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Securitites/Antitrust - *Gordon v. New York Stock Exchange* - The Securities Exchanges' System of Fixed Commission Rates Is Impliedly Immune from the Antitrust Laws

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SECURITIES/ANTITRUST—*Gordon v. New York Stock Exchange*—The Securities Exchanges' System of Fixed Commission Rates Is Impliedly Immune from the Antitrust Laws.

Gordon v. New York Stock Exchange[1] marks the Supreme Court's most recent attempt to delineate the extent to which the securities industry is subject to the antitrust laws.[2] In April, 1971, Richard A. Gordon filed suit on behalf of himself and a small class of similarly situated investors against the New York Stock Exchange (NYSE), the American Exchange (AMEX), and two representative firms.[3] Gordon alleged that the exchanges' system of fixed commission rates[4] constituted price discrimination and price-fixing in violation of the Robinson-Patman Act[5] and the Sherman Act.[6] The district court, in granting defendants' motion for summary judgment,[7] relied on section 19(b)(9) of the Securities Exchange Act of 1934,[8]

1. 422 U.S. 659 (1975).
2. *See generally* Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675 (1970); Johnson, *Application of Antitrust Laws to the Securities Industry*, 20 SW. L.J. 536 (1966); Nerenberg, *Applicability of the Antitrust Laws to the Securities Field*, 16 WEST. RES. L. REV. 131 (1964).
3. These two representative firms were Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Company, Inc.
4. The fixed commission rate system was effective for transactions of less than $500,000. NYSE CONST. art. XV, § 2 (1971); AMEX CONST. art. VI, § 2 (1971). Additionally, there was a surcharge of $15 on all transactions involving less than 1,000 shares, volume discounts on trades over 1,000 shares, and negotiated rates for portions of orders in excess of $500,000. NYSE Rule 383 (1971), *repealed* April 1, 1974; AMEX Rule 396 (1971), *repealed* April 1, 1974.
5. 15 U.S.C. § 13 (1970).
6. 15 U.S.C. §§ 1, 2 (1970).

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

7. Gordon v. New York Stock Exchange, 366 F. Supp. 1261 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir. 1974). Since plaintiff's complaint was dismissed on the merits, the district court did not consider his motion for a class action determination. Plaintiff's claim under the Robinson-Patman Act, 15 U.S.C. § 13 (1970), was dismissed because the court did not find the securities to be commodities within the meaning of the Act.
8. 15 U.S.C. § 78s(b)(9) (1970), which provided:

> The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for

which authorized the Securities Exchange Commission (SEC) to supervise the exchanges in "fixing of reasonable rates of commission."[9] Finding the exchanges' price-fixing activity subject to SEC review, the court held applicable the antitrust immunity first alluded to in *Silver v. New York Stock Exchange.*[10]

The Supreme Court unanimously affirmed,[11] finding that imposition of the antitrust laws would unduly interfere with the operation of the Securities Exchange Act of 1934.[12] Therefore, the Court reasoned that implied repeal of the antitrust laws is "necessary to make the Exchange Act work."[13] In reaching this decision, the Supreme Court willingly accepted two related propositions. First, the essence of plaintiff's suit constituted an attack only on exchange rules, not upon their application.[14] These rules are subject to SEC review under section 19(b)(9).[15] Second, pursuant to section 19(b)(9), the SEC has actively and efficiently fulfilled its duty to supervise these exchange rules.[16] Therefore, the exchanges' price-fixing activity must be accorded that antiturst immunity first recognized in *Silver v. New York Stock Exchange.*[17]

This article attempts to establish the following: (1) it is specious for a court to determine whether an antitrust suit attacks securities

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the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as . . . (9) the fixing of reasonable rates of commission, interest, listing, and other charges.

9. *Id.*

10. 373 U.S. 341 (1963). In *Silver*, plaintiff commenced an antitrust action against the NYSE when the Exchange, without affording a hearing or providing an explanation, ordered its members to sever all direct wire and ticker service with plaintiff's two securities firms. The Supreme Court refused to view the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1970), as a blanket antitrust exemption for the NYSE. Rather, the proper approach was to reconcile the operation of the antitrust laws with the regulatory scheme. This reconciliation was achieved through the principle 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." 373 U.S. at 357. For detailed discussion of *Silver*, see text accompanying notes 18 through 50 *infra*.

11. 422 U.S. 659 (1975).

12. *Id.* at 691.

13. *Id.*

14. *Id.* at 661.

15. *Id.* at 685.

16. *Id.* at 682.

17. *Id.* at 685.

In *Silver*, the Court concluded that there was no implied repeal of the antitrust laws because the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1970), did not provide for SEC jurisdiction or review of particular rule applications tendered by the exchanges. However, it was found that if the SEC had jurisdiction and if there was ensuing SEC review of a particular exchange ruling, there would exist a "different case" concerning antitrust exemption. 373 U.S. at 358n.12.

exchange *rules* or merely their *application*; (2) contrary to the *Gordon* Court's findings, the SEC has failed miserably in its attempt to efficiently supervise the exchanges' system of fixed commission rates; and (3) the doctrine of primary jurisdiction is both applicable and necessary in antitrust challenges to conduct subject to SEC review.

