to order the wholesale restructuring of any industrial sector' based only on its discretionary assessment" of factors like "cost" and "feasibility."²⁶⁶ This system did not align with the EPA's traditional understanding of its powers under the Clean Air Act.²⁶⁷ In its place, the EPA issued the Affordable Clean Energy Rule (ACE Rule), which gave states more discretion when setting their own emissions standards and gave power plants more flexibility in complying with those standards.²⁶⁸

After yet another change in presidential administration, the D.C. Circuit vacated the EPA's repeal of the CPP and the agency's issuance of the ACE Rule.²⁶⁹ The Supreme Court again reversed.²⁷⁰ After determining that the case presented a live issue even though neither the CPP nor the ACE Rule were in effect,²⁷¹ the Court concluded that the EPA's effort to make broad, industry-wide changes violated the "major questions" doctrine—shorthand for a judicially crafted rule requiring that Congress clearly state whether it intends to give an agency the power to make "decisions of vast economic and political significance."²⁷² The Court found that the EPA, through the CPP, sought to exercise "unprecedented power over American industry."²⁷³ Given the scope of

²⁶⁴ *Id.* at 2602. Specifically, Section 111 empowers the EPA to determine the "best system of emission reduction" that, taking into account cost, health, and other factors, it finds "has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

²⁶⁵ *West Virginia*, 142 S. Ct. at 2603–05 ("The Agency interpreted Section 111 as 'limit[ing] the BSER'—an acronym for the statute's reference to 'best system of emission reduction . . . adequately demonstrated,' see 42 U.S.C. § 7411(a)(1),—"to those systems that can be put into operation *at* a building, structure, facility, or installation.").

²⁶⁶ *Id.* at 2604–05 (quoting Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32523–29 (proposed July 8, 2019) (codified at 40 CFR pt. 60)).

²⁶⁷ *See id.*

²⁶⁸ *See generally id.* (discussing the Affordable Clean Energy rule).

²⁶⁹ *Id.* at 2606.

²⁷⁰ *Id.* at 2616.

²⁷¹ *Id.* at 2606–07. The Court observed that the government "vigorously defend[ed]" the CPP's legality, meaning it was not "absolutely clear" that the "allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 2607 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).

²⁷² *See generally id.* at 2607–16 (discussing the major questions doctrine).

²⁷³ *Id.* at 2612.

the EPA's claimed authority, the Court saw "little reason to think Congress assigned" decisions "of such magnitude and consequence" by statutory implication.²⁷⁴ Instead, the EPA needed to identify "clear congressional authorization" for its actions; Section 111's language, however, offered no such congressional endorsement.²⁷⁵

Though many aspects of *West Virginia* are noteworthy, four warrant special attention given their connection to the *Billing* test.

First, *West Virginia*'s views toward separation-of-powers principles contrast sharply with *Billing*'s enthusiasm for centralized agency decision-making. *West Virginia* notes that both "separation of powers principles and a practical understanding of legislative intent" cautioned against reading significant delegations of authority into ambiguous statutory text.²⁷⁶ That statement embodies the Court's baseline assumption that Congress does not normally intend to cede significant policymaking discretion to the executive branch. For that reason, *West Virginia* observes that the Court will approach agency assertions of "extravagant statutory power over the national economy" with "skepticism."²⁷⁷

Although the validity of this assumption remains debatable, its focus on agency outcomes—rather than how an agency arrives at those outcomes—represents a significant change in course.²⁷⁸ The Court's current reasoning ele-

²⁷⁴ *Id.* at 2612, 2616.

²⁷⁵ *See id.* at 2614, 2616.

²⁷⁶ *Id.* at 2609.

²⁷⁷ *Id.* (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *see also* *Biden v. Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (explaining that the major questions doctrine sets a baseline assumption that "a reasonable interpreter [of a statute] would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch"); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

²⁷⁸ Broad statutory language, for instance, can demonstrate congressional intent to give agencies flexibility to reinterpret existing authorities in response to new technologies and unforeseen circumstances. *See generally* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984) ("We find that the legislative history as a whole is silent on the precise issue before us. It is consistent, however, with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments."). It also reflects a practical and constitutional reality; the execution of laws necessarily includes some measure of policymaking discretion, especially as applied to legislation governing complex topics. *See Utility Air Regul. Grp.*, 573 U.S. at 327 ("The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration."). Justice Elena Kagan's dissent takes up these themes, claiming that Congress's use of "capacious terms" shows congressional intent to give an agency more discretion in fashioning tailored regulatory solutions. *West Virginia*, 142 S. Ct. at 2632 (Kagan, J., dissenting) (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)). The use of broad terms transcends the time of the statute's enactment, Justice Kagan writes, because "newness" in application "might be perfectly legitimate—even required." *Id.* at 2640. Still, this approach remains susceptible to attacks that its "common sense" approach to assessing statutory delegations relies too heavily on judges' policy preferences, notwithstanding efforts to cast itself as an exercise of "judicial modesty" that re-

vates formalist separation-of-powers concerns—particularly those between the legislative and executive branches—over most other interpretive principles, including those rooted in the statutory text. *Billing*, however, promotes a far different approach to separation-of-powers protections. Whereas *West Virginia* sought to protect against the executive branch’s encroachment on the legislative branch by effectively dictating how Congress must draft statutes, *Billing* sought to protect against the judiciary’s encroachment on both the executive and legislative branches.²⁷⁹ In this way, *Billing* views the judicial respect toward broad delegations of authority as promoting separation-of-powers protections—albeit different protections than those emphasized in *West Virginia*.

Second, *West Virginia* adopts an extremely narrow view of the EPA’s technical and policy expertise. Citing *Kisor*, the Court reasoned that the EPA had no “comparative expertise” in making technical and policy judgments about “system-wide . . . trends in areas such as electricity transmission, distribution, and storage.”²⁸⁰ It also quoted official EPA statements admitting that such expertise was “not traditionally needed in EPA regulatory development.”²⁸¹ Unsurprisingly, *Billing* and its predecessors take a different approach. These decisions express faith in the SEC’s ability to draw lines between proper and improper securities activities both now *and* in the future.²⁸² They also interpret the Exchange Act’s broad delegation of authority to the SEC as a congressional understanding that securities practices evolve over time and, consequently, that Congress intended the corresponding regulatory regime to evolve alongside them.²⁸³ *West Virginia* reflects no such understanding. Although this difference in treatment could turn differences between the Clean Air Act and the Exchange Act—or a recognition that the SEC, as an independent agency, is more insulated from politically motivated shifts in policy than a non-independent agency like the EPA—*West Virginia* suggests that the EPA’s long history of regulating environmental matters cautioned *against* upholding the CPP. In the Court’s view, the CPP represented a novel interpretation of the Clean Air Act that expanded its delegated authority into an area be-

spects Congress’s choice to use “expansive language” to create a “broad[] statutory design.” *Id.* at 2632–34. To combat these claims in *West Virginia*, Justice Kagan briefly identifies two “meaningful” statutory constraints on the EPA—that the agency needs to “[t]ake into account costs and nonair impacts” and “make sure the best system has a proven track record.” *Id.* at 2629. But Justice Kagan quickly invokes the EPA’s “broad authority” in the next sentence and never returns to these constraints. *Id.*

²⁷⁹ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (plurality opinion); *West Virginia*, 142 S. Ct. at 2587.

²⁸⁰ *West Virginia*, 142 S. Ct. at 2612 (citing *Kisor*, 139 S. Ct. at 2417).

²⁸¹ *Id.* (citing EPA, FISCAL YEAR 2016: JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMMITTEE ON APPROPRIATIONS 213 (2015)).

²⁸² *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 285 (2007).

²⁸³ *Id.* at 274.

yond the EPA's historical expertise (at least as divined by the *West Virginia* majority).²⁸⁴

Third, *West Virginia* and *Billing* express opposing attitudes toward agencies' ability to faithfully execute congressional commands. *Billing* believes that Congress can—and often does—delegate through broad statutory mandates so agencies can tailor appropriate solutions for emerging issues.²⁸⁵ For *Billing*, this belief holds true even when issues arise in new areas that nevertheless implicate these agencies' technical or policy expertise.²⁸⁶ It also embodies a judicial assumption that agencies can faithfully execute broad statutory mandates while remaining politically accountable. In contrast, *West Virginia* views novel applications of older statutory provisions as inherently suspect.²⁸⁷ The opinion looks skeptically on agencies' efforts to reconfigure a longstanding statutory scheme even if the law's language makes those efforts "colorable."²⁸⁸ Compared to *Billing*, *West Virginia* reflects a judicial belief that agencies *cannot* effectively meet statutory obligations absent clear guidance from Congress—a

²⁸⁴ See *West Virginia*, 142 S. Ct. at 2605, 2612 (noting that the EPA's "novel" view of its authority "was not only unprecedented; it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind" (quoting *MCI Telecomms. Corp. v. Am. Tele. & Tele. Co.*, 512 U.S. 218, 231 (1994) (alteration in original))); *id.* at 2614 ("[W]e cannot ignore that the regulatory writ [the] EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000))). Justice Kagan's dissent forcefully attacks this reasoning, arguing that the Court has only labeled agency exercises of authority as "anomalous" where the agency had "strayed out of its lane, to an area where it had neither expertise nor experience." *Id.* at 2636 (Kagan, J., dissenting). Justice Kagan's opinion also stresses that courts "must give agencies 'ample latitude' to revisit, rethink, and revise their regulatory approaches" even when the approach or underlying subject matter is "novel." *Id.* at 2640 (quoting *Brown & Williamson*, 529 U.S. at 157).

