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Securities Regulations and Antitrust Laws—Implied Repeal of the Antitrust Laws with Respect to Practices of the Securities Industry—Active SEC Review or Pervasive Regulatory Scheme Sufficient to Imply Immunity—Gordon v. New York Stock Exchange, 95 S. Ct. 2598 (1975); United States v. National Ass,n of Securities Dealers, 95 S. Ct. 2427 (1975).

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SECURITIES REGULATION AND ANTITRUST LAWS—IMPLIED REPEAL OF THE ANTITRUST LAWS WITH RESPECT TO PRACTICES OF THE SECURITIES INDUSTRY—ACTIVE SEC REVIEW OR PERVASIVE REGULATORY SCHEME SUFFICIENT TO IMPLY IMMUNITY—*Gordon v. New York Stock Exchange*, 95 S. Ct. 2598 (1975); *United States v. National Ass'n of Securities Dealers*, 95 S. Ct. 2427 (1975).

In *United States v. National Association of Securities Dealers, Inc.*,[1] and in *Gordon v. New York Stock Exchange*,[2] the Supreme Court was asked to find certain anticompetitive practices in the securities market violative of the federal antitrust laws.[3] While the challenged practices had not been granted an express congressional exemption from the provisions of the Sherman Act,[4] the Court, applying the doctrine of implied repeal, held that the market restrictions were immune from antitrust proscriptions.[5] Under the doctrine of implied repeal the Court looks to the legislative history of a particular act in order to determine whether it can be inferred that Congress, in passing the act, intended to grant an exemption from the federal antitrust laws.[6] In *Gordon* and *NASD* the Court was thus presented with the task of determining which legislative enactment, the Securities Exchange Act of 1934 (the Act)[7] or the antitrust legislation, was intended by Congress to be paramount.[8]

1. 95 S. Ct. 2427 (1975).
2. 95 S. Ct. 2598 (1975).
3. United States v. NASD, 95 S. Ct. 2427, 2435 (1975); Gordon v. NYSE, 95 S. Ct. 2598, 2601 (1975).
4. The Sherman Antitrust Act, 15 U.S.C. § 1 (1970), provides in part:

> 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. . . .

The Sherman Antitrust Act, 15 U.S.C. § 2 (1970), provides in part:

> 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 [*sic*] . . . .

5. United States v. NASD, 95 S. Ct. 2427, 2449 (1975); Gordon v. NYSE, 95 S. Ct. 2598, 2615 (1975).
6. United States v. NASD, 95 S. Ct. 2427, 2435-40 (1975); Gordon v. NYSE, 95 S. Ct. 2598, 2602-04 (1975).
7. Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq., as amended*, 15 U.S.C.A. § 78a *et seq.* (Supp. IV, 1975).
8. *See* Silver v. NYSE, 373 U.S. 343, 349-50 (1963).

> The difficult problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications.

Id.

I. Implied Repeal and Regulatory Agencies

Because of the hybrid nature of regulatory agencies and the broad powers vested in them,[9] these agencies have often invoked the doctrine of implied repeal in an attempt to immunize their actions from liability under the Sherman Act.[10] In such cases the court focuses on the legislative history of the particular agency's enabling legislation in order to determine whether the powers vested in the agency were designed to create "a pervasive legislative scheme"[11] or if an express power was intended to supplant the antitrust laws.[12] If such a scheme or express delegation of power exists, the court will grant an implied exemption from the antitrust laws.

Generally the courts consider several factors when making a determination of whether implied repeal is to be granted. Among the more prominent are: (1) whether the transaction is pursuant to the agency's authority; (2) whether the agency's authority has been exercised; (3) the extent of the powers granted to the agency by Congress; (4) the nature of the conflict between the enabling legislation of the agency and the antitrust legislation; and (5) whether immunization must be granted to insure that the agency's purposes can be fulfilled.[13]

It is possible that Congress did not anticipate conflicts between the federal antitrust laws and the regulatory statutes or that they were reluctant to grant an *express* immunity from antitrust laws because of the strong national interest favoring antitrust policy.

9. These agencies possess executive, judicial and legislative powers in varying degrees. J. Wiesen, Regulating Transactions in Securities 3 (1975). For example, an examination of the SEC's activities reveals that through releases, no-action letters, review of rules and regulations of exchanges and associations, requests of Congress for legislation, and the institution of suits, the SEC exercises powers that overlap the activities of all three branches of government. *Id.* at 4.

10. *See* cases cited at note 13 *infra.*

11. United States v. NASD, 95 S. Ct. 2427, 2435 (1975).

12. Gordon v. NYSE, 95 S. Ct. 2598, 2614-15 (1975).

13. In utilizing these factors, the Supreme Court has granted implied immunity in only two cases involving an agency other than the SEC. Both of these involved actions of the Civil Aeronautics Board (CAB). In Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963), the Court held that the CAB must consider competition and monopolistic aspects when reviewing unfair competitive practices in transactions, and, because these are two important elements of the antitrust statutes, acquisitions given CAB approval were immune from antitrust liability. *Contra, e.g.*, California v. Federal Power Comm'n, 369 U.S. 482, 486 (1962); United States v. RCA, 358 U.S. 334, 351 (1959) (regulatory agencies statutorily mandated to follow the standard of "public interest and necessity" when approving and overseeing industry conduct not granted implied immunity).

Cases in which the Court has dealt with and denied implied repeal fall within three broad categories:

I. In those cases in which the activity under consideration was determined to be

The securities industry has had more success than other industries in invoking the doctrine of implied repeal.[14] The self-regulatory nature of

outside the scope of agency authority, the Court concluded no congressional intent could be found to imply repeal of the antitrust laws. *See* Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973); Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945).

II. The second category consists of cases in which the particular rule or transaction was within the scope of regulatory agency authority but was not exempt from antitrust liability. After determining the transaction was within the scope of agency authority, the Court was unable to find a scheme which was so pervasive that it would support implied repeal.

Two cases involving the Federal Power Commission (FPC) reveal that the FPC has a grant of authority for specific aspects of the industry, but lacks a "pervasive regulatory scheme" over the industry as a whole. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), involved the refusal of a power company to install interconnections between itself and a municipal power company. The FPC could order interconnections; however, this power was limited to those situations where a company refused to voluntarily interconnect when in the public interest. This authority was so limited as to negate the possibility of any pervasive regulatory scheme inconsistent with antitrust liability. *Accord*, California v. Federal Power Comm'n, 369 U.S. 482 (1962).

In other cases, the Court has found no immunization because, although a scheme may be present, there were clear and specific indications against immunization in the legislative intent. In United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Court noted that, while the Comptroller of the Currency has the power to approve bank mergers and, in so doing, to consider competitive factors, the Comptroller is *not required* to give any particular weight to these factors. *But see* United States v. Citizens S. Nat'l Bank, 95 S. Ct. 2099 (1975); United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974). In light of a clear legislative intent not to repeal the antitrust laws here, such mergers were held subject to antitrust liability. Similarly, transactions between television stations, although subject to Federal Communications Commission (FCC) approval, were held not immune from antitrust liability in United States v. RCA, 358 U.S. 334 (1959). This holding was supported by clear and specific indications to the contrary appearing in the regulatory statute governing the FCC and in the legislative reports preceding its enactment.

III. Finally, there are cases in which regulatory authority to supervise the activity under consideration existed but was not exercised. These cases stand for the proposition that the participation and affirmative approval of the agency creates exemption, but without that participation no justification exists for removing commercial transactions from the restrictions of the basic antitrust policy. In Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, *modified*, 383 U.S. 932 (1966), acts establishing rates between shippers which were not submitted for Federal Maritime Commission scrutiny and approval were not held to be immune from antitrust liability even though the Commission had the power to exempt such agreements from antitrust statutes through its affirmative approval. United States v. Borden Co., 308 U.S. 188 (1939), involved milk distributors, producers and municipal officials who were charged with violation of the antitrust laws arising from certain agreements regarding production, distribution and marketing of milk. The Court held that neither the Agriculture Marketing Agreement Act nor the Capper-Volstead Act, both of which allowed the Secretary of Agriculture to immunize various types of price agreements including the type at issue in the case, applied to agreements made without the participation and approval of the Secretary.