Silver: A "DIFFERENT CASE"

In *Silver v. New York Stock Exchange*,[18] the Supreme Court initially acknowledged potential antitrust immunity for the securities industry.[19] Silver brought an antitrust action against the NYSE which, in *ex parte* fashion, had ordered its members to sever all direct wire and ticker service with his two securities firms.[20] The NYSE claimed that its actions were immune from antitrust liability under section 19(b) of the Securities Exchange Act of 1934.[21] However, the Court, after reviewing the purposes, scope, and structure of that Act,[22] found no express exemption from either the antitrust laws or any other statute.[23] Accordingly, any repeal of the antitrust laws must result by implication[24] and "[i]t is a cardinal principle of construction that repeals by implication are not favored."[25] The Court emphasized that repeal is to be implied only to the extent necessary to effective implementation of the Securities Exchange Act.[26]

The *Silver* Court noted that both the constitution and rules of the NYSE provided that wire service between a member and a nonmember could be terminated at will.[27] The NYSE constitution and rules contained no provision for notice or a hearing prior to such termination.[28] Section 19(b) grants the SEC jurisdiction to disapprove the rules of the exchanges.[29] The Court, in a hair-splitting maneuver, concluded that Silver was attacking not the NYSE consi-

18. 373 U.S. 341 (1963).
19. *Id.* at 360.
20. *Id.* at 344.
21. *Id.* at 346.
22. *Id.* at 349-57.
23. *Id.* at 357.
24. *Id.*
25. United States v. Borden Co., 308 U.S. 188, 198 (1939). *See* California v. Federal Power Commission, 369 U.S. 482, 485 (1962); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-57 (1945).
26. 373 U.S. at 357.
27. *Id.* at 344.
28. *Id.* at 361.
29. 15 U.S.C. § 78s(b) (1970).

titution and rules, but their particular application to him.[30] After concocting the notion that the SEC could not disapprove or regulate any particular application of the rules,[31] the Court determined that there was no governmental oversight of the self-regulatory scheme;[32] no method of protecting the public interest in competition;[33] and no conflict of the regulatory scheme with the antitrust laws.[34] Consequently, this discontinuance of wire service subjected the NYSE to application of the antitrust laws.[35] In attempting to qualify its reconciliation of the conflict between the antitrust laws and the Securities Exchange Act of 1934, the *Silver* Court created the caveat eventually embraced by the *Gordon* Court:

> [s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.[36]

The *Gordon* Court resolved that it had found *Silver's* "different case."[37] Whereas *Silver* presented a case of SEC impotence to affect particular applications of exchange rules, *Gordon* involved statutory authorization for SEC review of all exchange rules dealing with the commission rate structure.[38] Careful analysis of these two cases reveals that the Court's distinction between rule and application of rule is an exercise in tedium ad infinitum.

Contrary to the Court's finding, attack of a rule is implicit attack of its application, as demonstrated by logical progression: attack of a rule requires standing;[39] standing requires that the litigant has sustained damage;[40] to have sustained damage, the litigant must have been subjected to the rule's application. In *Silver*, the rules of the NYSE allowed severance of the lines of communication to nonmember dealers.[41] Since those rules established no regulatory proce-

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30. 373 U.S. at 357.
31. *Id.*
32. *Id.*
33. *Id.* at 358.
34. *Id.*
35. *Id.* at 360.
36. *Id.*
37. 422 U.S. at 685.
38. *Id.*
39. Adler v. Fenton, 24 How. 407 (1860); United States v. Cooper Corporation, 312 U.S. 600 (1941); Baker v. Carr, 369 U.S. 186 (1962).
40. *Id.*

Section 4 of the Clayton Act provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover treble damages. . . .

15 U.S.C. § 15 (1970).

41. See text accompanying note 27 *supra*.

dure for such severance, they implicitly allowed the *ex parte* action which Silver subsequently challenged.[42] Therefore, Silver was attacking the rule allowing severance as well as its application.

Gordon challenged the exchanges' rules requiring fixed commission rates.[43] Yet, in order to qualify for the damages sought,[44] Gordon would necessarily have to demonstrate that he had suffered financial detriment as a result of the application of the challenged rules to him. Thus, both Gordon and Silver assailed the particular application of exchange rules, as well as the rules themselves.

The logical extension of *Gordon's* rule-application distinction is to grant antitrust immunity in all cases where the SEC has actively been supervising exchange activity. Assume, for example, that a member of the NYSE is operating his place of business in violation of either the NYSE constitution or its rules. The NYSE can penalize the member and/or threaten revocation of his membership unless his activity conforms to its rules. The member may then file suit in federal district court, alleging that this application of the rules violates the antiturst laws.[45] Plaintiff-member will claim, pursuant to *Silver*, that he challenges not the validity of the rules, but merely their particular application to him.[46] Defendant-NYSE can be expected to move for summary judgment, claiming: (1) plaintiff is essentially attacking the rules and not their particular application to him; (2) section 19(b)(5) of the Securities Exchange Act of 1934 grants the SEC supervisory authority over these rules;[47] and (3) the SEC has been actively exercising that supervisory authority. Thus, plaintiff's action is barred by *Gordon's* implied repeal of the antitrust laws.[48] Should the court decide that plaintiff is challenging the application of a rule, as in *Silver*, a denial of defendant's motion and an adjudication on the merits is required.[49] Such an adjudication

42. *See* Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675, 687 (1970).

43. See text accompanying note 4 *supra*.

44. Gordon brought a class action, the class comprised of himself and similarly situated investors. In addition to seeking injunctive relief, he requested treble damages of $1.5 billion, plus interest, attorneys' fees of $10 million, and other costs and disbursements. 422 U.S. at 661n.3.

45. *See* Sherman Act, 15 U.S.C. §§ 1, 2 (1970).

46. Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963).

47. Section 19(b)(5) provided that the SEC had the power to "alter or supplement the rules of such exchange . . . in respect of such matters as . . . (5) the manner, method and place of soliciting business. . . ." 15 U.S.C. § 78s(b)(5) (1970). Under the 1975 Amendments the SEC is granted the power to change the rules of a self-regulatory organization in any respect, not just with respect to certain enumerated areas. 15 U.S.C.A. § 78s(c) (Aug. 1975 Pamph.).

48. 422 U.S. at 691.

49. 373 U.S. at 360.

will necessarily approve, alter, or supplement the NYSE rules. Thus, the court will be exercising a power which *Gordon* and *Silver* found to be solely within the purview of the SEC.[50] For this reason an adjudication on the merits cannot be allowed; the motion for summary judgment must be granted; any remedial action must come from the SEC. The conclusion is obvious—the securities industry's activity is effectively exempt from the antitrust laws.