²⁸⁵ *Billing*, 551 U.S. at 274.

²⁸⁶ Cf. *id.* at 276–77 ("[T]he law grants the SEC authority to supervise all of the activities here in question. Indeed, the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage." (citing 15 U.S.C. §§ 77b(a)(3), 77j, 77z-2, 78o(c)(2)(d), 78i(a)(6), 78j(b))); *id.* at 282 ("[T]hese factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, i.e., results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages). And therein lies the problem.").

²⁸⁷ *West Virginia*, 142 S. Ct. at 2610–13.

²⁸⁸ *Id.* at 2609 (noting that even where regulatory assertions have "a colorable textual basis," "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue . . . made it very unlikely that Congress had actually done so" (quoting *Brown & Williamson*, 529 U.S. at 133) (alteration in original))).

divergent baseline assumption that the *West Virginia* dissent highlights at length.²⁸⁹

Fourth, *West Virginia* dovetails with other administrative law cases questioning broad delegations of administrative authority. In *Gundy v. United States*, for example, a plurality opinion authored by Justice Kagan and a concurring opinion from Justice Alito combined to hold that the Sex Offender Registration and Notification Act (SORNA) did not violate the nondelegation doctrine.²⁹⁰ Though the plurality avoided an outcome casting doubt on the constitutionality of much of the modern federal government, it nevertheless reflected the Court's increasing skepticism toward agency discretion.²⁹¹ In staving off the nondelegation challenge, the plurality resorted to reading SORNA narrowly. The plurality reasoned that Congress had not given the Attorney General discretion to decide *whether* to make the registration requirements retroactive, but rather to do so "as soon as feasible" (a phrase that did not appear in SORNA).²⁹² To arrive at this result, the plurality opinion implicitly applied the constitutional avoidance canon of construction, whereby the Court addresses nondelegation challenges by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."²⁹³ But "such a narrowing construction is in considerable tension with . . . the notion that administrative agencies receive deference if they seek to interpret their statutory authority broadly, yet permissibly."²⁹⁴ *Gundy* and *West Virginia* therefore reveal how the Court increasingly favors nondelegation-esque canons of construction—in substance if not in name—particularly where the underlying subject matter raises uniquely important policy considerations or practical con-

²⁸⁹ See generally *id.* at 2636–41 (Kagan, J., dissenting) (discussing precedents surrounding agency delegations); see also, e.g., *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 663, 665 (2022) (per curiam) (finding that the major questions doctrine applied where the statute provided OSHA with broad authority to create emergency standards in the workplace, specifically where "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" (quoting 29 U.S.C. § 665(c)(1))); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486, 2489 (2021) (per curiam) (holding that the Center of Disease Control and Prevention lacked authority to impose a nationwide moratorium on evictions in order to combat the spread of COVID-19, observing that Congress did not clearly grant the agency authority over such a matter of "vast 'economic and political significance'").

²⁹⁰ 139 S. Ct. 2116, 2121–23 (2019) (plurality opinion). Specifically, the Court reviewed a section of the statute conferring authority on the Attorney General to determine whether to apply its registration requirement retroactively. *Id.*

²⁹¹ See *id.* at 2130 (arguing that if the SORNA provision was unconstitutional, "then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs").

²⁹² See *id.* at 2123 (citing *Reynolds v. United States*, 565 U.S. 432, 442–43 (2012)).

²⁹³ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

²⁹⁴ Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 174 (2019).

sequences.²⁹⁵ To that end, *Gundy* and *West Virginia* also suggest that expertise-based justifications for broad statutory delegations to administrative agencies will find little support at the Court in the immediate term.²⁹⁶

Taken together, these observations expose fundamental disagreements about who should bear responsibility for making policy-related decisions and how those decisions should get made. Under *West Virginia*, the major questions doctrine encourages the executive branch to faithfully execute express congressional commands; for example, agencies have less leeway when interpreting and applying vague statutory terms and will require more bounded statutory commands from Congress. The doctrine also promotes political accountability; for example, more policy decisions will come from Congress, which the Court views as more politically accountable than faceless administrative bureaucrats.²⁹⁷ *Billing*, however, views agencies as better positioned than courts when making policy judgments that resolve regulatory ambiguities—ambiguities that will still exist under a robustly applied major questions doctrine.²⁹⁸ *Billing* also reflects an implicit understanding that expert agencies remain politically accountable (at least more so than courts and juries) through statutory design,²⁹⁹ presidential supervision,³⁰⁰ the citizenry’s ability to drive policy changes through elections,³⁰¹ and notice-and-comment rulemaking.³⁰²

²⁹⁵ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (“Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.”).

²⁹⁶ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); see also Jonathan D. Urick, Note, *Chevron and Constitutional Doubt*, 99 VA. L. REV. 375, 376 (2013) (outlining the “unsettled” conflict between *Chevron* and constitutional avoidance).

²⁹⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–09 (2022).

²⁹⁸ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 281–82 (2007).

²⁹⁹ See JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 1–17 (2002) (discussion how legislatures’ structural features affect bureaucratic discretion).

³⁰⁰ Following *West Virginia*, some courts have doubted whether even the President remains sufficiently accountable to justify broad statutory delegations to the executive branch. See generally *Georgia v. President of the U.S.*, 46 F.4th 1283, 1297 (11th Cir. 2022) (holding that the President likely lacked authority to issue an Executive Order pursuant to the Procurement Act, reasoning that “no statutory provision contemplate[d] the power to implement an across-the-board vaccination mandate”).

³⁰¹ See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (noting that the President is electorally accountable to the entire nation).

³⁰² See, e.g., Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63 (1995) (identifying agency procedures as a cost that “reduce[s] independence”); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 257 (1987) (noting how “greater delegation allows agencies greater opportunities to pursue their own goals,” which “only helps the agencies, not the political principals”).

Similarly, although *Billing* implies that another means of political control over agency decision-making—ex post reviews by Congress³⁰³—can constrain “the overzealous pursuit of agency goals,”³⁰⁴ *West Virginia* implies that the Supreme Court now views such measures as insufficient from both a practical and separation-of-powers perspective.³⁰⁵ This view tracks with historical efforts to limit the power of agencies by shifting power—and responsibility—to Congress. Then-Judge Kavanaugh, for example, argued that “ambiguity-dependent” principles of statutory interpretation leave too much scope for judicial discretion and fail to promote the “neutral, impartial rule of law.”³⁰⁶ But by withdrawing decision-making authority from agencies in this manner and by dictating how Congress can empower agencies with such authority going forward, *West Virginia* necessarily endows the least politically accountable branch—the judiciary—with at least some measure of policymaking authority over matters of “vast economic and political significance.”³⁰⁷ Though a more demanding major questions doctrine nominally addresses then-Judge Kavanaugh’s concerns, *West Virginia* actually elevates concerns related to *where* judges impose their discretion rather than *whether* they exercise that discretion at all.

Likewise, despite its concern with preventing excessive aggregations of policymaking power, *West Virginia* and its ilk effectively encroach on the other branches’ constitutional prerogatives by resetting the governmental rulebook. This reshuffling has led some scholars to lament that the Court “is consolidating its power, systematically undercutting any branch of government, federal or state, that might threaten that power.”³⁰⁸ While this view carries facial appeal—especially among legal realists—it remains, at least for now, too reductive. Any constitutional form of government “requires some body with final say over the interpretation of the Constitution,” and the Framers understood the value of leaving that interpretation “to judges with life tenure, who would not have to run for reelection, thus removing the immediate political ad-

³⁰³ Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173, 179 (1998) (“Generally speaking, the cure for bureaucratic drift is ex post control over bureaucratic behavior by congressional subcommittees, oversight by specialized agencies such as the Congressional Budget Office and the General Accounting Office, and reliance on interest group notification.”).

³⁰⁴ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–80 (2001) (surveying congressional, intra-agency, interest-group, judicial, and presidential means by which agencies priorities are affected and influenced).

³⁰⁵ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

³⁰⁶ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2129, 2154 (2016) (reviewing ROBERT A. KATZMAN, *JUDGING STATUTES* (2014)).

³⁰⁷ *West Virginia*, 142 S. Ct. at 2605–08.

³⁰⁸ See, e.g., Lemley, *supra* note 38, at 113.

vantages from consideration in resolving” such questions.³⁰⁹ As described above—and taking the Justices at their word—*West Virginia* furthers this tradition; it represents another decision in a long line of cases policing the boundaries between the branches.³¹⁰ Although plausible that the Court could pursue an imperialist bent in future administrative law cases, existing opinions suggest something less nefarious at play.