14. *See* J.R. Williston & Beane, Inc. v. Haack, 387 F. Supp. 173 (S.D.N.Y. 1974) (immunity given to exchange disciplinary action per rule 19(b)); Abbot Sec. Corp.

the securities industry has inherent antitrust tendencies[15] and, though the securities laws are designed to protect public investors, the laws themselves recognize the near-monopolistic position of the securities exchanges.[16] Hence, the regulatory scheme intended by Congress for the securities industry exists against a backdrop of certain anticompetitive characteristics which may be necessary for the well-being of the industry.[17] Though this scheme cannot be carried out "in a fundamentally unfair manner,"[18] the SEC has been given liberal authority in areas specifically or impliedly within its jurisdiction.[19]

II. THE JUDICIAL UNDERPINNINGS

The necessary prerequisite for analysis of *Gordon* and *NASD* is *Silver v. NYSE.*[20] In that case, the New York Stock Exchange (the Exchange) ordered ten of its member firms to sever private wire connections with petitioners who were nonmembers functioning in the over-the-counter securities market.[21] The discontinuance of these connections caused substantial losses in revenue for one firm and the cessation of the other's business.[22] The Exchange did not provide the petitioners with reasons

v. NYSE, 384 F. Supp. 668 (D.D.C. 1974) (immunity given to nonmember minimum commission schedule and rebate prohibition); Baum v. Investors Diversified Servs., Inc., 286 F. Supp. 914 (1968), *aff'd*, 409 F.2d 872 (7th Cir. 1969) (commission rate structure held not to be a per se antitrust violation); Kaplan v. Lehman Brothers, 250 F. Supp. 562 (1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967) (immunity given to change and alter fixed rates of commission).

15. *See generally* Nerenberg, *The Applicability of the Antitrust Laws to the Securities Field*, 16 WEST. RES. L. REV. 131 (1964) [hereinafter cited as Nerenberg].

16. *See generally id.*; Johnson, *Application of Antitrust Laws to the Securities Industry*, 20 SW. L.J. 536 (1966) [hereinafter cited as Johnson].

17. Johnson, *supra* note 16, at 536-37. The fundamental near-monopolistic powers of the New York Stock Exchange are

> the maintenance of a minimum commission schedule; the imposition of various prohibitions designed to restrict multiple trading in listed securities; and the utilization of a restrictive set of membership requirements, designed to control entry into the market.

Id.

18. Silver v. NYSE, 373 U.S. 341, 364 (1963).

19. *See* cases cited note 14 *supra.*

20. 373 U.S. 341 (1963).

21. *Id.* at 344. Petitioners were proprietors of two companies, Municipal Securities (dealing primarily in municipal bonds) and Municipal Securities, Inc., (trading in over-the-counter securities). Both firms were registered with the National Association of Securities Dealers, Inc. The private wire connections (direct wire telephone connections and a stock ticker service) had been temporarily approved by the Exchange but were ordered removed pursuant to Art. XIV, § 17 of the Exchange's Constitution and Rules. 373 U.S. at 343-44; *see id.* at 354 n.9.

22. 373 U.S. at 344-45.

for, or advance notice of, its actions or with an opportunity to be heard.[23]

The Court reviewed Silver's complaint which alleged violations of the Sherman Act and sought injunctive relief and treble damages, among other remedies. Noting that the Exchange's severance of private wire lines was not expressly exempted from, and in view of its adverse effect on competition would therefore be a per se violation of the Sherman Act,[24] the Court pursued the issue of whether the Exchange's actions

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23. *Id.* at 344, 361, 364-65. Reasons were not afforded petitioners at the time the Exchange ordered the severance of private wire connections. Furthermore, no opportunity to reply was given. The Court concluded that no policy of the Act was served by denial of notice and opportunity to be heard. The purpose of self-regulation is to protect investors and to promote fair dealing; this is lost when an exchange wields such "tremendous economic power without explaining its basis for acting . . . ." *Id.* at 361.

> In addition to the general impetus to refrain from making unsupportable accusations that is present when it is required that the basis of the charges be laid bare, the explanation or rebuttal offered by the nonmember will in many instances dissipate the force of the *ex parte* information upon which an exchange proposes to act. The duty to explain and afford an opportunity to answer will . . . be of extremely beneficial effect in keeping exchange action from straying into areas wholly foreign to the purposes of the Securities Exchange Act. And, given the possibility of antitrust liability for anticompetitive acts of self-regulation which fall too far outside the scope of the Exchange Act, the utilization of a notice and hearing procedure with its inherent check upon unauthorized exchange action will diminish rather than enlarge the likelihood that such liability will be incurred and hence will not interfere with the Exchange's ability to engage efficaciously in legitimate substantive self-regulation. . . . [T]he affording of procedural safeguards not only will substantively encourage the lessening of anticompetitive behavior outlawed by the Sherman Act but will allow the antitrust court to perform its function effectively.

Id. at 362-63 (footnote omitted). *See also* Zuckerman v. Yount, 362 F. Supp. 858 (N.D. Ill. 1973) (procedural due process is merely threshold justification for exemption from antitrust laws and does not necessarily indicate antitrust immunity).

24. 373 U.S. at 347. "The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute." *Id.* at 357.

Certain acts are expressly exempted from application of the antitrust laws. *Cf.* Capper-Volstead Act (Agricultural Prod. Producers Ass'n Act), 7 U.S.C. §§ 291-92 (1970); Bank Merger Act, 12 U.S.C. § 1828(c) (1970) (for an interpretation see United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350 (1963)); Clayton Anti-Trust Act, 15 U.S.C. § 12 *et seq.* (1970); Webb-Pomerene Act, 15 U.S.C. § 62 (1970) (export trade); Securities Exchange Act of 1934, 15 U.S.C. § 78o-3(n), *as amended*, 15 U.S.C.A. § 78o-3(n) (Supp. IV, 1975) (over-the-counter markets); Fisheries Co-operative Marketing Act, 15 U.S.C. § 522 (1970); Small Business Act, 15 U.S.C. § 631 *et seq.* (1970); Insurance Moratorium Act, 15 U.S.C. § 1013 (1970); Shipping Act of 1916, 46 U.S.C. § 814 (1970); Merchant Marine Act, 46 U.S.C. § 885(b) (1970); Federal Communications Act of 1934, 47 U.S.C. §§ 221(a), 222(c)(1) (1970); Interstate Commerce Act, Part 1, 49 U.S.C. § 5(2) (1970); Federal Aviation Act of 1958, 49 U.S.C. § 1348 (1970).

Even where there is an express exemption, the administrative agency is generally required to take competitive factors into account. *See, e.g.*, United States v. ICC, 396 U.S. 491 (1970); Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Line, 390 U.S. 238 (1968); Denver & R.G.W.R.R. v. United States, 387 U.S. 485 (1967); Minneapolis & S.L.R.R. v. United States, 361 U.S. 173 (1959); McLean Trucking Co. v.

were impliedly immune from the operation of the antitrust laws.[25]

Recognizing that implied repeal is not favored,[26] the Court stated: "Repeal 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."[27] The Court found that the Exchange's order to its members demanding that they summarily sever their private line connections with nonmembers could not, under the above test, be granted implied immunity.

The Court's decision was based on the SEC's inability to review the Exchange's order. The 1934 Act specifically provided individual stock exchanges with the opportunity to regulate themselves by adopting and enforcing rules not inconsistent with that act.[28] Additionally, the SEC was given the power to request the exchanges to make changes in their rules, and, impliedly, to disapprove any rules adopted by an exchange.[29]

United States, 321 U.S. 67 (1944); Shipping Act of 1916, 46 U.S.C. § 814 (1970); Interstate Commerce Act, Part 1, 49 U.S.C. § 5(2)(c) (1970).