SEC Activity Under Section 19(b)(9)

Imposition of Government Regulation on the Securities Industry

The Buttonwood Tree Agreement, executed in 1792 by a number of securities dealers and traders, marked the creation of the NYSE and the establishment of fixed rates of commission.[51] In 1913, the House Committee on Banking and Currency conducted a general investigation of the stock exchanges and reported that fixed rates of commission were rigidly enforced in order to prevent competition among members.[52] However, no remedial action was taken because the Committee believed the rates to be reasonable. The Committee opined that low or competitive rates would encourage irresponsibility of members, promote speculation, and destroy the value of membership.[53] Additionally, the securities exchanges were historically treated by courts as private clubs not subject to government regulation.[54] It was not until the securities industry attained a prom-

50. 422 U.S. at 690; 373 U.S. at 363.

51. SEC Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess. 295 (1963).

> We the Subscribers, Brokers for the Purchase and Sale of Public Stock, do hereby solemnly promise and pledge ourselves to each other, that we will not buy or sell from this day for any person whatsoever, any kind of Public Stock at a less rate than one-quarter percent Commission on the Specie value, and that we will give a preference to each other in our Negotiations. In Testimony whereof we have set our hands this 17th day of May, at New York, 1792.

52. H.R. Rep. No. 1593, 62d Cong., 3d Sess. 39 (1913) [hereinafter cited as Pujo Report]. Mr. Sturgis, a former president of the NYSE, testified that violation of the exchange rules was regarded as one of the most infamous crimes that a member could commit. The violation was considered a gross breach of faith, punishable by suspension from one to five years for the first violation and expulsion for the second. The object of the rules and their severe penalties was to prevent competition among members.

53. *Id.* at 115-16.

54. *See* Belton v. Hatch, 109 N.Y. 593, 17 N.E. 225 (1888). A member of the NYSE assigned his membership to plaintiff. The member was then expelled for insolvency and his membership subsequently sold. Plaintiff filed suit for the proceeds of the sale. The court, likening the NYSE to a business club, determined that a member does not have absolute title to his membership. Upon a determination of insolvency the member could be expelled and plaintiff would not be entitled to the proceeds of the sale. *See also* Hyde v. Woods, 94 U.S. 523 (1876).

Shortly after the Sherman Act was enacted, the Supreme Court indicated doubt whether inent position in the nation's financial structure that the private club analogy became inappropriate.[55]

The stock market crash of 1929 and the problems of 1933 spurred the passage of the Securities Act of 1933[56] and the Securities Exchange Act of 1934.[57] This regulatory legislation was designed to

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securities were commodities and suggested that they might fall outside the commerce power on which that Act was passed. Hopkins v. United States, 171 U.S. 578, 597-98 (1898).

55. Doubts as to the validity of fixed commission rates should have occurred no later than 1927, when the Supreme Court determined that agreements constraining competitors to a minimum common price were illegal per se. United States v. Trenton Potteries Co., 273 U.S. 392, 396-402 (1927). However, fixed commission rates faced no formal challenges at that time. One writer has expressed the theory that any threats to these rates were greatly reduced by the hostility toward competitive markets which characterized the first Roosevelt administration. President Roosevelt's early advisors were dedicated to an inverted Keynesianism which asserted that if prices could be forced up, employment and production would return to higher and more normal levels. Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675, 677 (1970).

56. Securities Act of 1933, ch. 38, §§ 1 *et seq.*, 48 Stat. 74, *as amended* 15 U.S.C. §§ 77a *et seq.* (1970).

In the decade following World War I, over 50 billion new securities were issued in the United States. Approximately 50% of these securities were worthless. W.O. DOUGLAS, AN ALMANAC OF LIBERTY 221 (1954) [hereinafter cited as DOUGLAS].

The states were powerless to effectively regulate the industry, since they could not reach out-of-state promoters. As a result, Congress, under pressure from President Roosevelt, enacted the Securities Act of 1933, requiring full disclosure of the financial and business underpinnings of companies issuing securities.

57. Securities Exchange Act of 1934, ch. 404, §§ 1 *et seq.*, 48 Stat. 881, *as amended* 15 U.S.C.A. §§ 78a *et seq.* (Aug. 1975 Pamph.).

Speculation in securities, stock market pools, and other ways of manipulating security prices were the forces behind the collapse of the market in 1929. From 1929 to 1932, the market value of all stocks on the NYSE dropped from $89 billion to $15 billion. *See* DOUGLAS, *supra* note 56, at 221.

As preventive medicine against a recurrence of the 1929 disaster, President Roosevelt encouraged Congress to enact the Securities Exchange Act of 1934. In a letter to Representative Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce, President Roosevelt stated his conviction that unregulated speculation in securities was one of the most important factors contributing to the unwarranted "boom" following the crash of 1929. President Roosevelt expressed his commitment to definite regulation of the exchanges. Two objectives to be sought were: (1) the requirement of margins designed to curtail speculation; and (2) governmental supervisory power sufficient to correct any future abuses which may arise. The primary goal was to be the prevention of price manipulation which ultimately operates to the detriment of investors along with the elimination of destructive speculation. Letter from Franklin D. Roosevelt to Sam Rayburn, March 26, 1934, H.R. REP. No. 1383, 73d Cong., 2d Sess. 7702 (1934).

Samuel Untermyer, formerly chief counsel to the committee that drafted the Pujo Report, *supra* note 52, testified that he was of the belief that the exchanges were essentially public institutions and should be subject to close government regulation. *Hearings on S. Res. 97 Before the Senate Committee on Banking and Currency*, 73d Cong., 2d Sess. 7705 (1934).