III. FUTURE OF THE *BILLING* TEST AND SIMILAR DOCTRINES

The Supreme Court’s recent decisions raise questions about whether this Court would adhere to the expertise-based rationale accepted in *Billing*.³¹¹ Section A of this Part discusses whether the *Billing* test remains viable after these decisions.³¹² Section B considers whether the *Billing* test has worked.³¹³ Section C considers how to reconcile and reshape the *Billing* test to meet the practical and constitutional concerns raised in recent jurisprudence.³¹⁴ Finally, Section D considers the impact that approach will have on litigation brought under Rule 10b-5.³¹⁵

A. *The Billing Test’s Continued Viability*

Kisor v. Wilkie and *West Virginia v. EPA* raise questions about core premises underlying the *Billing* test.³¹⁶ As a result, lower courts seem poised to narrow the circumstances where implied antitrust immunity applies. *Billing* and its precedents, for example, give considerable respect to the SEC’s comprehensive regulatory authority under the securities law (*Billing* Factor #1).³¹⁷ In contrast, *Kisor* and *West Virginia* will encourage lower courts to employ more searching reviews into whether clear statutory language supports the SEC’s assertion of regulatory authority over the activity at issue.³¹⁸ This new ap-

³⁰⁹ See Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in U.S. Constitutional Democracy*, 86 TUL. L. REV. 181, 184 (2011).

³¹⁰ See *West Virginia*, 142 S. Ct. at 2609 (citing cases).

³¹¹ 551 U.S. 264, 281–82 (2007); see *supra* Part II.

³¹² See *infra* notes 317–321 and accompanying text.

³¹³ See *infra* notes 322–384 and accompanying text.

³¹⁴ See *infra* notes 385–389 and accompanying text.

³¹⁵ See *infra* notes 390–399 and accompanying text.

³¹⁶ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (plurality opinion); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). These opinions also stand in tension with the securities laws’ broader “belief in the efficacy of expert management of complex economic processes.” See Mahoney, *supra* note 125, at 7 (discussing how the Exchange Act’s policy of exchange self-regulation valued “regimentation over competition”).

³¹⁷ See, e.g., *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 276 (2007) (“[T]he SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage.”).

³¹⁸ See *West Virginia*, 142 S. Ct. at 2608 (“[O]ur precedent teaches that there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and breadth of the authority that

proach would necessarily narrow courts' ensuing evaluations into whether the SEC routinely exercises that authority (*Billing* Factor #2): If the SEC does not have sufficiently established statutory authority to regulate the activity, how can courts assess whether the Commission routinely exercise that authority? Lower courts will also likely change how they assess the risk of increasing conflicts between antitrust and securities laws (*Billing* Factor #3). The Supreme Court's de facto reassertion of authority over how Congress delegates authority and how agencies exercise that authority (even when the underlying claims arise out of technically complex regulatory regimes where courts retain no comparative expertise) suggests that lower courts will take up these issues—and afford less respect to the SEC's views—despite the increased risk. Viewed together, these decisions foreshadow a far narrower *Billing* test in the short-to-medium term and an overruling at the Supreme Court—either by express decision or implicit disuse³¹⁹—in the long term.³²⁰

[the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (alteration in original)); *Kisor*, 139 S. Ct. at 2416 ("[N]ot every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.").

³¹⁹ Some scholars have argued that the Supreme Court has taken a similar approach to *Chevron* deference. See, e.g., Cass R. Sunstein, *Chevron Without Chevron*, 2018 SUP. CT. REV. 59, 60 (2019) ("It seems clear that *Chevron* is entering a period of serious reconsideration. In the fullness of time, it might be seriously qualified or even abandoned."); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1868 (2015) (describing *Chevron*'s demise as a doctrine). These warnings seem prescient, as the Supreme Court will revisit *Chevron* deference—and likely cast further doubt on the persuasive power of administrative expertise—shortly after this Article goes to print. *Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (May 1, 2023) (No. 22-451).

³²⁰ These decisions also call into question other rules of decision invoking or relying on agency expertise. In *Thunder Basin Coal Co. v. Reich*, for example, the Supreme Court established a three-pronged test for determining whether Congress intended to exclude certain claims from judicial review before completion of the administrative process. 510 U.S. 200, 212–13 (1994). Under that test, courts assume that a respondent's claim needs to funnel through the administrative proceedings dictated by the relevant statutory scheme unless (1) doing so would "foreclose all meaningful judicial review"; (2) the claim is "wholly 'collateral'" to the agency's review scheme; and (3) the claims are "outside the agency's expertise." *Id.* Courts have taken different views on this last factor as applied to the SEC. Some have interpreted the Commission's expertise narrowly, and reasoned that claims "present[ing] only 'standard questions of administrative law, which the courts are at no disadvantage in answering,'" do not satisfy the *Thunder Basin* requirements. *Cochran v. SEC*, 20 F.4th 194, 207–08 (5th Cir. 2021) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010)), *cert. granted*, 142 S. Ct. 2707 (May 16, 2022) (No. 21-1239). Others have advised that courts should instead assess expertise by looking at the overall case—a distinctly *Billing*-esque argument that evokes respect in the SEC's substantive expertise and evinces trust in the Commission's ability to separate permissible securities activities from impermissible securities fraud (without courts needing to render unnecessary rulings). See, e.g., *Jarkesy v. SEC*, 803 F.3d 9, 29 (D.C. Cir. 2015) (holding that Congress implicitly precluded district court jurisdiction over constitutional claims arising out of an

B. *Has the Billing Test Worked?*

The practical implications of the Supreme Court's analytical shift remain murky but nevertheless significant. *Billing*, for example, effectively treats antitrust and securities laws as alternatives rather than complements.³²¹ By consequence, the enforcement of competition-related policy goals in securities markets largely reflects the SEC's rulemaking and supervisory choices.³²² This approach, however, casts the SEC as a primary antitrust enforcer despite having a statutory mission whose core aims stand somewhat in tension with competitive principles.³²³ The SEC's oft-repeated three-part mandate requires it to protect investors, maintain fair and efficient markets, and facilitate capital formation.³²⁴ Congress also instructs the SEC to "consider, in addition to the protection of investors, whether [an] action will promote efficiency, *competition*,

administrative proceeding absent exhaustion of administrative remedies, noting that the SEC's "expertise 'can otherwise be brought to bear on'" the underlying dispute by, among other things, "offer[ing] an interpretation of the securities laws in the course of the proceeding that might answer or shed light on" the constitutional claim). The Supreme Court recently expressed support for the former line of decisions. *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 901 (2023) (observing that *Thunder Basin*'s "second and third [factors] reflect in related ways the point of special review provisions—to give the agency a heightened role in the matters it customarily handles, and can apply distinctive knowledge to"). In holding that the SEC's administrative process was not amenable to so-called "structural" constitutional challenges that are "collateral" to any Commission orders or rules, the Court stated bluntly that such claims "have nothing to do with the enforcement-related matters the Commission[] 'regularly adjudicate[]'" and are divorced from the agency's "competence and expertise." *Id.* at 904–05 (first quoting *Elgin v. Dep't of Treas.*, 567 U.S. 1, 22 (2012); and then quoting *Free Enter. Fund*, 561 U.S. at 491 (alteration in original)).

³²¹ *Billing*, 551 U.S. at 279. Then-judge Stephen Breyer—*Billing*'s author—developed this view in a 1987 law review article, noting that "antitrust is not another form of regulation" but "an *alternative* to regulation and, where feasible, a better alternative." Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1007 (1987). Others have taken different approaches. *See, e.g.*, *N. Nat. Gas Co. v. FPC*, 399 F.2d 953, 959 (D.C. Cir. 1968) (stating that antitrust and securities laws are "two forms of economic regulation" that "complement each other").

³²² *See* Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922, 1943 (2018) (stating that the enforcement of competition-related policy goals has "depend[ed] on the nature of the relevant rules, the [SEC]'s commitment to enforcement, and the kinds of sanctions the [Commission] can impose").

³²³ *See* Kyle Langvardt & James Fallows Tierney, *On "Confetti Regulation": The Wrong Way to Regulate Gamified Investing*, 131 YALE L.J. F. 717, 739–40 (2022) (noting how "[c]ompetitive pressure may channel innovation" toward products with "nonsalient . . . attributes" for certain classes of investors); *see also* Robert Pozen, *Competition and Regulation in Stock Markets*, 73 MICH. L. REV. 317, 322 (1974) ("Conflicts between these two public policies [promotion of a competitive economy under antitrust laws and regulation of stock transactions under the Exchange Act] are often difficult to resolve.").

³²⁴ *See, e.g.*, SEC, THE ROLE OF THE SEC, Mission, <https://www.sec.gov/about/mission> [<https://perma.cc/FZN9-FBN3>].

and capital formation” when enacting new rules and regulations.³²⁵ But this balancing act proves easier in theory than in practice. Although the SEC may account for certain *types* of competition-related considerations (for example, those related to investor pricing and fees), it does not necessarily follow that the Commission—or the securities laws—adequately accounts for other types of anticompetitive harm falling within the ambit of antitrust law (for example, collusion, consolidation, and exclusionary policies and practices).³²⁶

Other organizational characteristics also hamper the SEC’s ability to pursue certain antitrust policy goals. Like other regulators, the SEC adjusts gradually to emerging market developments, making “regulation more likely than antitrust to outlast the problems it was implemented to solve.”³²⁷ Similarly, “[a]lmost any regulatory regime will develop a constituency, armed with congressmen and self-interested bureaucrats,” meaning “regulation almost always will be very difficult to dislodge, even if it proves mistaken.”³²⁸ On one level, entrenched regulation may promote artificially high barriers to entry, inhibit the development of new products and services, lead to suboptimal pricing of existing products and services, and worsen long-run investor welfare. On another level, such regulation could embed other outdated or artificially low barriers to entry and exit—thereby inhibiting an industry’s long-term incentives to address systemic issues, manage risk, address externalities, and protect consumers.³²⁹ Antitrust law may therefore provide a comparatively flexible mechanism to address the former set of concerns—particularly in highly inelastic regulatory regimes—during periods of deregulation or rapid technological change.³³⁰ In this scenario, regulators can focus their efforts on the other side of the coin—excessively low barriers to entry that, for securities markets, can

³²⁵ See 15 U.S.C. §§ 77b(b) (Securities Act of 1933) (emphasis added), 80a-2(c) (Investment Company Act of 1940) (emphasis added), 80b-2(c) (Investment Advisor Act of 1940) (emphasis added).