Under other statutes there is no express exemption, but the administrative agency is required to assess competitive effects in determining whether a particular transaction is in the public interest. *See, e.g.*, Savings and Loan Holding Co. Amendments of 1967, 12 U.S.C. § 1730 (1970); Federal Aviation Act of 1958, 49 U.S.C. § 1378(b) (1970).

Moreover, with respect to the Securities and Exchange Commission, the *Silver* Court found:

> The absence of Commission jurisdiction, besides defining the limits of the inquiry, contributes to its solution. 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-regulative ends. By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to "the influences of . . . [improper collective action] over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted," . . . .

373 U.S. at 358-59 (citations omitted).

25. 373 U.S. at 357.

26. *Id.; see* United States v. National Ass'n of Sec. Dealers, 95 S. Ct. 2427, 2443 (1975); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973); Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 303 (1973); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348, 350 (1963); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304 (1963); California v. Federal Power Comm'n, 369 U.S. 482, 485 (1962); United States v. RCA, 358 U.S. 334, 350 (1959); Georgia v. Pennsylvania R.R., 324 U.S. 439, 456-57 (1945); United States v. Borden Co., 308 U.S. 188, 198 (1939).

27. 373 U.S. at 357.

28. Securities Exchange Act of 1934, 15 U.S.C. § 78f(c), *as amended*, 15 U.S.C.A. § 78f (Supp. IV, 1975) (necessity for regulation). *See* El Khadem v. Equity Sec. Corp., 494 F.2d 1224 (9th Cir. 1974).

29. Securities Exchange Act of 1934, 15 U.S.C. § 78s(b), *as amended*, 15 U.S.C.A. § 78s (Supp. IV, 1975).

However, the Commission was not given the power to review the enforcement of exchange rules which formed the basis of Silver's action.[30]

The Court found that since it was not the purpose of the Securities Exchange Act to deprive individuals of procedural safeguards in the form of notice and a hearing, it could not be said that repeal was "necessary to make the Securities Exchange Act work."[31] The Court expressly withheld an opinion as to what standard of review would have been applied to the anticompetitive practices challenged in *Silver* had there been the possibility of review by the Commission.

> Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary action by a registered securities association (*i.e.*, by the NASD), a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity . . . .[32]

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30. 373 U.S. at 357. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78s(b), *as amended*, 15 U.S.C.A. § 78s (Supp. IV, 1975). *See also* 2 LOSS, SECURITIES REGULATION 1178 (2d ed. 1961).

The Court also alluded to the issue of primary jurisdiction. This doctrine involves deferring a matter to a supervisory agency for its expertise before the court decides the case. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (Stewart, J., concurring in part, dissenting in part); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 305-06 (1973) (administrative jurisdiction necessary where membership transferred in violation of Commodity Exchange Act); Far East Conference v. United States, 342 U.S. 570, 574-75 (1952); United States Navigation Co. v. Cunard S.S., 284 U.S. 474 (1932) (Shipping Board had exclusive jurisdiction to consider petitioner's antitrust complaint); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

The Court in *Silver* recognized the absence of jurisdiction by the Securities and Exchange Commission. Even if the Court wanted to defer the matter to the Securities and Exchange Commission, that Commission was not empowered, by statute or rule, to hear the matter. 373 U.S. at 358. *See* notes 27 & 28 *supra* and accompanying text.

It should be noted that after the Commission has acted on a particular measure, there is a procedure for judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702, 704 (1970), or, in the case of final commission orders, under the provisions of 15 U.S.C.A. § 78y (Supp. IV, 1975). Under this latter provision, the Court of Appeals is more severely restricted than in cases of review under the Administrative Procedure Act. *See* Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974); Independent Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971). On the primary jurisdiction doctrine, *see* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 19 (1958); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964); King, *The "Arguably Lawful" Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries*, 40 TENN. L. REV. 617 (1973); Note, *Primary Jurisdiction in Antitrust Action Against the New York Stock Exchange: Immunization and Expertise*, 1970 U. ILL. L.F. 544.

31. 373 U.S. at 364-65.

32. *Id.* at 358 n.12 (citations omitted).

Thus whether an express provision for SEC review would be sufficient to allow implied repeal of the antitrust laws, or whether a factual examination would have to be made to determine if an implied repeal was necessary to make the securities laws work, was left unanswered.

The Court of Appeals for the Seventh Circuit examined this question in *Thill Securities Corp. v. NYSE.*[33] The plaintiff in *Thill* challenged, on antitrust grounds, the Exchange's "antirebate rule" which prohibited any member from sharing a commission with a nonmember.[34] The fact that the rule in question might be subject to review by the SEC under section 19(b)(9) was found insufficient to sustain a finding of implied repeal.[35] The court stated that even if the rule were expressly subject to SEC review an analysis under *Silver* would still be necessary.[36]

Less than three years prior to *Thill,* the Court of Appeals for the Seventh Circuit, in *Kaplan v. Lehman Brothers,*[37] was presented with a fact situation similar to that in *Gordon* in that it concerned the SEC's power under section 19(b)(9) to "alter or supplement the rules of such exchange . . . in respect of such matters as . . . the fixing of reasonable rates of commission."[38] The court held that the mere finding

33. 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971).

34. *Id.* at 266-67.

35. *Id.* at 270. The court expressed skepticism as to the necessity of the rule. The rule was applied somewhat arbitrarily depending upon the economics of the situation in dealings between member and nonmember brokerage firms. *Id.* at 274.

36. *Id.* at 269; *see* text accompanying note 27 *supra.* The case was therefore remanded to the district court for determination of: (1) whether the antirebate rule was in fact subject to SEC review; (2) whether the "regulatory scheme 'performs the antitrust function' "; (3) whether, under *Silver,* the antirebate rule was necessary to make the Securities Exchange Act work in light of its application by some exchanges but not by others; and (4) what the ultimate effects of the antirebate rule would be upon competition. *Id.* at 270.

37. 371 F.2d 409 (7th Cir.), *cert. denied,* 389 U.S. 954 (1967).

38. *Id.* at 411. The appellate court in *Thill* recognized the direct review power of the SEC in *Kaplan* as contrasted to the SEC's possible review of the antirebate rule in *Thill.* However, the *Thill* court was not ready to recognize SEC review power, standing alone, as being sufficient to constitute antitrust immunity. Rather, the court took issue with the district court's application of *Kaplan,* stating that the analysis did not end once the court determined that the SEC did have the power of review over the complained of Exchange practice. Rather the court demanded a consideration under *Silver* to determine if the Exchange practice, (fixing of commission rates) was in fact necessary to make the Securities Exchange Act work, and that that practice was being used to the minimum extent necessary. 433 F.2d at 268-69.

The *Thill* court expressed this finding as follows: ". . . we find in the teachings of *Silver,* no 'intimation' that the mere possibility of SEC review wraps the conduct of the Exchange in an impregnable shield of antitrust immunity." *Id.* at 269.

of SEC review power under this section necessarily implied antitrust immunity.[39]

Against this judicial background the Supreme Court in *Gordon* and *NASD* was given the opportunity to clarify the proper application of *Silver*.

III. Gordon v. NYSE

In *Gordon*, the petitioner, individually and on behalf of an asserted class of small investors, filed suit in federal district court against the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), and two member firms.[40] Gordon claimed that the exchanges' practices of fixing commission rates[41] for transactions of less than $500,000 violated sections 1 and 2 of the Sherman Act.[42] Granting respondents' motion for summary judgment, the district court found that it

> lack[ed the] jurisdiction to entertain an anti-trust attack on the commission structure of the Exchanges, since the fixing of commissions falls

39. 371 F.2d at 410-11.

40. Gordon v. NYSE, 366 F. Supp. 1261, 1262 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir. 1974), *aff'd*, 95 S. Ct. 2598 (1975). The two member firms were Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Company, Inc.

41. Price fixing has been held a per se violation of the Sherman Act. United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927). *See, e.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 489 (1950) (services, as well as goods, are subject to the Sherman Act); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

42. 95 S. Ct. at 2601. Only transactions greater than $500,000 were open to competitive commission rates at the time this suit was filed. *Id.* at 2606.