The House Committee on Interstate and Foreign Commerce determined:

> The fundamental fact behind the necessity for this bill is that the leaders of private business, whether because of inertia, pressure of vested interests, lack of organization, or otherwise, have not since the war been able to act to protect

promote responsible conduct throughout the securities industry.[58] However, government entry into the industry was not intended to totally displace self-regulation.[59] The exchanges were still responsible for promulgating rules and regulations pertaining to their own affairs. When the exchanges, in establishing rules and regulations, failed to protect investors, the SEC was authorized under section 19(b) of the Securities Exchange Act of 1934 to compel them to do so.[60]

The Issue of SEC Efficiency

The *Gordon* Court concluded that the SEC, from 1958 to 1975, was actively and efficiently fulfilling its duty to supervise the exchanges in the fixing of reasonable rates of commission.[61] A careful review of that period reveals otherwise. In 1958, the SEC announced a study of NYSE commission rates to determine whether they were "reasonable and in accordance with the standards contemplated by applicable provisions of the Securities Exchange Act of 1934."[62] The SEC acknowledged that the study was undertaken pursuant to its duties imposed by section 19(b).[63] This study had three direct re-

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> themselves by compelling a continuous and orderly program of change in methods and standards of doing business to match the degree to which the economic system has itself been constantly changing. . . .

H.R. REP. No. 1383, 73d Cong., 2d Sess. 7702 (1934).

58. SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess. 502 (1963). The SEC carefully reviewed the three-fold need for government supervision of exchange self-regulation which motivated the enactment of the Securities Exchange Act of 1934. The first was to assure that the exchanges assume responsibility for self-regulation. Second, since self-regulation involves some degree of impairment of competition, governmental regulation is necessary to limit such impairment as much as possible. Third, insofar as the exchanges operate as quasi-public institutions, public supervision is required for much the same reason that public utilities are regulated.

59. SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess. 501 (1963). The SEC briefly described the agency's historic regulation of the securities exchanges:

> The Commission's relationship to the business it regulates is fundamentally different from that of other Federal independent administrative agencies; it is not only the regulator, but also supervisor of "self"-regulators. . . . [S]ecurities regulation is unique in featuring self-regulation as an essential and officially sanctioned part of the regulatory pattern.

William O. Douglas, while serving as Chairman of the SEC, described the "proper relationship" between the stock exchanges and the SEC as:

> . . . letting the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, clean ready for use but with the hope it would never have to be used.

W.O. DOUGLAS, DEMOCRACY AND FINANCE 82 (J. Allen ed. 1968).

60. See note 8 *supra* for complete text of 15 U.S.C. § 78s(b) (1970).

61. 422 U.S. at 682.

62. SEC Securities Act Release No. 5678 (April 14, 1958).

63. SEC Securities Act Release No. 5889 (Feb. 20, 1959).

sults: (1) the SEC was to be afforded greater advance notice of proposed rate changes; (2) the SEC and NYSE were to collaborate in further study of the rate structure; and (3) the NYSE agreed to reduce commission rates in certain transactions.[64]

The 1958 study was followed by a 1961 SEC investigation of the adequacy of exchange rules for the protection of investors. Two years and six volumes later, the SEC concluded that a further study was necessary to determine and articulate the criteria important in arriving at reasonable rate structures.[65]

The Court found the 1958 and 1961 studies significant in that the SEC had initiated a thorough overhaul of the fixed commission rate structure, an institutionalized tradition in the securities industry.[66] However, stripped of its accoutrements, the result of the 1958 study was a conclusion that a second study would be necessary;[67] the result of the 1961 study was a conclusion that a third study would be necessary.[68]

Finally, after ten years of study, the SEC proposed alternative price systems to the exchanges and urged their implementation. In 1968, the SEC requested that the NYSE reduce its rates on orders for round lots in excess of 400 shares or, alternatively, eliminate minimum rate requirements for orders in excess of $50,000.[69] These proposed modifications were considered interim measures, pending *further* study.[70] They were eventually adopted in a restricted form when the NYSE and AMEX adopted a volume discount for orders exceeding 1,000 shares.[71] This minimal alteration was accorded SEC approval.[72] In 1971, the SEC concluded that minimum commissions on institutional size orders were neither necessary nor appropriate, and announced that it would not object to competitive rates on orders above a designated level.[73] The SEC proceeded, over the next three years, to phase out fixed commission rates.[74] The death knell

64. *Id.*

65. *See* SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963). The study was conducted pursuant to section 19(d) of the Securities Exchange Act, 15 U.S.C. § 78s(d) (1970).

66. 422 U.S. at 668-69.

67. See text accompanying note 64 *supra*.

68. See text accompanying note 65 *supra*.

69. SEC Securities Act Release No. 8324 (May 28, 1968).

70. Letter from SEC Chairman Cohen to NYSE President Haack, May 28, 1968, *cited in* SEC Securities Act Release No. 8324 (May 28, 1968).

71. *See* Wall Street Journal, Sept. 5, 1968, at 3, col. 1; Oct. 11, 1968, at 3, col. 2; Oct. 25, 1968, at 2, col. 3; Nov. 26, 1968, at 27, col. 1.

72. *Id.*

73. SEC Securities Act Release No. 9007 (Oct. 22, 1970).

74. *See* SEC Securities Act Release No. 9950 (Jan. 16, 1973); SEC Securities Act Release

tolled in January, 1975, when the SEC ordered that by May 1, 1975, competitive rates be utilized by exchange members in all transactions involving persons other than members.[75] Use of a phase-out program was justified by an SEC claim that hasty changes would result in a sharp revenue decline for the industry.[76]

The *Gordon* Court found that the SEC phase-out program balanced the competing interests in the price-fixing dilemma by eliminating the system of fixed commission rates in a manner designed to retain financial stability for the exchanges.[77] The Court also concluded that the record provided ample evidence that the SEC actively fulfilled its responsibilities under section 19(b)(9).[78] However, this perception regarding the SEC's proficiency in policing the exchanges' price systems is a prismatic illusion.