³²⁶ Indeed, some commentators have asked whether secondary trading markets are *too* competitive. See, e.g., BARR ET AL., *supra* note 83, at 578–79 (“An intriguing question . . . is whether the 1975 amendments [to the Exchange Act] might have led to excessive competition in trading markets, evidenced by both socially wasteful investments in high-frequency trading and reduced liquidity through extreme fragmentation.”).

³²⁷ See Shelanski, *supra* note 322, at 1952–53.

³²⁸ See Michael Boudin, *Regulation and Competition*, 49 U. CHI. L. REV. 1098, 1106 (1982) (reviewing STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982)).

³²⁹ See Bryant Cannon & Hannah Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA HIGH TECH. L.J. 23, 34 (2015) (“While low-transaction costs create low barriers to entry and permit high market participation, the higher number of participants in the new market comes at the price of shedding market safeguards.”).

³³⁰ See Shelanski, *supra* note 322, at 1958 (“Overall, the arguments in the various policy debates surrounding competition policy are consistent with using antitrust enforcement as a countercyclical force to deregulation.”); see also Shelanski, *supra* note 48, at 727 (discussing the balance between regulation and antitrust).

encourage market actors to pursue short-term incentives at the expense of investor protection and long-term efficiency.

Changes in exchanges' structures, business models, and economic functions further highlight antitrust law's possible salience to many financial market activities. Just three corporations—InterContinental Exchange, Nasdaq, Inc., and CBOE Global Markets—own seventeen of the country's twenty-four public equities exchanges and together control nearly ninety-five percent of exchange-based trading.³³¹ As for-profit entities, these exchanges have strong incentives to engage in profit-maximizing behavior.³³² Although these structural characteristics have encouraged higher levels of stock price and service fee competition between market venues, exchanges nevertheless retain significant discretion when setting other trading platform policies. Consider the *City of Providence* case. Many trading venues offer rebates to firms who send liquidi-

³³¹ Of these twenty-four registered exchanges, InterContinental Exchange owns five (NYSE, NYSE Arca, NYSE Chicago, NYSE American, and NYSE National), NASDAQ owns six (NASDAQ BX, NASDAQ GEMX, NASDAQ ISE, NASDAQ MRX, NASDAQ PHLX, and the Nasdaq Stock Market), and CBOE Global Markets owns six (CBOE Exchange, CBOE BYX Exchange, CBOE BZX Exchange, CBOE C2 Exchange, CBOE EDGA Exchange, and CBOE EDGX Exchange). See *Self-Regulatory Organization Rulemaking*, SEC, <https://www.sec.gov/rules/sro> [<https://perma.cc/Q9MP-UK8T>]; see also Robert J. Jackson, Jr., SEC Comm'r, Speech: Unfair Exchange: The State of America's Stock Markets (Sept. 19, 2018), <https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets> [<https://perma.cc/5K4B-GJL2>] (discussing inequities in the current market system). Other areas of the securities industry also raise competition-related questions. Only three credit-rating agencies are responsible for rating nearly all debt securities in the United States. Emily Guy Birken & Benjamin Curry, *Understanding Bond Rating Agencies*, FORBES ADVISOR (Aug. 11, 2021), <https://www.forbes.com/advisor/investing/bond-rating-agencies/> [<https://perma.cc/88GU-ECDA>]. Some SEC officials have also suggested that prices charged by investment banks for initial public offerings have remained static for many years. See Robert J. Jackson, Jr., SEC Comm'r, Speech: Competition: The Forgotten Fourth Pillar of the SEC's Mission (Oct. 11, 2018), <https://www.sec.gov/news/speech/speech-jackson-101118> [<https://perma.cc/8459-CD73>].

³³² Starting in the late 1990s, most major stock exchanges converted from mutually owned not-for-profit entities into private corporations organized under general corporate law—a process called “demutualization.” See Stavros Gadinis & Howell E. Jackson, *Markets as Regulators: A Survey*, 80 S. CAL. L. REV. 1239, 1257 (2007); see also Jonathan R. Macey & Maureen O'Hara, *From Markets to Venues: Securities Regulation in an Evolving World*, 58 STAN. L. REV. 563, 585 (2005) (“As exchanges convert to become profit-seeking firms . . . the gains of the few turn into the profits of the corporation.”). Nasdaq, for example, explains that its business model contains a significant risk factor because it simultaneously owes “self-regulatory obligations and also operate[s] for-profit businesses.” Nasdaq, Inc., Annual Report (Form 10-K) 27 (Feb. 23, 2022). But Nasdaq warns that “these two roles may create conflicts of interest,” suggesting that its profit motive may detract from its “obligations to regulate . . . and ensure compliance with applicable law and rules of its markets.” *Id.*; see also Cboe Global Markets, Inc., Annual Report (Form 10-k) 6 (Feb. 18, 2022) (noting potential difficulties in “managing potential conflicts between our regulatory responsibilities and our for-profit status”); Intercontinental Exchange, Inc., Annual Report (Form 10-K) 24 (Feb. 3, 2022) (explaining that the “for-profit exchanges’ goal of maximizing shareholder value might contradict the exchanges’ regulatory and self-regulatory responsibilities”).

ty-providing orders to their trading books.³³³ Exchanges also sell so-called “co-location” services, where traders seeking a speed-based advantage can locate their computer servers next to the exchanges’ systems.³³⁴ They also offer direct data feeds that enable select customers to obtain trade data even before it is publicly disseminated.³³⁵ Others offer enriched data feeds—sometimes called “depth-of-book” data feeds—where sophisticated subscribers can purchase more information than gets sent to public data feeds.³³⁶ HFT firms value this information—which “indicates the degree of market interest beyond the quoted prices”—and exchanges often price these services accordingly (and potentially to the exclusion of less technically sophisticated investors).³³⁷ And many trading venues offer specialized order types that, along with high technical barriers to their use, contain features favoring HFT firms.³³⁸

In response to these criticisms, some observers argue that exchanges act as multi-sided platforms, competing with each other and with off-exchange trading platforms across each business line (trading, data, and co-location services).³³⁹ Under this view, “competition is properly understood as being be-

³³³ Memorandum from SEC Comm’n Div. of Trading & Mkts. to SEC Mkt. Structure Advisory Comm. (Oct. 20, 2015), <https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf> [<https://perma.cc/88FT-EHJD>]. Most exchanges and non-exchange trading venues use fee structures where they offer a per-share rebate to their members as an incentive for placing resting liquidity-providing orders on their trading system. *Id.* “If an execution occurs, the liquidity providing ‘maker’ receives a rebate, and the ‘taker’ that executes against that resting order pays a fee to the market.” *Id.*

³³⁴ Michael A. Goldstein, Pavitra Kumar & Frank C. Graves, *Computerized and High-Frequency Trading*, 49 FIN. REV. 177, 178 n.1 (2014). Co-location facilitates latency arbitrage trading strategies, where market participants engage in a zero-sum race to be first in line to buy or sell a security at an advantageous (often outdated) price. *See id.* at 188; David Gaffen, *Measuring Arbitrage in Milliseconds*, WALL ST. J. (Mar. 9, 2009), <https://www.wsj.com/articles/BL-MB-5348> [<https://perma.cc/2QPP-5JJM>].

³³⁵ *See* Steven R. McNamara, *The Law and Ethics of High Frequency Trading*, 17 MINN. J.L. SCI. & TECH. 71, 110–11 (2016) (“Direct data feeds are the exchanges’ product Data is released directly to clients at precisely the same time that it is sent to the [public data feeds]; given the inherent delays in transmission and processing by the [public data feeds], a direct data feed is therefore a few milliseconds ahead of the [public data feeds].”).

³³⁶ *See id.* at 111; *see also* THEMIS TRADING LLC, *Stop the Press. Exchanges See No Unfairness!*, (Sept. 27, 2012), <https://blog.themistrading.com/2012/09/stop-the-press-exchanges-see-no-unfairness/> [<https://perma.cc/N6CW-LWV9>] (“We all know a few things about the Stock Exchanges enriched data feeds. We all know they have more information—like order IDs, cancel replace information, order identifiers and modifiers, and of course hidden order information.”).

³³⁷ *See* BARR ET AL., *supra* note 83, at 581.

³³⁸ *See* McNamara, *supra* note 335, at 117 (noting that trading venues often allow HFT firms “to jump the queue in certain situations that enable them to trade or collect a liquidity rebate in a risk-free manner”).