Other challenges to the exchanges' practices were directed at: (1) volume discount rates given to transactions of greater than 1,000 shares and the existence of negotiated rather than fixed rates for transactions in excess of $500,000; (2) rules limiting the number of exchange memberships; and (3) rules denying discounted commission rates to nonmembers using exchange facilities. Gordon v. NYSE, 366 F. Supp. 1261 (S.D.N.Y. 1973), *aff'd*, 498 F.2d 1303 (2d Cir. 1974), *aff'd*, 95 S. Ct. 2598 (1975).

The district court found the Robinson-Patman Discrimination Act, 15 U.S.C. § 13(a) (1970), inapplicable to petitioner's challenge to volume discount rates and negotiated rather than fixed rates. That act only applied to commodities; shares did not constitute commodities. 366 F. Supp. at 1263. The Supreme Court agreed. 95 S. Ct. 2601 & nn.2-4. *See, e.g.*, Baum v. Investors Diversified Servs., Inc., 409 F.2d 872, 876 (7th Cir. 1969). As to petitioner's challenge to the limitation on exchange memberships the district court found that he lacked the requisite standing because he had never applied for an exchange membership. 366 F. Supp. at 1263. Finally, with respect to the last challenge, the court found inherent in the term "member" as defined by the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(3), *as amended*, 15 U.S.C.A. § 78c(a)(3) (Supp. IV, 1975), that nonmember access to the exchanges was to be limited. 366 F. Supp. at 1263.

> squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act.[43]

Recognizing that the 1934 Act expressly directed the SEC to supervise the "fixing of reasonable rates of commission,"[44] the court believed that it was presented with the "different case" on which *Silver* reserved decision, "where review of exchange self-regulation [would be available] 'through a vehicle other than the anti-trust laws.' "[45]

The United States Court of Appeals for the Second Circuit affirmed the district court.[46] It based its holding upon: (1) the express statutory authorization of the SEC to fix reasonable rates of commission;[47] (2) the legislative history of the Act, *i.e.*, Congress knowing that price fixing was illegal per se, nonetheless afforded the SEC power to fix reasonable rates of commission;[48] and (3) the need for exchange self-regulation,[49] while not subjecting the exchange to conflicting standards.[50] In light of the additional factor that the SEC had exercised its supervisory power over the exchanges with respect to the fixing of reasonable rates of commission, the court concluded that antitrust immunity was proper.[51]

The Supreme Court, in granting certiorari,[52] was thus presented with the opportunity to adopt either *Thill's* application of *Silver* (*i.e.*, whether the anticompetitive practice involved was necessary to make the Securities Exchange Act work), the *Kaplan* approach (*i.e.*, an express power

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43. *Id.* at 1264.

44. *Id.; see* Securities Exchange Act of 1934, 15 U.S.C. § 78s(b)(9), *as amended*, 15 U.S.C.A. § 78s(b) (Supp. IV, 1975).

45. 366 F. Supp. at 1264, *quoting* Silver v. NYSE, 373 U.S. 341, 360 (1963).

46. 498 F.2d 1303 (2d Cir. 1974), *aff'd*, 95 S. Ct. 2598 (1975).

47. *Id.* at 1305-06.

48. *Id.* at 1307; *see* note 41 *supra*.

49. *Id.* at 1307, 1309-10; *see* Silver v. NYSE, 373 U.S. 341, 352 (1963).

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

Id. at 352, *quoting* W.O. DOUGLAS, DEMOCRACY AND FINANCE 82 (Allen ed. 1940).

50. 498 F.2d at 1307.

51. *Id.* at 1309-10.

52. 419 U.S. 1018 (1974). It might be intimated that the United States Supreme Court granted certiorari due to the apparent conflict existing among lower federal courts. *Compare* Thill Sec. Corp. v. NYSE, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); Fredrickson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 389 F. Supp. 1151 (N.D. Ill. 1974), *with* Kaplan v. Lehman Bros., 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967); Abbott Sec. v. NYSE, 384 F. Supp. 668 (D.D.C. 1974); Jacobi v. Bache & Co., 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975). *See* notes 33-39 *supra* and accompanying text.

of review standing alone would be sufficient to grant implied repeal), or to formulate another approach.[53] The *Gordon* Court concluded that there was an implied repeal of the antitrust laws with respect to the fixing of commission rates.[54] Three factors were relied upon: (1) there was a congressional intent that the SEC have the power to review, alter, and supplement commission rates under section 19(b)(9);[55] (2) that power was being actively exercised by the SEC;[56] and (3) in light of *Silver*, the express statutory authority given to the SEC under section 19(b)(9) itself signified that the rule was necessary to make the Act work.[57]

In so holding, the Court distinguished *Thill* on two grounds.[58] First, whereas there was no evidence of SEC review as to the "antirebate rule" in *Thill*, the NYSE and AMEX in *Gordon* presented considerable evidence of actual SEC review and regulation of commission rates.[59] Second, the Court noted that the "antirebate rule" was not enumerated under section 19(b) as was the power to fix reasonable rates of commission. Furthermore, the "antirebate rule" was not applied consistently as was the fixing of rates of commission, but was applied arbitrarily. Most importantly, however, the Court noted that the question of implied

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53. It would seem that the Second Circuit in *Gordon*, 498 F.2d 1303 (2d Cir. 1974), chose a variation of the *Kaplan* approach. In addition to recognizing SEC power of review under the Securities Exchange Act of 1934, 15 U.S.C. § 19(b)(9), *as amended*, 15 U.S.C.A. § 78s (Supp. IV, 1975), the circuit court in *Gordon* affirmed the congressional policy that

> those matters [are] fundamental to achieving "the aims of the Securities Exchange Act" . . . and accorded the SEC the authority to make whatever changes respecting those matters that are "necessary or appropriate" . . . to effectuate those aims—*i.e.*, in the terms of the *Silver* test, "necessary to make the Securities Exchange Act work."

498 F.2d at 1306. Thus one could surmise that the court took the position that any express statutory power given to the SEC such as set forth in § 19(b), had the effect of satisfying *Silver*, as long as that power was being exercised by the SEC. *Id.* at 1307-09.

In contrast to the circuit court in *Gordon*, *Thill* required a finding that the express statutory provision, if one existed, was necessary to make the Exchange Act work. Insofar as *Thill* refused to extend antitrust immunity upon a mere showing of SEC review, it is consistent with the lower court in *Gordon*. However, *Gordon* differs from *Thill* with respect to the quantum of additional evidence necessary to sustain implied immunity. *See* notes 33-36 *supra* and accompanying text. This was reflected when the appellate court in *Gordon* stated: "Thus, to the extent our decision today is inconsistent with *Thill*, we find ourselves constrained to disagree with the holding there announced." *Id.* at 1310.

54. 95 S. Ct. at 2615.

55. *Id.* at 2602-04.

56. *Id.* at 2604-11.

57. *Id.* at 2612-13.

58. *Id.* at 2613-14. *See* notes 36 & 38 *supra* and accompanying text.

59. *See* note 72 *infra* and accompanying text.

repeal was not one of fact as to whether the particular rule in question was necessary to make the Act work; rather, it was a question of law as to whether "allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates."[60]

The Court also distinguished its decision in *Ricci v. Chicago Mercantile Exchange.*[61] In that case, the respondent commodity exchange transferred the petitioner's membership without hearing or notice. Ricci alleged violations of the Commodity Exchange Act,[62] the particular rule of the Exchange,[63] and the Sherman Act, in that the Exchange action was part of a conspiracy aimed at restraining the conduct of petitioner's business.[64] Although the Court recognized *Ricci* as the "different case" of which *Silver* spoke,[65] it declined to decide the question of antitrust immunity. Instead, it stayed proceedings in the federal court until the Commodity Exchange Commission made a factual determination of whether the actions complained of were in conformity with the Commodity Exchange Act and the Exchange rules.[66] Only after such a determination could the Court appropriately decide whether there was an implied repeal of the antitrust laws.