Like Odysseus traversing the Aegean, the SEC embarked upon a circuitous journey, finally achieving its destination only after 17 years of delay, occasioned by an incessant propensity to succumb to the siren song of the exchanges. In 1968, the SEC requested the exchanges to reduce their rates;[79] however, upon encountering exchange resistance, the SEC acquiesced to a volume discount substantially less than its original proposal.[80] Additionally, in 1970, the NYSE determined that a service charge of the lesser of $15 or 50 percent of the required minimum commission on orders less than 1,000 shares should be imposed.[81] The SEC permitted this service charge to become operative on a 90-day interim basis, pending further rate structure hearings.[82] In reality, these "interim" rates remained operative for over 23 months.[83]

In 1971, the SEC determined that minimum commissions were

No. 10206 (June 6, 1973); SEC Securities Act Release No. 10560 (Dec. 14, 1973); SEC Securities Act Release No. 11019 (Sept. 19, 1974).

75. SEC Securities Act Release No. 11203 (Jan. 23, 1975). In order to permit an orderly transition, competition in floor brokerage rates was deferred until May 1, 1976.

76. SEC Securities Act Release No. 10560 (Dec. 14, 1973). Facing criticism for allowing a temporary increase in commission rates, SEC Chairman Garrett noted that the increase was necessary due to the inflation in exchange costs and the decline in the volume of transactions. The rate increase was justified as forestalling any industry impairment during the transition to competitive rates.

77. 422 U.S. at 673-74.

78. *Id.* at 682.

79. See text accompanying note 69 *supra*.

80. See text accompanying notes 71 and 72 *supra*.

81. NYSE Proposed Rule 383. Letter from NYSE President Haack to NYSE members, March 19, 1970, *cited in* SEC Securities Act Release No. 8860 (April 2, 1970).

82. Letter from SEC Chairman Budge to NYSE President Haack, April 2, 1970, *quoted in* SEC Securities Act Release No. 8860 (April 2, 1970); SEC Securities Act Release No. 8923 (July 2, 1970).

83. Gordon v. New York Stock Exchange, 422 U.S. 659, 671 (1975).

neither necessary nor appropriate. However, the Commission offered no proposals for change, merely stating that it would not object to competitive rates on portions of orders above a designated level.[84] The SEC's original $100,000 breakpoint fell prey to the exchanges' demand for a $500,000 cut-off, above which competitive rates would be allowed.[85]

The SEC, in 1972, released its Policy Study examining the problems of the securities markets, many of which were attributed to the prevailing commission rate structure.[86] Upon completion of this study, competitive rates were gradually imposed upon the exchanges.[87] Nevertheless, this prolonged phase-out program experienced further detours.

On January 16, 1973, the SEC announced that it was considering reduction of the breakpoint on competitive rates to orders in excess of $100,000.[88] However, stimulated by a NYSE request to permit an increase of 15 percent of current rates on all orders from $5,000 to $300,000 and a minimum commission on orders below $5,000, the SEC, in June of 1973, held additional hearings on the rate structure.[89] Three months later, the SEC once again acceded to a rate increase proposed by the NYSE.[90] Attached to this approval was a cursory warning that if the exchanges did not terminate fixed commission rates by May, 1975, the SEC would do so.[91]

On September 19, 1974, the SEC formally requested the exchanges to eliminate fixed commission rates by April 30, 1975.[92] Confronted with negative exchange reactions, the SEC cowered from this position and released the proposed changes for public comment.[93] It was not until January 23, 1975, that the Commission determined to adopt the rules eliminating fixed commission rates.[94]

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84. See text accompanying note 73 *supra*.

85. SEC Securities Act Release No. 9007 (Oct. 22, 1970).

86. Statement of the SEC on the Future Structure of the Securities Markets, 37 Fed. Reg. 5286 (Feb. 2, 1972). The Policy Study noted that:

> Our concern with the fixed minimum commission . . . is not only with the level of the rate structure but with its side effects as well. Of these, perhaps the most important are the following: (a) Dispersion of trading in listed securities; (b) Reciprocal practices of various kinds; (c) Increasing pressure for exchange memberships by institutions.

87. See note 74 *supra*.

88. SEC Securities Act Release No. 9950 (Jan. 16, 1973).

89. SEC Securities Act Release No. 10206 (June 6, 1973).

90. SEC Securities Act Release No. 10383 (Sept. 11, 1973).

91. *Id.*

92. SEC Securities Act Release No. 11019 (Sept. 19, 1974).

93. SEC Securities Act Release No. 11073 (Oct. 24, 1974).

94. SEC Securities Act Release No. 11203 (Jan. 23, 1975). The decision to impose competitive rates was based on the SEC's conclusion that competition, rather than the fixed rates,

Thus, competitive commission rates were not imposed on the securities industry until four years after the SEC resolved that fixed commission rates were neither necessary nor appropriate, and 17 years after the original study was initiated. The SEC record of performance from 1958 to 1975 demonstrates a distinct lack of diligence and a fetish for studies.

Congressional Criticism

The SEC's inefficiency was recognized by Congress. In 1972, the Senate Subcommittee on Securities found that the fixed commission rate system failed to produce equitable and economic rates[95] and created a distortion in favor of the institutionally oriented firms.[96] The Subcommittee expressed dissatisfaction with the SEC because the agency: (1) claimed that it never approved NYSE rate changes in 1971, but merely failed to object to them;[97] (2) procrastinated in arriving at its decisions concerning the commission rate structure;[98] and (3) lacked clarity and perpetuated uncertainty in its statements concerning the status of fixed rates on transactions exceeding $100,000.[99] The Subcommittee stressed that fixed rates must be promptly eliminated.[100]

The House Committee on Interstate and Foreign Commerce, shortly after the Senate report, concluded that competitive rates were in the best public interest and should be implemented without excessive delay.[101] The Committee prodded the SEC to hasten its canter in ordering competitive rates for transactions of all sizes.[102]

Despite its legislative mandate, the SEC has remained wholly inefficient in eliminating the exchanges' fixed commission rate system. Yet, incredibly, the *Gordon* Court concluded that this SEC

would best serve the interests of investors and the industry. This notion was not based on a desire to foster competition, but on the various deficiences in the fixed commission rate system, some of which are set forth in text accompanying notes 112 through 114 *infra*.

95. REPORT OF THE SUBCOMMITTEE ON SECURITIES OF THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, 92d Cong., 2d Sess. 53-60 (1972).