³³⁹ *See* Ranier Schwabe, *Platform Competition and the Regulation of Stock Exchange Fees*, NAT’L L. REV. (June 9, 2022), <https://www.natlawreview.com/article/platform-competition-and-regulation-stock-exchange-fees> [<https://perma.cc/DB8J-HGWK>]. Currently, equity trading is dispersed across the exchanges, thirty-three alternative trading systems, and numerous broker-dealer internalizers and wholesalers. *See Form ATS-N Filings and Information*, SEC, <https://www.sec.gov/>

tween platforms . . . that balance the needs of consumers,” meaning deviations from competitive pricing in individual product or service lines does not necessarily reveal a lack of overall competition.³⁴⁰ Instead, these products and services are linked through positive liquidity-based externalities. As traders increase the amount of market data they purchase from a specific exchange, it decreases uncertainty about an order execution’s price, likelihood, or timing.³⁴¹ Consequently, offering more market data for purchase makes trading on that platform more attractive. In turn, traders will send more order flow to that platform as opposed to other trading venues. These observers therefore argue that this multidimensional competition—overseen by the SEC, which bears responsibility for ensuring that all associated fees remain reasonable³⁴²—“can discipline stock exchanges’ overall pricing and profitability.”³⁴³

Although these interrelationships may induce price and fee competition under certain conditions, this argument does not fully account for potential anti-competitive externalities related to trading venue concentration and collusion. The current operating structure, for example, incentivizes these trading venues to adopt rules and policies favoring (and monetizing) technically sophisticated customers over other investors.³⁴⁴ As Professor Herbert Hovenkamp recently explained, “those who stand to gain from the preservation of high profits are individually larger, less numerous, and have a common set of interests in the preservation of profit.”³⁴⁵ This phenomenon has turned judicial biases against antitrust enforcement “into an important vehicle for rent seeking at the expense of consumers, labor, and others who stand to profit from a more competitive economy.”³⁴⁶ As applied here, current exchange dynamics allow a select segment of high-volume traders to use their economic and political power to perpetuate preferred market practices even if those practices have a negligible (or detrimental) effect on market efficiency or investor protection.³⁴⁷

divisions/marketreg/form-ats-n-filings.htm [https://perma.cc/G9NQ-A24R] (compiling list of alternative trading systems registered with the SEC); *U.S. Equities Market Volume Summary*, CBOE GLOB. MKTS., INC., https://www.cboe.com/us/equities/market_share/ [https://perma.cc/5YYQ-78GV].

³⁴⁰ Schwabe, *supra* note 339.

³⁴¹ Marc Rysman, *Stock Exchanges as Platforms for Data and Trading* 3 (2019), <https://www.sec.gov/files/rules/sro/nysearca/2019/34-87795-ex3b.pdf> [https://perma.cc/EAD8-W6NS].

³⁴² 15 U.S.C. § 78k-1(c)(1)(C)–(D); *see also* 17 C.F.R. § 242.603(a) (2022) (requiring that terms related to information distribution be fair and reasonable).

³⁴³ *See* Schwabe, *supra* note 339.

³⁴⁴ *See* Jaime Lizarraga, *Statement: Increasing Competition and Improving Transparency in U.S. Equity Markets*, SEC (Dec. 14, 2022), <https://www.sec.gov/news/statement/lizarraga-rule-605-20221214> [https://perma.cc/UXP2-CZWU] (noting concern about inequities surrounding retail investor participation in equities markets “relative to other market participants with substantial market power”).

³⁴⁵ Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. PA. J. BUS. L. 293, 349 (2022).

³⁴⁶ *Id.*

³⁴⁷ *See generally* BARR ET AL., *supra* note 83, at 581 (noting how exchanges “have an incentive to price [market data] information at a premium, thereby making depth-of-book data available only to

Static maker-taker fee systems provide a useful case study. Under this system, trading venues offer rebates to traders who “make” liquidity by submitting resting limit orders to their order book and charge fees to traders “taking” liquidity through submitting market orders that execute against those resting limit orders.³⁴⁸ Though seemingly designed to increase liquidity levels, evidence suggests that HFT firms prefer—and generally trade in—securities that are already highly liquid (for example, those with heavy trading volumes).³⁴⁹ Static maker-taker fee systems—which base rebates and fees on the number of shares traded rather than the total amount traded—therefore perpetuate liquidity biases favoring HFT firms. Securities that are already highly liquid—usually those of companies with large market capitalizations and high prices—become more liquid. Meanwhile, securities that are already illiquid—usually those of companies with small capitalizations and low prices—remain so. In the long run, these biases may induce artificially low costs of capital for large firms relative to their market liquidity levels and may artificially raise the costs of capital for smaller firms.³⁵⁰

Some critics also cite the SEC’s historically deferential approach to oversight of exchange activities as further cause for questioning Commission efforts to accommodate competition-based policies.³⁵¹ Under the Exchange Act, national securities exchanges are considered self-regulatory organizations (SROs).³⁵² Acting as SROs, exchanges regulate member-firms by writing rules governing their conduct, examining their activities, and disciplining them for improper behavior.³⁵³ In turn, the SEC oversees SROs by, among other things, inspecting SROs and reviewing SRO-proposed rule changes.³⁵⁴ Although SROs remain private entities, they spring from congressional delegations of

investors with the financial wherewithal to shoulder its costs”); Press Release, SEC, SEC Adopts Requirements to Ensure Public Notice, Comment, and Approval Prior to Effectiveness of NMS Plan Fees (Aug. 19, 2020), <https://www.sec.gov/news/press-release/2020-188#:~:text=The%20new%20procedures%20require%20public,changed%20fee%20can%20be%20charged> [<https://perma.cc/SA2U-CJUA>] (announcing revision of SEC rules to ensure that the Commission reviews and approves changes in core market data fees).

³⁴⁸ See, e.g., Stanislaw Dolgoplov, *The Maker-Taker Pricing Model and Its Impact on the Securities Market Structure: A Can of Worms for Securities Fraud?*, 8 VA. L. & BUS. REV. 231, 270 (2014).

³⁴⁹ See Morelli, *supra* note 2, at 103.

³⁵⁰ See *id.* at 102 (discussing selective liquidity concerns associated with HFT).

³⁵¹ See generally Hammond, *infra* note 354, at 1710 (“A regulated industry that regulates itself has numerous incentives to dampen participation of statutory beneficiaries, engage in anticompetitive conduct toward weaker members, and ratchet regulatory law toward the lowest common denominator.”).

³⁵² See 15 U.S.C. § 78c(a)(26) (defining “self-regulatory organization”). As relevant here, self-regulatory organizations include “any national securities exchange, registered securities association, or registered clearing agency.” *Id.*

³⁵³ See generally Kirstin N. Johnson, *Governing Financial Markets: Regulating Conflicts*, 88 WASH. L. REV. 185, 201–04 (2013) (discussing the self-regulatory model for financial markets).

³⁵⁴ See generally Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1734–39 (2016) (discussing the relationship between SROs and the SEC).

power; they implement authority delegated to the SEC under the Exchange Act.³⁵⁵ As a result, the SRO's actions are considered the SEC's actions.³⁵⁶

Policymakers favor SRO arrangements for their political and economic expediency.³⁵⁷ Regulated entities are more likely to accept regulation if they have a say in its design and administration.³⁵⁸ Additionally, regulators could not themselves “assume the responsibilities of their SROs without extraordinary increases in their staffing and budgets.”³⁵⁹

Yet SROs' strengths parallel their weaknesses. SROs tend to promote industry self-preservation by adopting policies that protect the industry's credibility.³⁶⁰ As a result, SROs may adopt facially comprehensive policies that mask inadequate enforcement of existing measures, ignore anticompetitive conduct toward weaker members, and promote suboptimal wealth transfers between investors and SRO members.³⁶¹ Observers also worry that shifting

³⁵⁵ See Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 543 (2022).

³⁵⁶ Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 175–76 (1995). The 1975 Amendments gave the SEC more power over SROs, for example, by giving the SEC the power to approve SRO rule changes and the ability to require an SEC-supervised SRO to enact or modify any rule as the SEC deems necessary. *See generally* Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (amending the Securities Exchange Act to grant additional power over SROs). In other words, the 1975 Amendments “effectively entwined the SEC and its SROs.” *See* Edwards, *supra* note 355, at 559.

³⁵⁷ Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 466 (2011) (explaining that SROs are “largely a product of political compromise and economic expediency”).

³⁵⁸ *See* Michael, *supra* note 356, at 181 (explaining that regulated entities are more likely to accept self-regulation); *see also* William I. Friedman, *The Fourteenth Amendment's Public/Private Distinction Among Securities Regulators in the U.S. Marketplace—Revisited*, 23 ANN. REV. BANKING & FIN. L. 727, 738 (2004) (“Through [the Securities Exchange Act of 1934], Congress achieved a historic compromise between the public and private powers of Washington and Wall Street over the future of regulation in the securities markets.”).

³⁵⁹ *See* Hammond, *supra* note 354, at 1718; *see also* Derek Fischer, Note, *Dodd-Frank's Failure to Address CFTC Oversight of Self-Regulatory Organization Rulemaking*, 115 COLUM. L. REV. 69, 80 (2015) (“From a rational perspective, it would be practically impossible for government regulators alone to adequately oversee the industry considering the scope of their mandate.”).

³⁶⁰ *See* Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 WASH. & LEE L. REV. 1457, 1489 (2017) (“Self-regulating professions often defend occupational licensing by arguing that it protects the public from abuse and exploitation when market forces fail.”).