The *Gordon* case did not present a situation requiring a factual determination of whether the actions complained of were in conformity with the Securities Exchange Act and the exchange rules. The Court recognized that the Securities and Exchange Commission and the exchanges were acting pursuant to their statutory authority under the Act, and a factual determination of such conformity was unnecessary.[67]

In light of a long history of exchange self-regulation prior to enactment of the 1934 Act,[68] the Court found an intent by Congress that such self-regulation should continue under the Act, subject to SEC supervi-

60. 95 S. Ct. at 2613.
61. 409 U.S. 289 (1973).
62. *Id.* at 290-91.
63. *Id.*
64. *Id.*
65. *Id.* at 302. *See* note 32 *supra* and accompanying text.
66. 409 U.S. at 302. The Court remanded the case for three different reasons: first, to determine whether the Commodity Exchange Act or any of its provisions were inconsistent with an action brought under the antitrust laws; second, to determine whether the Commodity Exchange Commission would have statutory jurisdiction to consider aspects of the dispute between petitioner Ricci and the respondent; and third, whether the Exchange was acting within its statutory authority when it transferred Ricci's membership. *Id.*
67. 95 S. Ct. at 2614.
68. *Id.* at 2602-03.

sion.[69] As the Court concluded: "Supervised self-regulation, although consonant with the traditional private governance of exchanges, allows the Government to monitor exchange business in the public interest."[70] The Court found evidence of this policy of supervised self-regulation in Section 19(b)(9) which in the first instance left the fixing of commission rates to the exchange but subject to the SEC's power to "alter or supplement" as it determined "necessary or appropriate for the protection of investors or to insure fair dealing in securities . . . ."[71]

The Court further noted the active role which the SEC had actually taken with regard to the fixing of reasonable commission rates. The fifteen year period preceding the Court's decision was replete with instances of SEC investigation of existing exchange fixed commission rates, changes of those commission rates, and promulgation of new rates.[72] While that history was marred by instances of congressional disapproval of SEC progress in review and regulation,[73] Congress had "generally been content to allow the SEC to proceed without new legislation."[74]

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69. *Id.*

70. *Id.* at 2604, *quoting* Merrill Lynch, Pierce, Fenner & Smith, Inc., 414 U.S. 117, 127-28 (1973), where the Court noted two types of regulation in the 1934 Act. On the one hand there are direct requirements and prohibitions, *i.e.*, registration requirements, and on the other, self-regulatory provisions, *i.e.* fixing of commission rates.

71. Securities Exchange Act of 1934, 15 U.S.C. § 78s(b)(9), *as amended*, 15 U.S.C.A. § 78s (Supp. IV, 1975).

72. For example, in 1968 volume discounts were adopted by the NYSE and later by the AMEX for transactions greater than 1,000 shares. In 1971 competitive rates were adopted for transactions greater than $500,000. In April of 1972, the level was reduced to $300,000. In 1974 the SEC allowed competitive rates on nonmember orders below $2,000. Later in 1975 the SEC adopted rules prohibiting the fixing of commission rates after May 1, 1975 for all nonmember transactions, and on May 1, 1976 for all member transactions *i.e.* floor brokerage transactions. 95 S. Ct. at 2606-08.

73. *See* SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, SUBCOMM. ON SECURITIES, SECURITIES INDUSTRY STUDY REPORT, S. DOC. No. 93-13, 93d Cong., 1st Sess., 5-7, 43-63 (1973); SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 92d Cong., 2d Sess., SECURITIES INDUSTRY STUDY REPORT INCLUDING REPORT OF THE SUBCOMM. ON SECURITIES 4 (Comm. Print 1972); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, SUBCOMM. ON COMMERCE AND FINANCE, SECURITIES INDUSTRY STUDY, H.R. REP. No. 1519, 92d Cong., 2d Sess., XIX, 141, 144-45, 146 (1972); *Hearings on S. 3169 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 2d Sess. (1972). *See also* Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675 (1970).

74. 95 S. Ct. at 2611. However, note the new legislation, 15 U.S.C.A. § 78a *et seq.* (Supp. IV, 1975), which in addition to codifying the SEC directive to prohibit the fixing of commission rates, 15 U.S.C.A. § 78f(e) (Supp. IV, 1975), changes the procedures

In the final part of the opinion, the Court distinguished *Gordon* from *Silver* in terms of SEC review of exchange conduct. Whereas the SEC in *Silver* did not have the power to review an application of an exchange rule, *Gordon* presented the "different case" in which the SEC did have the power under section 19(b)(9) to review the fixing of commission rates by the exchanges.[75] The Court then concluded that due to the SEC's direct supervisory power over the fixing of reasonable rates of commission and the exercise of that power, along with continued congressional approval, it was necessary to grant implied repeal "to make the Act work as it was intended."[76]

In his concurring opinion, Justice Douglas recognized the three factors the majority had relied upon in reaching its decision, namely, the SEC's statutory power of review, the SEC's use of that power, and congressional support of the SEC's role.[77] However, he emphasized that the power of review, standing alone, would not immunize the exchanges from antitrust sanctions. He stated that the "active and aggressive" use of SEC review, as was demonstrated by the record in *Gordon*,[78] would be needed to insure that congressional intent to grant immunity was satisfied with respect to fixing commission rates.[79] This active review was found lacking in *NASD*, thus serving as the basis for a portion of the dissent in that case.[80]

Justice Stewart, with whom Justice Brennan concurred, emphasized congressional intent in affording the SEC the power of review under section 19(b)(9) as the most important factor in finding implied repeal of the antitrust laws.[81] The *Silver* criteria would be satisfied by this manifestation of congressional intent rather than by the mere exercise of SEC review power.

In finding implied repeal of the antitrust laws as applied to the exchanges' practices of fixing commission rates, the *Gordon* Court has recognized the need for breathing space for these self-regulatory agencies, whether or not the practice is "necessary to make the Securities Exchange Act work."

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with respect to SEC supervision over the rules of the exchanges, 15 U.S.C.A. § 78s (Supp. IV, 1975).

75. 95 S. Ct. at 2614.

76. *Id.* at 2615.

77. *Id.*

78. *See* note 56 *supra* and accompanying text.

79. 95 S. Ct. at 2615.

80. *See* text accompanying note 117 *infra*.

81. 95 S. Ct. at 2615.

IV. UNITED STATES v. NASD

In *NASD* the Court was not presented with a congressional delegation of an *express* power of review as it was in *Gordon*. Rather, the existence of a broad regulatory scheme was the basis for the claim of immunity.

In that case, the United States brought suit on behalf of investors against members of the NASD,[82] nonmember securities dealers and mutual fund companies[83] alleging that these parties, in violation of federal antitrust laws,[84]

> combined and agreed to restrict the sale and fix the resale prices of mutual fund shares in secondary market transactions between dealers, from an investor to a dealer, and between investors through brokered transactions.[85]

The alleged practices, which were sanctioned by the NASD, created two types of restrictions on the secondary market. First, vertical restrictions were imposed by agreements between underwriters and broker-dealers

> that compel[led] the maintenance of the public offering price in brokerage transactions of specified mutual-fund shares, and that prohibit[ed] interdealer transactions by allowing each broker-dealer to sell and purchase shares only to or from investors.[86]

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82. The National Association of Securities Dealers is a self-regulating association comprised of broker-dealers and principal underwriters and is the only association registered pursuant to section 15A of the Securities Exchange Act (the Maloney Act), 15 U.S.C. § 78*o* (1970), *as amended*, 15 U.S.C.A. § 78*o* (Supp. IV, 1975). *In re* Mutual Funds Sales Litigation, 374 F. Supp. 95, 97 n.3 (S.D.N.Y. 1973), *aff'd in part sub nom.* United States v. NASD, 95 S. Ct. 2427 (1975). The NASD is authorized to prescribe rules and regulations governing its members subject to SEC supervision. *See generally* the Maloney Act, 15 U.S.C. § 78*o* (1970), *as amended*, 15 U.S.C.A. § 78*o* (Supp. IV, 1975).