96. *Id.* at 59.

97. *Id.* at 58. This is in reference to the SEC position in Independent Investor Protective League v. Securities Exchange Commission, (S.D.N.Y. No. 71-1924), *dismissed without opinion* (2d Cir. 1971).

98. REPORT OF THE SUBCOMMITTEE ON SECURITIES OF THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, 92d Cong., 2d Sess. 58 (1972).

99. *Id.*

100. *Id.* at 60.

101. SECURITIES INDUSTRY STUDY, REPORT OF THE SUBCOMMITTEE ON COMMERCE AND FINANCE OF THE HOUSE COMMITTEE ON INSTERSTATE AND FOREIGN COMMERCE, H.R. REP. No. 1519, 92d Cong., 2d Sess. 141 (1972).

102. *Id.*

supervisory activity was sufficient to provide antitrust immunity to the exchanges' price-fixing structure. In light of this conclusion, the securities exchanges are effectively exempt from all antitrust jurisdiction.

ANTITRUST JURISDICTION UNDER THE SEC

The Sherman Act was enacted in 1890 in response to a strong public sentiment against trusts.[103] While the primary goals of the Act have long been a subject of confusion,[104] it is undisputed that its major purpose is to check anticompetitive practices in the business community.[105]

The Sherman Act has attained near-constitutional dimensions.[106] The judiciary does not favor implied repeal of the antitrust laws by regulatory statutes.[107] Any repeal must be based on a clear repugnancy between antitrust and the regulatory scheme.[108] The courts remain leery of the regulatory agencies' ability or commitment to adequately promote competition among members of the regulated industries. Under the Securities Exchange Act of 1934, the role of the SEC is to decide whether certain exchange activities are in the best interests of the investors and the exchanges.[109] As a result, the SEC has developed an expertise in most phases of the securities industry. But this is not to say that the SEC exhibits any predilec-

103. *See* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U.CHI. L. REV. 221 (1956).

104. These goals range from the achievment and maintenance of competitive processes in the economy to the prevention of the undue growth of big business. *See* Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812 (1967); Bork and Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Blake and Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965).

105. *See* Gordon v. New York Stock Exchange, 422 U.S. 659, at 689 (1975).

106. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933):

> The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.

107. Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-57 (1945); United States v. Borden Co., 308 U.S. 188, 198 (1939).

108. United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-57 (1945); United States v. Borden Co., 308 U.S. 188, 198-99 (1939).

109. 15 U.S.C. § 78s(b) (1970) predicated the authority of the SEC to request or compel changes by the securities industry on a determination that:

> such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange . . . .

tion to promote competition as required by the Sherman Act.

This is demonstrated by an examination of the reasoning underlying the SEC's order directing the elimination of the fixed commission rate system.[110] The transition to competitive pricing was based on an SEC determination that competition in commission rates is in the best interests of the securities exchanges and the industry as a whole.[111] The SEC recognized numerous deficiencies in the fixed commission rate structure: the structure tends to create conflicts of interest on the part of institutional investors;[112] the structure tends to corrupt fiduciary relationships in these institutional investing situations; the structure leads to inefficiency in the management of assets;[113] the structure, by its rigidity and dalliance, inhibits innovations in the rendering of brokerage services to the investing public.[114] The SEC never proffered the protection of competition as a reason for its order and never addressed itself to the goals and policies of the antitrust laws. Indeed, the SEC acknowledged that the fixed rate system was not inherently evil in all situations, and refused to commit itself to permanent abolition of the fixed commission rate structure.[115] It is unreasonable to conclude that the SEC, in the performance of its regulatory duties, has the propensity or expertise to adequately enforce and promote antitrust policies as mandated by the Sherman Act. Nevertheless, the recent passage of the Securities Acts Amendments of 1975[116] increases the responsibility of the SEC in regulating the securities exchanges.

Securities Acts Amendments of 1975

On June 5, 1975, President Ford signed a bill which enacted the Securities Acts Amendments of 1975.[117] This legislation amends section 19(b) of the 1934 Act by providing for mandatory SEC review of all proposed rules offered by the exchanges.[118] The exchanges must file copies of any proposed rule with the SEC and justify that proposal through a statement of basis and purpose.[119] The SEC is required to publish notice of the proposal so that interested persons

110. SEC Securities Act Release No. 11203 (Jan. 23, 1975).

111. *Id.*

112. These institutional investors predominently engage in managing investments on behalf of others, rather than investing their own funds.

113. Inefficiency in the management of assets results even when no misconduct is present.

114. SEC Securities Act Release No. 11203 (Jan. 23, 1975).

115. *Id.*

116. 15 U.S.C.A. §§ 78a *et seq.* (Aug. 1975 Pamph.).

117. U.S. CODE CONG. AD. & NEWS 613 (1975).

118. 15 U.S.C.A. § 78s (Aug. 1975 Pamph.).

119. 15 U.S.C.A. § 78s(b)(1) (Aug. 1975 Pamph.).

may be provided an opportunity to submit relevant data, views and arguments.[120] Unlike prior practice, where the SEC merely stated that it had no objection to a proposed rule change, an explicit approval is now imperative.[121] Under the Amendments, the SEC has 35 days from the publication of notice in which to give its approval.[122] The SEC may approve the proposal upon a finding that it is consistent with the requirements of the 1934 Act and the rules and regulations thereunder.[123]

The prior scheme under section 19(b) authorized the SEC to alter or supplement the rules of the exchanges regarding twelve specifically enumerated categories.[124] Congress, by the Amendments, has

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120. *Id.*

121. *Id.*

122. 15 U.S.C.A. § 78s(b)(2) (Aug. 1975 Pamph.).

The SEC may, alternatively, order proceedings to determine whether the exchange's proposal should be disapproved. The Amendments require notice of the grounds upon which disapproval is being considered, and opportunity for hearing. These proceedings must be concluded within 180 days, unless extended for up to 60 days for good cause. 15 U.S.C.A. § 78s(b)(2)(B) (Aug. 1975 Pamph.).