³⁶¹ *See* Michael, *supra* note 356, at 189; *see also* Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71256, 71256 (Dec. 8, 2004) (codified at 17 C.F.R. pt. 240) (“Inherent in self-regulation is the conflict of interest that exists when an organization both serves the commercial interests of and regulates its members or users.”); William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 10 (2013) (describing the possibility that larger firms will exert disproportionate influence within SROs and squeeze out smaller firms); Johnson, *supra* note 272, at 189–90 (“Members’ incentives frequently diverge from SROs’ regulatory objectives.”); Jonathan Macey & Caroline Novogrod, *Enforcing Self-Regulatory Organization's Penalties and the Nature of Self-Regulation*, 40 HOFSTRA L. REV. 963, 966 (2012) (“SROs traditionally have been able to enforce their own rules without having to use the government’s civil and criminal enforcement power . . . by main-

oversight responsibility to the private sector raises accountability and legitimacy issues paralleling those discussed in *West Virginia*.³⁶² Though the SEC reviews SRO rules and orders de novo, scholars argue that the Commission acts “deferential[ly] either in practice or as a matter of statutory design to both rules and orders originating” from them.³⁶³ In their view, the SEC typically accepts SRO rules and generally does not use its authority to revise these rules.³⁶⁴

Top-line evidence remains mixed on these points. Although most SRO rules go into effect immediately after filing with the SEC, those that do not increasingly come under regulatory scrutiny.³⁶⁵ Consider the rulemaking efforts of two unaffiliated exchanges: Nasdaq and NYSE. In 2018 and 2019, Nasdaq filed twenty-one proposed rulemakings subject to the SEC’s review before going into effect.³⁶⁶ Of those, five were granted, fourteen were granted after the exchange amended its initial proposal, one was withdrawn (possibly after being encouraged to do so by SEC staff), one remains pending, and none were denied.³⁶⁷ But the next two years saw the SEC grow more willing to reject or request amendments to Nasdaq’s proposed rulemakings. In 2020 and 2021, Nasdaq filed twenty-eight proposed rulemakings subject to the SEC’s review before going into effect.³⁶⁸ Of those, eleven were granted, seven were granted after the exchange amended its initial proposal, four were withdrawn, one remains pending, and five were denied.³⁶⁹ Although not as pronounced, a similar story holds for NYSE’s proposed rulemakings. In 2018 and 2019, NYSE filed twenty-four proposed rulemakings subject to the SEC’s review

taining a monopoly and using their credible threat to be able to exclude a participating firm from the cartel as its ultimate enforcement mechanism.”).

³⁶² See, e.g., Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1304 (2003) (“Public law scholars worry that privatization may enable government to avoid its traditional legal obligations, leading to an erosion of public norms and a systematic failure of public accountability.”). Other scholars, however, have argued that privatization of oversight responsibility can serve as an effective means for infusing public norms into private behavior. See *id.* at 1286.

³⁶³ See Hammond, *supra* note 354, at 1710.

³⁶⁴ See *id.* at 1738–39. Proposed rules can also become effective without SEC approval in certain circumstances. See *id.* at 1735–38 (citing 15 U.S.C. § 78s). For example, SRO rule changes or proposals that merely clarify the meaning of existing rules may go into effect immediately. 15 U.S.C. § 78s(b)(3). Likewise, changes to fee structures or rules concerning an SRO’s internal affairs may go into effect without SEC approval. *Id.*

³⁶⁵ See *supra* note 364 and accompanying text (discussing circumstances under which rules become automatically effective); Appendix A, Fig. 1A, Fig. 2A (discussing recent rates of SEC approval and denial of rules). Because not all platforms support tables and graphics, this Article’s appendix is also archived at https://bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/64-7/morelli_appendix.pdf [<https://perma.cc/7Q49-PW9C>].

³⁶⁶ See Appendix A, Fig. 1A.

³⁶⁷ See *id.*

³⁶⁸ See *id.*

³⁶⁹ See *id.*

before going into effect.³⁷⁰ Of those, ten were granted, eleven were granted after exchange amendments, two were withdrawn, and one was denied.³⁷¹ In 2020 and 2021, NYSE filed thirty-six such rulemakings.³⁷² Of those, nine were granted, seventeen were granted after exchange amendments, seven were withdrawn, two remain pending, and one was denied.³⁷³

But these figures only tell half the story. The Exchange Act requires exchanges to show that their rulemakings “do not impose any burden on competition not necessary or appropriate in furtherance of the purposes” of the Act.³⁷⁴ Yet a review of SEC orders approving or disapproving Nasdaq’s proposed rulemakings reveals that the Commission independently analyzed this factor in only 11.9% of cases between 2018 and 2021.³⁷⁵ Similarly, SEC orders approving or disapproving NYSE’s proposed rulemaking independently analyzed this factor in only 18.4% of cases during that same period.³⁷⁶ Although legitimate reasons may explain these figures—for example, many rulemakings are technical in nature and do not implicate competition-related concerns—the lack of any express or direct analysis likely also reflects either the SEC’s prioritization of other policy goals or a relative lack of expertise in analyzing competition-related issues.

Irrespective of statistics, the Exchange Act’s statutory design creates extra accountability problems akin to those discussed in *Kisor* and *West Virginia*.³⁷⁷ SRO actions are publicly perceived as having the SEC’s blessing. If challenged in court, these actions benefit from judicial deference accorded to other types of agency action.³⁷⁸ Likewise, SROs often have “expertise and other strategic advantages” relative to the SEC, “enabl[ing] them to affect the processes through which [they or other] institutions evolve in self-serving ways.”³⁷⁹ Viewed this way, *Kisor* and *West Virginia*’s efforts to promote political accountability among the elected branches could similarly address challenges related to the SEC’s supervision of SRO activities and policies. In turn, courts may view a

³⁷⁰ See Appendix A, Fig. 2A.

³⁷¹ *Id.*

³⁷² See *id.*

³⁷³ See *id.*

³⁷⁴ 15 U.S.C. § 78f(b)(8).

³⁷⁵ See Appendix A, Fig. 1A.

³⁷⁶ See Appendix A, Fig. 2A.

³⁷⁷ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (plurality opinion) (considering whether agencies should receive deference in how they interpret their regulations); *West Virginia v. EPA*, 142 S. Ct. 2587, 2600 (2022) (considering if the EPA has the authority it was granted by Congress).

³⁷⁸ Hammond, *supra* note 354, at 1711 (“Combining this judicial deference with the oversight agency’s deference obscures the many participatory, deliberative, and transparency-related shortcomings of the overall scheme.”).

³⁷⁹ Cf. Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 577 (2015) (describing how the relative functional expertise of intermediating agents can provide them leverage to impact processes and transactions).

narrower *Billing* test—coupled with vigorous judicial oversight of private anti-trust claims—as a meaningful vehicle for addressing these challenges.

That said, courts should carefully consider how a narrower *Billing* test would affect the securities laws' effectiveness as an efficient and stabilizing legal framework. *Billing* and its precedents recognized that financial markets are essential tools for promoting economic growth and innovation.³⁸⁰ Their strength sprouts from the confidence that investors place in the efficiency and fairness of those markets. In large part, this confidence stems from the established regulatory system, whereby the SEC treats exchanges as public utilities, polices against fraud, and strives to mitigate economic externalities. One could therefore read *Billing* as effectuating a congressional intent—embodied in the Exchange Act's general structure and broad statutory directives—that the SEC maintains a uniform, predictable, and centralized regulatory framework that achieves these social benefits.³⁸¹ Those benefits may not flow should courts decline to afford *Billing*-style immunity to defendants facing antitrust or similar claims. A narrower *Billing* test, for example, represents a decision to accord less judicial respect to SEC judgments on securities practices. Consequently, courts position themselves as co-principal authorities of those practices. The result could implicate the same considerations that animated *Billing*: an *over-emphasis* of antitrust considerations at the expense of other social concerns and in opposition to the Exchange Act's intended regulatory design.

In the same vein, an overly narrow *Billing* test would irreparably hinder the SEC's ability to speak authoritatively on emerging securities market practices. Domestically, this loss in standing could foster uncertainty—or the perception of regulatory risk—among market participants. These participants could demand higher rates of return on their investments to compensate for this increased un-

³⁸⁰ See, e.g., *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 282–83 (2007) (discussing the import of regulation to the economy).

³⁸¹ Cf., e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); *Teamsters Local 282 Pension Tr. v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985) (“The securities laws are designed to induce issuers to commit their representations to writing, and judicial use of the writings as the authoritative disclosure promotes certainty and thus planning.”); *Graphic Scis., Inc. v. Int’l Mogul Mines Ltd.*, 397 F. Supp. 112, 128 (D.D.C. 1974) (“The Court concludes that the public interest demands uniform and exacting enforcement of the securities laws and that policy encourages a thorough review of possible violations thereof.”); *SEC v. Mowen*, No. 09-cv-786-DB, 2011 WL 4835751, at *3 (D. Utah Oct. 12, 2011) (“[T]he court has an interest in resolving this case because enforcement of the federal securities law promotes economic and social policies and serves as a deterrent to further violations.”); cf. also Chris Brummer, *Disruptive Technology and Securities Regulation*, 84 *FORDHAM L. REV.* 977, 979 (2015) (noting how “the market ecosystem subject to securities regulation was quite stable and experienced only incremental change” during the twentieth century and how “the forward-looking legislative framework enacted in 1933 and 1934 had time to mature and even improve itself”).

certainty/risk, leading to higher trading costs, lower liquidity levels, and higher overall costs of capital for securities issuers. Likewise, an excessively restrictive *Billing* test would affect the SEC's ability to coordinate effective cross-jurisdictional supervision and regulation.³⁸² These coordination issues have increased in importance since *Billing*, as two intervening financial crises and countless financial regulatory reforms have made global securities markets more complex, interconnected, and interdependent.³⁸³ Divesting the SEC of its authoritative voice at this critical juncture could harm the financial system's resiliency and exacerbate systemic risk by inhibiting the Commission's ability to take quick and effective cross-market and cross-border remedial actions.