83. A mutual fund is a particular form of investment company. The distinguishing factor of an investment company security is that the sole assets of the issuer are in the form of investments in other corporations. Investment Company Act of 1940, § 3(a), 15 U.S.C. § 80a-3(a) (1970).

> Shares in the investment thus represent proportional interests in its investment portfolio and their value fluctuates in relation to the changes in the value of the securities it owns.

United States v. NASD, 95 S. Ct. 2427, 2432 (1975). A mutual fund is an open-end investment company, *i.e.*, it is required by law to redeem its shares upon demand. 15 U.S.C. § 80a-2(a)(32) (1970); 15 U.S.C. § 80a-22(e) (1970).

> In order to avoid liquidation through redemption, mutual funds continuously issue and sell new shares. These features—continuous and unlimited distribution and compulsory redemption—are, as the Court recently recognized, "unique characteristic[s]" of this form of investment.

United States v. NASD, 95 S. Ct. 2427, 2433 (1975).

84. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (1970).

85. 95 S. Ct. at 2433.

86. *Id.* at 2434.

Second, a conspiracy to restrain trade arose from "an overall course of conduct engaged in by the NASD and its members going beyond the NASD's rule-making authority."[87] The practical effect of these restrictions was to establish a uniform price and a single market for each mutual fund's shares. The NASD contended that these rules and activities were in pursuance of the statutory provisions of sections 22(d) and 22(f) of the Investment Company Act of 1940[88] (the Investment Act). The district court[89] accepted these contentions and dismissed the action holding that a clear repugnancy existed between the practices authorized by the Investment Act and the antitrust laws. The court stated:

> It is . . . apparent that Congress designed §§22(d) and 22(f) to create and protect a primary distribution system which is repugnant to the antitrust laws and did so in complete recognition of the fact that the legislation would frustrate the growth of a free secondary market. That statutory scheme is "incompatible with the maintenance of [an] antitrust action."[90]

On appeal, the Supreme Court affirmed the district court's disposition, but disagreed in part with its substantive analysis. Before discussing the specific provisions of sections 22(d) and 22(f), the Court examined the legislative history of the Investment Act.[91] The Court con-

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87. *Id.* at 2449 n.3; *see id.* at 2448 n.42.

88. 15 U.S.C. § 80a-22 (1970).

89. *In re* Mutual Fund Sales Antitrust Litigation, 374 F. Supp. 95 (S.D.N.Y. 1973), *aff'd in part sub nom.* United States v. NASD, 95 S. Ct. 2427 (1975).

90. 374 F. Supp. at 109, *quoting* Silver v. NYSE, 373 U.S. 341, 358 (1963). The court also relied on the existence of a "pervasive statutory scheme" to justify implied repeal.

> [T]he fact that Congress clearly intended to substitute a pervasive regulatory scheme, *i.e.*, § 22 of the [Investment Act], for the usual antitrust prohibitions in the *narrow area of distribution and sale of mutual fund shares,* [makes it] clear that the price maintenance practices complained of are immune from ordinary antitrust strictures.

374 F. Supp. at 114 (emphasis added and footnote omitted). *See* note 115 *infra.* However, recognizing that "antitrust laws represent a fundamental national economic policy" (*id.* at 113, *quoting* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966)), the district court took care to note that it was "not hold[ing] that the Investment Company Act and the Maloney Act 'completely displace the antitrust laws.' " *Id.* at 114, *quoting* Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 389 (1973).

91. The Investment Act was passed in recognition of the fact that the provisions of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1970), *as amended,* 15 U.S.C.A. § 77a *et seq.* (Supp. IV, 1975) and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1970), *as amended,* 15 U.S.C.A. § 78a *et seq.* (Supp. IV, 1975), were insufficient to provide adequate protection for purchasers of investment company securities. Its formulation was based largely on the Investment Trust Study (ITS). This report was conducted when Congress directed the SEC to study problems endemic to the investment company industry.

Part III of the ITS provided an analysis of the sales and distribution practices of mutual funds prior to the passage of the Investment Company Act. The study noted that discriminatory trading based on a "two-price system" within the secondary market cluded that the Investment Act was passed to combat the disruptive effect on the mutual funds market which arose from abuses within a widespread secondary market.[92] It was against this background that the Court examined the particular practices alleged to be violative of the antitrust laws.

A. *Vertical Restrictions*

The NASD contended initially that congressional sanction of the vertical restrictions (*i.e.*, the price maintenance agreements) could be found in section 22(d)[93] of the Investment Act which authorized price maintenance in certain transactions. Accordingly, it was argued that, to the extent Congress allowed such restrictive practices, it thereby intended the antitrust laws to be displaced and a corresponding immunity to be granted the activities which comprised the vertical restrictions.[94]

The Court, however, found that the particular activities under consideration extended beyond the scope of section 22(d). Although Congress in enacting this section mandated maintenance of the public offering price of mutual funds' securities in transactions between dealers or underwriters and the investing public, the pricing agreements disputed

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existed due to "riskless trading." This practice occurred when an investor had knowledge of

> the present day's trading price based on the portfolio value established the previous day; and the following day's price, which was based on the net asset value computed at the close of exchange trading on the present day.

95 S. Ct. at 2437. Those sophisticated investors who engaged in "two-price system" trading were guaranteed the enjoyment of an instantaneous increase in the market value of the investment. This immediate gain was concomitant with an equivalent dilution in the value of the other outstanding shares. Inadequate explanations of the complex system effectively precluded the investing public from utilizing or benefiting from this system, even though information of the "two-price system" was available to the general public. *Id.*

Based on an examination of this legislative history, the Court concluded:

> Together, §§ 22(d) and 22(f) [of the Investment Company Act were enacted to] protect the primary distribution system for mutual-fund securities. Section 22(d), by eliminating price competition in dealer sales, inhibits the . . . [two-price trading system] and thus assures the maintenance of a variable sales system. Section 22(f) complements this protection by authorizing the funds and the SEC to deal more flexibly with other detrimental trading practices by imposing SEC-approved restrictions on transferability and negotiability.

Id. at 2445.

92. 95 S. Ct. at 2436-38; *see* note 91 *supra*.

93. 15 U.S.C. § 80a-22(d) (1970) provides in pertinent part:

> No registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and, if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security, and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus.

94. 95 S. Ct. at 2443.

in this case also covered transactions by broker-dealers with other than the investing public. The Court questioned whether the pricing agreements to which broker-dealers were a party and which governed the brokered transactions of these individuals were encompassed by section 22(d), thus qualifying for the antitrust exemption.[95]

The NASD argued that the word "dealer" referred to an occupational status. Because one individual may engage in both brokered and dealer transactions in the securities market, the definition of dealer within section 22(d) applied to *all* transactions engaged in by a broker-dealer.[96] In disposing of the appellee's claim the Court noted that the Investment Act specifically defines "broker"[97] and "dealer"[98] and utilizes the terms throughout the Act as they relate to the individual's role in a particular transaction. The Court then held that the use of the word "dealer" in the statutory provision referred to a transactional capacity. Hence section 22(d) applied only to the dealer transactions of a broker-dealer.[99]

The Court also gave considerable weight to SEC rulings interpreting the statute[100] and adopted the Commission's position that Congress did not intend section 22(d) to control "brokered" transactions. This narrow construction of the language of the provision was mandated by the Court's policy disfavoring the granting of implied immunity.[101] The Court concluded that to adopt the broad construction posited by the appellees, would "not only displace the antitrust laws by implication [but] it also would impinge seriously on the SEC's more flexible regulatory authority under Section 22(f)."[102]

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95. *Id.* at 2440-41

96. *Id.* at 2441.

97. The Investment Act defines a "broker" as:

> [A]ny person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank or any person solely by reason of the fact that such person is an underwriter for one or more investment companies.