123. 15 U.S.C.A. § 78s(b)(2) (Aug. 1975 Pamph.).

A proposal offered by an exchange may become effective summarily if the SEC determines that it is necessary for the protection of investors, the maintenance of orderly markets, or the safeguarding of securities or funds. 15 U.S.C.A. § 78s(b)(3)(B) (Aug. 1975 Pamph.). However, the aforementioned filing procedure must thereafter be followed. Additionally, proposals on specified matters may take effect upon filing with the SEC. Such specified matters include those:

> (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission may, by rule, consistent with the public interest and the purposes of this subsection, may specify. . . .

15 U.S.C.A. § 78s(b)(3)(A) (Aug. 1975 Pamph.).

Enforcement of the proposal may begin if it is not inconsistent with the Securities Exchange Act, or the rules and regulations thereunder. 15 U.S.C.A. § 78s(b)(3)(C) (Aug. 1975 Pamph.). The SEC has the authority to specify other areas, concerning self-regulatory organization, in which the exchanges may enact rules upon filing with the SEC. 15 U.S.C.A. § 78s(b)(3)(A) (Aug. 1975 Pamph.).

124. Specifically, these areas were:

> (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving

eliminated these twelve categories of express SEC jurisdiction. While the legislation puts congressional pressure on the SEC to act expeditiously, it substantially broadens[125] the agency's regulatory authority. This creates an intriguing anomaly: whereas the recent SEC experience with the exchanges' price-fixing system amply demonstrates that the agency has been wholly inefficient in eliminating fixed rates of commission, the Amendments have saddled the SEC with even more responsibility in the self-regulatory scheme. Furthermore, the *Gordon* Court, by granting the SEC exclusive jurisdiction, has thrust virtually all antitrust responsibility on this agency which has demonstrated its inability to promote competition among the exchanges.

PRIMARY JURISDICTION: A VIABLE ALTERNATIVE

The *Gordon* Court failed to address the well established doctrine of primary jurisdiction. The doctrine is of judicial origin and is "designed to avoid duplication and conflict between governmental entities dealing with the same subject matter."[126] As defined in *United States v. Western Pacific Railroad Co.*,[127] primary jurisdiction:

> . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. . . . "Primary jurisdiction" . . . [is applied] where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.[128]

This doctrine was first formulated in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*,[129] where a shipper filed suit against a railroad for charging unreasonable rates. The Court held that the plaintiff must initially seek relief from the Interstate Commerce

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> other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts. . . .

15 U.S.C. § 78s(b) (1970). Additionally, a thirteenth category provided for SEC supervision of "similar matters." 15 U.S.C. § 78s(b)(13) (1970).

125. 15 U.S.C.A. § 78s(c) (Aug. 1975 Pamph.).

126. Mitchell, *Primary Jurisdiction: What It Is and What It Is Not*, 13 A.B.A. ANTITRUST SEC. REP. 26 (1958).

127. 352 U.S. 59 (1956).

128. *Id.* at 63-64.

129. 204 U.S. 426 (1907).

Commission (ICC) which solely is vested with the power to originally entertain such actions.[130] The *Abilene* decision was innovative in realizing the potential for severing an issue from a case and directing that issue to a governmental agency, expert in regulating the particular industry. Nevertheless, the case bred confusion concerning the utilization of the doctrines of primary and exclusive jurisdiction. *Abilene* involved only one issue; that single issue was deferred to the ICC. As a result, deferral to the agency on that issue was indistinguishable from a dismissal of the case, the mandatory result under exclusive jurisdiction.[131] The confusion between the application of these two doctrines was increased by three subsequent Supreme Court decisions.

In *Keogh v. Chicago & N.W. Ry. Co.*,[132] a shipper of commodities brought an antitrust action, alleging a combination and conspiracy among certain carriers to set uniform rates for the transportation of freight. The fixed rates had been filed with the Interstate Commerce Commission, challenged before the Commission, and upheld as reasonable. The Court determined that the exclusive remedy for excessive rates had been vested by Congress in the ICC and, therefore, dismissed the suit.[133]

In *United States Navigation Co., Inc. v. Cunard S.S. Co. Ltd.*,[134] a steamship company brought suit in equity under the antitrust laws to enjoin a conference of steamship companies from contracting to force the plaintiff out of business. Although the contracts had not been submitted to the United States Shipping Board for approval, the Supreme Court affirmed the lower court's dismissal of the complaint, concluding that the Shipping Act "covers the dominant facts alleged in the present case as constituting a violation of the Antitrust Act."[135] The *Cunard* Court held that the remedies under the antitrust laws had been superseded by the relief obtainable from the United States Shipping Board. In dismissing

130. *Id.* at 448.

131. Whitney National Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 421 (1965).

132. 260 U.S. 156 (1922).

133. *Id.* at 162.

134. 284 U.S. 474 (1932). Plaintiff alleged an agreement among the defendants to grant lower rates by as much as 100 percent to shippers who used the conference carriers exclusively. Plaintiff further alleged that defendants granted rebates, circulated false rumors and threatened to blacklist those brokers who dealt with him. *Id.* at 479.

135. *Id.* at 483.

The district court based its dismissal on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board under the Shipping Act of 1916. United States Navigation Co., Inc. v. Cunard S.S. Co., 39 F.2d 204, 207 (S.D.N.Y. 1929).

the suit, the Court specifically noted the superior competence and experience of that administrative body.[136]

The government's allegations in *Far East Conference v. United States*[137] were almost identical to those of plaintiff in *Cunard*. The Justice Department charged that a shipping conference had agreed on a contract rate system in violation of the antitrust laws. While the general conference agreement had been filed with the Federal Maritime Board,[138] the conference had failed to file its contract rate tariffs. Failure to file rate tariffs was in direct contravention of 46 U.S.C. § 814 (1970), which provided that an unfiled agreement was a per se violation of the antitrust laws. The Court held that the government could not sue under the Sherman Act without first seeking relief from the Federal Maritime Board.[139] However, unlike the *Keogh* result, the Court did not hold that the plaintiff had no cause of action. If the Federal Maritime Board were to refuse to immunize the conference agreement, presumably the government could seek an injunction or criminal sanctions under the antitrust laws.[140]

While *Abilene, Keogh, Cunard*, and *Far East* have received notoriety as classic primary jurisdiction cases, this quartet actually sang the tune of exclusive jurisdiction.[141]

> In such cases, a previously existing court remedy has been superseded by an exclusive administrative remedy. For example, an action in court by a shipper to recover unreasonable rates may be held to be barred by a statute providing an agency proceeding for reparations. This is not really primary jurisdiction; it is supersession, or exclusive agency jurisdiction, since subsequent resort to the courts as to the issue committed to the agency jurisdiction is barred.[142]

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136. 284 U.S. at 481-82.