C. Reshaping the Billing Test

Balancing these dueling perspectives is critical to preserving *Billing*'s effectiveness—and judicial acceptance—as a legal doctrine that supports the securities laws' animating policy goals. *Billing*'s second factor—evidence that ‘the responsible regulatory entities exercise their authority’ over the activities in question—provides courts an opportunity to do just that. By reorienting this factor toward assessing whether the responsible regulatory agency has exercised its authority, adequately accounted for antitrust concerns during its assessments, and brought its substantive expertise to bear when doing so, courts can ensure the SEC (and other market regulators like the CFTC) remain motivated to explore and respond to potentially anticompetitive practices in a reasoned and considered way. This approach would apply with equal force when the SEC exercises its regulatory authority and when it repeals, declines to promulgate, or stops enforcing rules that potentially conflict with private antitrust actions. Framed this way, the *Billing* test becomes a tailored check on regulatory decision-making that does not necessarily dictate *how* the agency assesses antitrust issues but *whether* it has done so.

This measured approach would strengthen regulatory processes in several ways. First, it would account for recent presidential efforts to marginalize agency expertise, for example, by “constraining their ability to build the ana-

³⁸² See, e.g., Michael Morelli, *Implementing High Frequency Trading Regulation: A Critical Analysis of Current Reforms*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 201, 227 (2017) (“[S]uccessful implementation of most [secondary market] policy measures . . . depends on significant regulatory coordination and cooperation. . . . Cooperation must extend to the international level as well. . . . Downward competitive pressure from jurisdictions that want to attract or retain [financial activity] might ‘enhance or debilitate [the] regulatory regime[s]’ of other jurisdictions, putting certain investment activity that has profound effects on a given market beyond a state’s regulatory reach.” (last two alterations in original) (quoting Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interactive Securities Markets*, 38 VA. J. INT’L L. 563, 606–07 (1998))).

³⁸³ See Morelli, *supra* note 24, at 705–14 (discussing reasons for, and responses to, growing complexity in the financial system, including securities markets).

lytic, economic, and technical foundation necessary for policymaking,” by ensuring that it has actually been applied in a given case.³⁸⁴ These concerns permeated both *Kisor* and *West Virginia*, where the procedural histories hinted that the regulatory actions at issue reflected bureaucratic intransigence or partisan executive commands rather than reasoned decision-making.³⁸⁵

Second, it encourages the SEC to obtain new expertise—within established legal boundaries—when market developments demand it. As market complexity increases, the methods through which market participants compete will evolve. These developments “by their very nature . . . defy ready-made expertise” and “require creative solutions that necessitate significant resources.”³⁸⁶ If courts expect the SEC to show that it has applied its expertise to these issues, it follows that the SEC must show it *has* that expertise in the first instance. Accordingly, the Commission maintains an incentive to develop new knowledge through various means, such as by engaging in more robust communications with public information resources, hiring more knowledgeable employees, maintaining dialogues with other regulatory authorities (foreign and domestic), and running further regulatory experiments and data-gathering efforts.³⁸⁷

³⁸⁴ See, e.g., Freeman & Jacobs, *supra* note 37, at 599 n.68, 615–20 (describing how presidential administrations may compromise agency expertise through “pervasive outsourcing and extensive reliance on nonexpert ‘loyalists’ in leadership,” “manipulating agency staffing levels,” “reducing the absolute numbers of expert staff,” “[m]arginalizing agency science,” “shift[ing] resources away from supporting agency expertise to other things,” “dismissing, ignoring, or overriding expert views without sufficient process or explanation,” and “diminishing an agency’s capacity to collect or produce essential information”).

³⁸⁵ Scholars have argued that both Democratic and Republican administrations have taken aggressive steps to roll back their predecessors’ regulatory policies. See generally Bethany Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REG. 1100, 1103 (2022) (observing that the Biden Administration “has pursued multiple rollback tools even beyond the ones” used by the Trump Administration and arguing that these tools will “form part of the standard transition plan for a new president after an inter-party transition” going forward); see also Shany Winder, *Extraordinary Policymaking Powers of the Executive Branch: A New Approach*, 37 VA. ENV’T L.J. 207, 225 (2019) (explaining how congressional gridlock leads to increased executive policymaking through administrative actions); Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 269–70 (2019) (describing the trend of increasing presidential reliance on agency action); Thomas O. McGarity, *Avoiding Gridlock Through Unilateral Executive Action: The Obama Administration’s Clean Power Plan*, 7 WAKE FOREST J.L. & POL’Y 141, 155 (2017) (discussing President Obama’s reliance on administrative actions to promulgate environmental policies in the face of congressional gridlock); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 698 (2016) (arguing that the Obama Administration exercised an unprecedented level of control over agencies).

³⁸⁶ Cf. Conti-Brown & Wishnick, *supra* note 41, at 645–49 (elaborating on the concept of “technocratic pragmatism” and identifying various methods through which the Federal Reserve can develop new expertise to address new challenges).

³⁸⁷ See *id.* at 645–48; see also Sharkey, *supra* note 216, at 1632–33 (detailing how the SEC doubled its headcount of staff economists and created a new division to conduct cost-benefit analyses

Third, by conducting this inquiry within *Billing*'s existing test, courts can ensure that the SEC retains primary guardianship over day-to-day securities practices, maintains the existing legal framework's stability, and respects the Supreme Court's recent guidance on administrative deference, delegation, and expertise. Finally, by continuing to ground the *Billing* test in the SEC's comparative expertise over securities matters, this approach actively restrains courts' ability to use the test as an indirect means for expanding judicial power over economic policy decisions. In this way, the *Billing* test promotes multiple separation-of-powers protections—and addresses the “legal realist idea that judges just implement their own policy preferences”—by preventing lower courts from using legal doctrines to adapt the law in their preferred ways.³⁸⁸

D. Implications for Rule 10b-5 Litigation

Aside from their potential effect on private antitrust claims, *Kisor* and *West Virginia* also cast doubt on the SEC and exchanges' parallel argument in *City of Providence* that the *Billing* test precluded plaintiffs' private Rule 10b-5 claims. Beyond the conceptual difficulty of a regulatory regime precluding itself, courts have repeatedly held that private Rule 10b-5 actions are an essential tool that complements SEC oversight and furthers the “same broad goal” of “preventing manipulation.”³⁸⁹ If courts stand ready to turn private antitrust claims into an implicit check on SEC decision-making, then courts seem even more likely to view private Rule 10b-5 claims as an even stronger constraint.

This reasoning carries significant repercussions for the scope of conduct subject to these claims. Persons bringing Rule 10b-5 actions can only do so because courts have read an implicit private right of action into the Exchange Act.³⁹⁰ Although the Supreme Court has often approached these implication

following the D.C. Circuit's decision overturning an SEC regulation in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011)).

³⁸⁸ See, e.g., Lemley, *supra* note 38, at 97, 114 (arguing that “the Court has begun to implement the policy preferences of its conservative majority in a new and troubling way”). For a detailed discussion of the legal realist concept, see AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horowitz & Thomas A. Reed eds., 1993). See generally also Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

³⁸⁹ See *In re Chi. Bd. Options Exch. Volatility Index Manipulation Antitrust Litig.*, 390 F. Supp. 3d 916, 931 (N.D. Ill. 2019); see also *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013) (“Congress, the Executive Branch, and this Court . . . have ‘recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement brought . . . by the . . . Securities and Exchange Commission.’” (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007))); *Tellabs, Inc.*, 551 U.S. at 313 (“This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions.”).

³⁹⁰ See *supra* note 13 and accompanying text (citing cases). Milton Friedman—one of Rule 10b-5's drafters—insisted that the SEC never contemplated a private right of action when they first wrote

questions liberally, it also has a history of cutting back when separation-of-powers concerns grow too great.³⁹¹ Justice Powell, for one, forcefully argued that the practice of judicial implication permits courts to expand its jurisdiction, engage in policy-making, and assume a legislative function.³⁹² To that end, the Court has strictly construed other implied private rights of action under the securities laws when confronted with concerns about judicial overreach.³⁹³ This restrictive approach has carried over into opinions interpreting Rule 10b-5's subsections. Though these opinions couch their critiques in efficiency-centric terms,³⁹⁴ the Court routinely conveys skepticism toward efforts to expand the law further with no express textual basis for doing so.³⁹⁵ And

the Rule. Milton V. Freeman, *Foreword*, 61 FORDHAM L. REV. S1, S2 (1993) ("Obviously neither I, nor the Commission that promulgated the Rule, had any such idea [that the Rule would provide the basis for a private lawsuit] when the Rule was adopted.").