15 U.S.C. § 80a-2(a)(6) (1970).

98. A "dealer" is defined as:

> [A]ny person regularly engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, insurance company, or investment company, or any person insofar as he is engaged in investing, reinvesting, or trading in securities, for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

15 U.S.C. § 80a-2(a)(11) (1970). For further distinctions between brokers and dealers see, 15 U.S.C. §§ 80a-3(c)(2), 10(b)(1), 17(e)(1), (2) (1970) (brokers); 15 U.S.C. §§ 80a-2(a)(40), 22(c), (d) (1970) (dealers).

99. 95 S. Ct. at 2442-43.

100. *Id.* at 2442.

101. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963); United States v. Borden Co., 308 U.S. 188, 198 (1939).

102. *Id.* at 2443.

Failing to find immunity under section 22(d), the Court then considered whether the vertical restrictions were within the scope of section 22(f).[103] The Court found under this section that mutual fund companies have the power to limit the transferability of the securities they issue subject only to the proviso that these limitations not conflict with SEC rules and regulations.[104] It expressly rejected the argument of the United States that section 22(f) authorized only restrictions appearing on the face of the shares,[105] finding instead that section "22(f) specifically recognizes that mutual funds can impose . . . restrictions on the distribution system."[106] The Court concluded that the restrictive practices were

> immune from liability under the Sherman Act, for we see no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws.[107]

This conclusion was reached by the Court in spite of the fact that the SEC had not exercised its power under section 22(f).[108]

As a second basis for implying repeal of the antitrust laws, the Court noted that if the industry practices were to come within the scope of the antitrust laws, there would be an unacceptable limitation on the investment industry's ability to reach the problems which the Investment Act was designed to combat.[109] The congressional judgment embodied in the Investment Act was that constraints on competition in the form of resale price maintenance agreements and concerted refusals to deal were unavoidable in dealing with the peculiar problems intrinsic to the mutual fund industry. Consequently, Congress granted the SEC ultimate authority in deciding to what degree, if any, such restrictions should be endured "in the interest of the holders of all the outstanding securities"[110] of mutual funds. Therefore, the Court held

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103. *Id.* Section 22(f) of the Investment Act provides:

> No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company.

15 U.S.C. § 80a-22(f) (1970).

104. 95 S. Ct. at 2443.

105. *Id.* at 2444-45.

106. *Id.* at 2446.

107. *Id.* at 2444.

108. *Id.* at 2443-44. Although the SEC is empowered to prescribe rules governing the transferability and negotiability of shares, at the time of the alleged conspiracy, they had not done so. Appellants maintained that failure to exercise this aspect of the SEC's authority precluded finding a "repugnancy between its regulatory authority and the antitrust laws." *Id.* at 2444. However, the Court held that the SEC's actual exercise of its power to authorize the restrictions was sufficient to create a repugnancy. *Id.*

109. *See* note 91 *supra.*

110. 15 U.S.C. § 80a-22(f) (1970).

> [t]here can be no reconciliation of [SEC's] authority under § 22(f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal *per se*. In this instance the antitrust laws must give way if the regulatory scheme established by the Investment Company Act is to work.[111]

B. *Horizontal Restrictions*

After according the vertical restrictions immunity from the antitrust laws, the Court then dealt with the more critical question of the legality of the horizontal combination. As noted by the Court, these activities were neither required by section 22(d) nor authorized by section 22(f).[112] Consequently, implied immunity could not be predicated on the same theories utilized for the vertical restrictions. It could not be inferred that Congress by authorizing practices which were either necessary to make the regulatory scheme work or which were directly in conflict with the antitrust laws, intended to grant immunity.[113]

Nonetheless, the Court found that the SEC was authorized under the Maloney Act to review any and all rules of the NASD,[114] and held:

> [T]he investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC.[115]

The importance of the Court's holding lies in the fact that a specific congressional grant of jurisdiction to the SEC over a particular activity was previously considered to be a prerequisite to the granting of antitrust immunity.[116]

It was this portion of the opinion for which the dissent reserved its

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111. 95 S. Ct. at 2448.

112. *Id.*

113. *Id.*

114. *See* 15 U.S.C. § 78*o*-3 (1970). In *NASD*, the Court specifically noted: 15 U.S.C. § 78*o*-3(b) (1970), *as amended*, 15 U.S.C.A. § 78*o*-3(b) (Supp. IV, 1975) (requiring the SEC to determine whether an association has met several specific requirements to qualify for registration as a national securities association); 15 U.S.C. § 78*o*-3(j) (1970) (requiring registered associations to file with the Commission any proposed rule changes for approval); and 15 U.S.C. § 78*o*-3(k)(2) (1970) (authorizing the SEC to request changes in or supplements to association rules).

115. 95 S. Ct. at 2449. In exercising this broad

> . . . authority over association rules and practices, [the SEC] is charged with protection of the public interest as well as the interests of shareholders . . . and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility.

Id. (footnotes omitted). This supervisory authority extends to review of the rules as well as the manner in which those rules are interpreted and implemented by the association and its members. *Id.*

116. *See* Silver v. NYSE, 373 U.S. 341, 358 n.12 (1963); pt. II *supra*.

strongest criticism. Justice White expressed the fear that because of the majority's holding,

> implied antitrust immunity becomes 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.[117]

The actual consequence of *NASD*, however, may not be to grant antitrust immunity to business conduct subject to regulatory agency approval in all situations. Rather this immunity may be extended only so far as to protect anticompetitive activity inherently related to other activities which are immunized from antitrust liability by a pervasive statutory scheme.[118] This conclusion is suggested by the holding of the Court that, to the extent the horizontal combination activities were intended to promote the vertical restriction activities, the former were "ancillary" to practices granted implied immunity[119] and, therefore, could be sheltered by the same immunity.[120]

> [A]ppellant urges in Count I that appellees' . . . [horizontal combination] was designed to encourage the suppression of intrafund secondary market activities, precisely the restriction that the SEC consistently has approved pursuant to § 22(f) for nearly 35 years. This close relationship is fatal to appellant's complaint, as the Commission's regulatory approval of the . . . [vertical restrictions] cannot be reconciled with appellant's attack on the ancillary activities averred in Count I.[121]

Ultimately, the discrepancy between the majority and dissenting opinions is narrowed to the question of how much evidence of legislative intent is necessary to grant implied immunity. While the dissenting Justices felt compelled to adhere strictly to the policy of disfavoring immunity, the majority took a somewhat more pragmatic approach in determining when repeal is "necessary to make the . . . [legislative scheme] work."[122]

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117. 95 S. Ct. at 2451.

118. *Id.* at 2450. It is unlikely that antitrust immunity based on other than the existence of a pervasive regulatory scheme would protect "ancillary" activities. When antitrust immunity is based on an express exemption or a clear repugnancy between the regulatory statute and antitrust laws, the scope of the regulatory power may not be so broad as to bring the "ancillary" activities within its confines.

119. *See* notes 93-111 *supra* and accompanying text.

120. 95 S. Ct. at 2449-50.

121. *Id.* at 2450.