137. 342 U.S. 570 (1952).

138. Section 3 of the Shipping Act of 1916 created the United States Shipping Board. Shipping Act of 1916, ch. 451, § 1, 39 Stat. 728. Through several steps the Board's functions have come to its present successor, the Federal Maritime Board. In 1936, Congress created the United States Maritime Commission. Act of June 29, 1936, ch. 858, § 201, 49 Stat. 1985. In 1950 the present Federal Maritime Board was established. Reorganization Plan No. 21 of 1950, 15 Fed. Reg. 3178-80 (1950).

139. 342 U.S. at 576.

140. *Id.* at 577.

141. Unfortunately, two of the most prominent administrative law authorities, Professors Kenneth Culp Davis and Louis Jaffe, persist in adhering to the confusing proposition that primary and exclusive jurisdiction are indistinguishable. *See* 3 K. DAVIS, ADMINISTRATIVE LAW § 19.01 (Supp. 1963); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964).

142. McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 1958 ANTITRUST REP. 57, 61-62 (1958).

A truly classic primary jurisdiction case came before the Supreme Court in 1973. In *Ricci v. Chicago Merchantile Exchange*,[143] plaintiff charged the Chicago Merchantile Exchange with conspiracy to restrain trade, alleging that his membership in the exchange was transferred in violation of the exchange rules, the Commodity Exchange Act,[144] and the Sherman Act. The Supreme Court held that the antitrust action must be stayed until the Commodity Exchange Commission determined the validity of the exchange's conduct under the Commodity Exchange Act.[145] The Court maintained:

> We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the [Commodity] Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regimes. . . .[146]

The Court concluded that the Commission's resolution of the dispute would allow "a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits."[147]

The doctrine of primary jurisdiction is invoked only in those cases in which referral to an agency is necessary and helpful to a court in resolving an antitrust suit.[148] Specifically, the doctrine is utilized when the court determines that either of two situations exists: (1) the question to be decided falls within the special expertise of the administrative agency because of the agency's familiarity with the industry; or (2) the question to be decided has been delegated to the agency as an essential part of a pervasive regulatory scheme that requires consistent administration.[149]

These two related factors were both present in *Gordon*. The Court found that the SEC had the requisite expertise to determine the

143. 409 U.S. 289 (1973).
144. 7 U.S.C. §§ 1 *et seq.* (1970).
145. 409 U.S. at 302.
146. *Id.* at 307.
147. *Id.* at 308.
148. The costs, in terms of time and resources, inherent in the invocation of the doctrine of primary jurisdiction are sufficient deterrence against unnecessary deferral.
149. Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 302 (1973).

necessity of the fixed commission rate structure.[150] Additionally, the Securities Exchange Act of 1934, both prior and subsequent to the 1975 Amendments, delegated to the SEC supervisory authority over exchange commission rates.[151] Therefore, the doctrine of primary jurisdiction was definitely available for invocation by the *Gordon* Court.

While the *Gordon* Court opted for exclusive jurisdiction, it is obvious that the utilization of primary jurisdiction was necessary for a proper consideration of the fixed commission rate system. The SEC had, for 17 years, studied and analyzed the need for and the propriety of the price-fixing structure.[152] However, the courts have traditionally shown great deference to the antitrust laws.[153] Thus, competing interests were presented in *Gordon*: the Sherman Act's interest in checking anti-competitive practices in the business community versus the interest of the Securities Exchange Act of 1934 in promoting fair and orderly markets within the securities industry. In view of these competing interests, the Supreme Court necessarily should have invoked primary jurisdiction and ordered the SEC to determine if, for the protection of investors and the securities industry, the fixed commission rate structure was essential. The Court could have used that determination to decide whether the fixed commission rate structure was violative of the antitrust laws or necessary for the protection of the investing public and, therefore, impliedly immune from the antitrust laws. To this extent, the utilization of primary jurisdiction would have proved invaluable to the *Gordon* Court's decision.[154] To the extent that it may contribute to a proper reconciliation of the Sherman Act and the Securities Exchange Act of 1934, the doctrine proves a viable alternative to the harshness of the holding in *Gordon*.

CONCLUSION

In *Gordon v. New York Stock Exchange* the Supreme Court held that an application of the antitrust laws to the NYSE's fixed commission rate structure is repugnant to the Securities Exchange Act of 1934. The Court found an abundant presence of SEC regulatory activity and determined that *Gordon* was *Silver's* "different case"

150. See text accompanying note 16 *supra*.
151. See text accompanying notes 124 and 125 *supra*.
152. See text accompanying notes 62 through 76 *supra*.
153. See text accompanying notes 106 and 107 *supra*.
154. For an enlightening discussion of primary jurisdiction, *see* Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 CALIF. L. REV. 926 (1975).

where review of exchange self-regulation is provided by a vehicle other than the antitrust laws. In view of the SEC's inability to satisfactorily enforce the antitrust policies as required by the Sherman Act, and the indistinquishability of *Silver*, the antitrust laws have been rendered dormant. Primary jurisdiction, a doctrine fostered and effectively utilized by the Court in other regulatory schemes, represents an alternative means of reconciling the interplay of the Sherman Act and the Securities Exchange Act of 1934.

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