³⁹¹ Compare *Cort v. Ash*, 422 U.S. 66, 78–79 (1975) (announcing an open-ended, four-factor approach for determining whether courts can imply a private right of action from a federal statute), and *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689–709 (1979) (applying *Cort* and concluding that Title IX of the Education Amendments of 1972 implicitly authorized a private right of action), with *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) ("[W]e fail to see how relations between the branches are served by having courts apply a multi-factor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not."), and *Alexander v. Sandoval*, 532 U.S. 275, 280, 291–93 (2001) (finding no "rights-creating" language in Title VI of the Civil Rights Act of 1964 and concluding that the statute did not "display an intent to create a freestanding private right of action to enforce regulations" implementing it).

³⁹² See *Cannon*, 441 U.S. at 730–49 (Powell, J., dissenting).

³⁹³ *Alexander*, 532 U.S. at 286–87. In 2001, the Supreme Court stressed that Congress must create private rights of action to enforce federal law. *Id.* Accordingly, whether a statutory provision contains an implied right of action turns on whether Congress intended for one to exist. *Id.* at 286. Absent such intent, the Court believes that efforts to imply a cause of action constitutes judicial overreach and undermines Congress's constitutional directive to establish the content of federal jurisdiction. See *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164–65 (2008) (refusing to create a private right of action for aiding and abetting under Section 20(e) of the Exchange Act).

³⁹⁴ See, e.g., *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (pointing out that the need for certainty in business transactions militated expansion of Rule 10b-5 liability to cover aiders and abettors of primary violators who make material misstatements or omissions or commit manipulative acts); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739–48 (1975) (discussing the various costs associated with vexatious lawsuits while upholding Rule 10b-5's private right of action).

³⁹⁵ See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274–75 (2014) (declining to overturn the presumption of reliance set forth in *Basic, Inc. v. Levinson*, 484 U.S. 224 (1988), in part because the presumption "d[id] not alter the elements of the Rule 10b-5 cause of action and thus maintains the action's original legal scope"); *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (resolving to "give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law'" (omission in original) (quoting *Stoneridge*, 552 U.S. at 167)); *Stoneridge*, 552 U.S. 161–62 (holding that investors could not bring Rule 10b-5 claim against suppliers who, by entering bogus transactions with a company, helped the company inflate its revenues, opining that Congress did not intend for Section 10(b) to reach such "remote" and "attenuated" causal chains); *Cent. Bank*, 511 U.S. at 177 ("It is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (holding that private

even when the Court decides to uphold novel Rule 10b-5 applications, it consciously disclaims any intent to “alter the elements of the Rule 10b-5 cause of action” or change “the action’s original legal scope.”³⁹⁶

With these background principles in mind, the Court’s current focus on separation-of-powers protections may leave lower courts with an unsettling interpretive dilemma. If courts apply the *Billing* test too narrowly, they risk (1) expanding Rule 10b-5’s implied private right of action and aggravating separation-of-powers concerns between the judicial and legislative branches, and (2) issuing rulings in tension with themes expressed in the Court’s recent Rule 10b-5 opinions. But if courts apply the *Billing* test too broadly, they risk constricting Rule 10b-5’s implied private right of action and compounding separation-of-powers concerns between the executive and legislative branches. Given its growing skepticism toward administrative decision-making, the Court seems poised to emphasize the latter set of concerns over the former. Yet this choice carries risks, even from a separation-of-powers standpoint.³⁹⁷ And as more households enter secondary markets to trade new products in new ways, these constitutional concerns could further hamstring the securities laws’ ability to redress any resulting abusive practices—ones that could disproportionately affect individual investors—absent clear terms from Congress.³⁹⁸

CONCLUSION

This Article makes modest observations about recent judicial trends in administrative law. But it shows how the implications of these trends carry huge consequences for securities practitioners everywhere. Though the *Billing*

actions under Section 10(b) and Rule 10b-5 require a showing of scienter rather than mere negligence, stating that “despite the broad view of the Rule advanced by the [SEC] in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b)”.

³⁹⁶ See *Halliburton*, 573 U.S. at 275.

³⁹⁷ Similar choices may arise in other securities law areas. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964) (ruling that Section 27 of the Exchange Act authorizes private parties to bring a direct or derivative suit against a company for issuing a false or misleading proxy statement in violation of Section 14(a) of the Exchange Act); *Stoneridge*, 522 U.S. at 164–66 (refusing to create a private right of action for aiding and abetting under Section 20(e) of the Exchange Act).

³⁹⁸ See, e.g., Alexander Osipovich, *Individual Investor Boom Reshapes U.S. Stock Market*, WALL ST. J. (Aug. 31, 2020), <https://www.wsj.com/articles/individual-investor-boom-reshapes-u-s-stock-market-11598866200> [<https://perma.cc/K6N2-X6DE>] (“Mom-and-pop investors have fallen back in love with stocks, lured by free trading apps, a resurgent bull market led by technology companies and a pandemic that has left millions of Americans at home with little to do.”); Ben Winck, *Retail Traders Make Up Nearly 25% of the Stock Market Following COVID-Driven Volatility*, *Citadel Securities Says*, BUS. INSIDER (July 9, 2020), <https://markets.businessinsider.com/news/stocks/retail-investors-quarter-of-stock-market-coronavirus-volatility-trading-citadel-2020-7-1029382035> [<https://perma.cc/X7GQ-RC5T>] (“Industry veterans have described the movement as muddying a market that valued discipline over speculation.”).

test fills a niche corner in securities law, its viability as a defense to private antitrust claims will soon come under threat.

Billing benefitted the SEC greatly; the decision allowed it to regulate large swaths of the securities industry free from the Pandora's Box of judges applying antitrust law in unpredictable and uncoordinated ways.³⁹⁹ Nevertheless, Supreme Court decisions in *Kisor v. Wilkie*, *West Virginia v. EPA*, and other similar cases challenge core premises justifying the Commission's exclusive regulatory authority over securities matters, especially where facts on the ground call into question whether the agency has actually brought its expertise to bear on the matter at hand. The full extent of any conflict remains uncertain; its knock-on effects for the SEC's ability to regulate novel market practices and ensure long-term financial market stability even less so. But scholars, securities law practitioners, and the SEC should brace themselves as courts seek new answers to long-thought-settled questions.

³⁹⁹ See Kling, *supra* note 186, at 953 (observing that *Billing*'s "central accomplishment" was its "enabl [ing] [of] the SEC to regulate outside the shadow of antitrust laws").

APPENDIX A: CHARTING THE SEC’S REVIEW OF EXCHANGE/SRO RULEMAKINGS

Figure 1A: Rulemakings Submitted by the Nasdaq Stock Market LLC, 2018-2021*

	2018	2019	2020	2021	Total		
Rulemakings Effective on Filing with SEC	80	68	60	63	271		
Rulemakings Subject to Pre-Effectiveness SEC Review	Granted	3	2	8	3	16	
	Granted with Amendments	5	9	3	Granted with Amendments	4	21
	Withdrawn	0	1	4	Withdrawn	0	5
	Disapproved	0	0	2	Disapproved	3	5
	Pending	0	1	Pending	0	1	2
	Total (Excluding Withdrawn or Pending)	8	11	13	10		
	SEC Orders on Rulemakings Subject to Pre-Effectiveness Review	1	0	2	Orders Discussing Effect on Competition	2	5
	% Pre-Effectiveness Total	12.50%	0.00%	15.38%	% Pre-Effectiveness Total	20.00%	

* This data reflects rulemakings filed during each respective calendar year. Rulemakings filed in one year but approved in a later year are counted in the year it was initiated. All data available at and sourced from *The Nasdaq Stock Market LLC (NASDAQ) Rulemaking*, U.S. Sec. & Exch. Comm’n (Sept. 13, 2022), <https://www.sec.gov/rules/sro/nasdaq.htm>.

Figure 2A: Rulemakings Submitted by the New York Stock Exchange LLC, 2018-2021*

	2018		2019		2020		2021		Total
Rulemakings Effective on Filing with SEC	48		49		77		53		227
Rulemakings Subject to Pre-Effectiveness SEC Review	Granted	7	Granted	3	Granted	5	Granted	4	19
	Granted with Amendments	3	Granted with Amendments	8	Granted with Amendments	14	Granted with Amendments	3	28
	Withdrawn	0	Withdrawn	2	Withdrawn	1	Withdrawn	6	9
	Disapproved	1	Disapproved	0	Disapproved	0	Disapproved	1	2
	Pending	0	Pending	0	Pending	1	Pending	1	2
Total (Excluding Withdrawn or Pending)		11	11		19		8		
SEC Orders on Rulemakings Subject to Pre-Effectiveness Review	Orders Discussing Effect on Competition	2	Orders Discussing Effect on Competition	2	Orders Discussing Effect on Competition	2	Orders Discussing Effect on Competition	3	9
	% Pre-Effectiveness Total	18.18%	% Pre-Effectiveness Total	18.18%	% Pre-Effectiveness Total	10.53%	% Pre-Effectiveness Total	37.50%	

* This data reflects rulemakings filed during each respective calendar year. Rulemakings filed in one year but approved in a subsequent year are counted in the year it was initiated. All data available at and sourced from *New York Stock Exchange Rulemaking*, U.S. Sec. & Exch. Comm’n (Sept. 13, 2022), <https://www.sec.gov/rules/sro/nyse.htm>.