122. Silver v. NYSE, 373 U.S. 341, 357 (1963). Subsequent to the decision in *United States v. NASD*, the Second Circuit handed down its decision in Jacobi v. Bache & Co., 520 F.2d 1231 (2d Cir. 1975). This court also took a pragmatic approach in using the

V. CONCLUSION

Gordon and *NASD* present a new and somewhat more expansive set of criteria by which a regulated industry action may be found immune from the antitrust laws. First, under *Gordon*, a congressional grant of power to a regulatory agency to approve specific types of industry conduct coupled with an exercise of that power will lead to antitrust immunity. Second, under *NASD*, anticompetitive industry conduct not specifically recognized by Congress in granting supervisorial power to the regulatory agency will be given immunity if the "regulatory authority . . . is sufficiently pervasive."[123]

Gordon leaves unanswered the question of what quantum of SEC activity is necessary to support an implied repeal of the antitrust laws in those cases where the existence of a pervasive regulatory scheme is not asserted. In *Gordon* there was a continuing pattern of activity over a considerable period of time to which the Court could look with respect to the fixing of commission rates.[124] In view of this fact, it may be inferred that a high degree of active SEC review will be necessary. This was the conclusion reached by Judge Friendly in *Jacobi v. Bache & Co.*,[125] in applying *Gordon.*

In the *Jacobi* case a NYSE rule imposed a service charge on transactions of less than 1,000 shares.[126] Registered representatives of member firms challenged on antitrust grounds an Exchange article and rule which prohibited the use of this service charge in the computation of the commissions they earned from securities transactions.[127]

The SEC had the authority, pursuant to SEC Rule 17a-8(a), to initially authorize the service charge,[128] and later, by agreement with the Exchange, to terminate its use.[129] The Commission conducted hearings on the rule,[130] but never took any official action with regard to the rule.[131] In addition the court noted that the SEC could possibly have

"rule of reason" which "provides the 'breathing space' necessary for the process of supervised self-regulation to work." *Id.* at 1239. *See* text accompanying note 133 *infra.*

123. 95 S. Ct. at 2448.

124. *See* note 72 *supra.*

125. 520 F.2d 1231 (2d Cir. 1975).

126. *Id.* at 1233. This rule was initially approved by the SEC for a 90 day period commencing April 6, 1970. However, by a subsequent agreement between the NYSE and the SEC, the rule could last indefinitely subject to SEC termination. Not until May 24, 1972, was the service charge eliminated. *Id.* at 1235-36.

127. *Id.* at 1236.

128. *Id.* at 1235.

129. *See* note 126 *supra.*

130. 520 F.2d at 1235-36.

131. *Id.* at 1236.

taken action under section 19(b)(9) of the Act to request the Exchange to include the service charge as part of the registered representatives' compensation base.[132]

The court did not find implied repeal of the antitrust laws.[133] Distinguishing *Gordon,* the court relied on two factors: (1) "the Exchange's authority to enforce" the prohibition against sharing the service charge was not express as it was in *Gordon*; and (2) the SEC had failed to exercise any power of review.[134] The court thus appears to interpret *Gordon* as requiring an express statutory delegation by Congress of power to regulate certain actions of the exchange and the SEC.

Gordon and NASD together may establish a singular test. *Gordon* may serve as a partial answer to the dissent's fear in *NASD* that implied antitrust immunity will flow from every statute giving a regulatory body the power to "approve business conduct."[135] This fear overstates to some degree the probable impact of *NASD.* In the absence of regulatory authority "ancillary" to a pervasive regulatory scheme, the courts will most likely apply the *Gordon* standards. The practical effect of such an application of these cases would be to establish a "shifting emphasis" test. In order to obtain immunity (under this test) one would have to show an increasing degree of specific legislative congressional recognition of the anticompetitive practice as the regulatory scheme became less pervasive.

Whether *NASD* would mandate a similar result in other areas of the securities market is open to question. Some commentators feel there are significant differences between the Maloney Act and Investment Act and the Securities Exchange Act.[136] These differences in the provisions of the enabling statutes may lead to varying applications of the antitrust laws within the securities industry. What will constitute sufficient SEC activity is an especially important question in light of the new Securities Exchange Amendments of 1975.

On June 5, 1975, President Ford signed into law amended versions of

132. *Id.* at 1237.

133. *Id.* The opinion went on to state that where the NYSE is acting pursuant to its self-regulatory function any otherwise per se antitrust violation must be measured under a "rule of reason." *Id.* at 1238-39. Finding that the NYSE was acting reasonably in prohibiting the sharing of the service charge in view of member firm's financial situations, the antitrust challenge was dismissed. *Id.* at 1240.

134. *Id.* at 1237.

135. 95 S. Ct. at 2451.

136. Nerenberg, *supra* note 15, at 140-41; Note, *Application of Antitrust Laws to the Securities Industry,* 10 WM. & MARY L. REV. 136, 142 (1968).

the Securities Exchange Act of 1934.[137] Under section 6(e), fixed commission rates are prohibited.[138] However, the SEC can provide for fixed rates where it, rather than the individual exchanges, determines that such fixed rates are in the public interest or are necessary to accomplish the purposes of the Act and will not impose any unnecessary burden on competition.[139] *Gordon* would appear to allow such SEC action antitrust immunity, especially in light of the SEC's duty to consider these antitrust factors.

Another provision, section 19(c), provides that:

> The Commission, by rule, may abrogate, add too, and delete from . . . the rules of a self-regulatory organization . . . as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to the requirements of this chapter . . . .[140]

Moreover, under section 23(a)(2), the Commission, in making such rules pursuant to this power, must consider the effect of such rules on competition.[141]

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137. Securities Exchange Act, § 1 *et seq.*, 15 U.S.C.A. § 78a *et seq.* (Supp. IV, 1975), *formerly* ch. 404, § 1 *et seq.*, 48 Stat. 881 (1934).

138. 15 U.S.C.A. § 78f(e) (Supp. IV, 1975).

139. 15 U.S.C.A. § 78f(e) (Supp. IV, 1975) provides in part:

> (1) . . . And provided further, that the commission, in accordance with the provisions of section 78s(b) of this title as modified by the provisions of paragraph (4) of this subsection, may—
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> (A) permit a national securities exchange, by rule, to impose a reasonable schedule or fix reasonable rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange prior to November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees are in the public interest; and (B) permit a national securities exchange, by rule, to impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange after November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees (i) are reasonable in relation to the costs of providing the service for which such fees are charged (and the Commission publishes the standards employed in adjudging reasonableness) and (ii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this chapter.
>
> (2) Notwithstanding the provisions of section 78s(c) [of this subchapter the Commission may alter any] rule which imposes a schedule or fixes rates of commissions, allowances, discounts, or other fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this chapter.
>
> . . . .
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> (4) (A) Before approving or disapproving any proposed rule change submitted by a national securities exchange which would impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange, the Commission shall afford interested persons (i) an opportunity for oral presentation of data, views, and arguments . . . .

140. 15 U.S.C.A. § 78s(c) (Supp. IV, 1975).

141. 15 U.S.C.A. § 78w(a)(2) (Supp. IV, 1975) provides:

It would thus appear that the SEC has authority with respect to *all* exchange rules rather than just those which had been enumerated under section 78s(b) prior to its amendment.[142] Applying the analysis of *Gordon*, it would appear that antitrust immunity would be afforded to any exchange whose conduct fell within the ambit of *any* rule which the SEC had actively supervised. This is strengthened by the fact that the SEC must consider anticompetitive effects of such conduct before approving exchange registration under section 6(b)(8) and before directing an exchange to change its rules under section 23(a)(2). However, this conclusion would appear to be inconsistent with a long line of cases disfavoring implied repeal of the antitrust laws,[143] the law of express exemptions,[144] and congressional intent that the new amendments would not change the relationship between the antitrust and securities laws.[145]

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The Commission, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.

142. Securities Exchange Act, 15 U.S.C. § 78s(b), *as amended,* 15 U.S.C.A. § 78s (Supp. IV, 1975).

143. *See* note 26 *supra.*

144. *See* note 24 *supra.*

145. *See* SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, SECURITIES ACTS AMENDMENTS OF 1975, REPORT TO ACCOMPANY S. 249, S. REP. No. 94-75, 94th Cong., 1st Sess. 14 (1975).

Furthermore, section 78s(d)(1) provides that notice will be filed with the SEC where any self-regulatory organization (exchange) bars any nonmember from associating with a member. 15 U.S.C.A. § 78s(d)(1) (Supp. IV, 1975). And section 78s(d)(2) provides that where notice is filed pursuant to (d)(1), the regulatory agency filing said notice will be subject to direct review by the SEC either upon request of the regulatory agency or the aggrieved person, member, participant, or applicant. 15 U.S.C.A. § 78s(d)(2) (Supp. IV, 1975). Thus it would appear that the problem of procedural due process which concerned the Court in *Silver* has now been alleviated. *See* note 23 *supra.*