




10-1974

## Gordon v. New York Stock Exchange, Inc. (NYSE)

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>

 Part of the [Administrative Law Commons](#), [Antitrust and Trade Regulation Commons](#), [Banking and Finance Law Commons](#), and the [Securities Law Commons](#)

---

### Recommended Citation

Gordon v. New York Stock Exchange, Inc. (NYSE). Supreme Court Case Files Collection. Box 25. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

D

DISCUSS

CA 2 ~~dis~~ dismissed Petr's  
anti-trust suit vs NY Stock  
Exchange: its rules not  
subject to Anti-Trust laws  
(Sherman Act).

Silver v NY Stock Exchange  
on controlling

Deary -  
CA 2 seems entirely  
correct on Silver.

RC

PRELIMINARY MEMORANDUM

November 15, 1974 Conference  
List 1, Sheet 4

No. 74-304

GORDON

v.

Cert to CA 2

(Kaufman, Mansfield &  
Mulligan)

Federal/Civil

NEW YORK STOCK EXCHANGE

Timely

1. SUMMARY: Petr challenges a CA 2 ruling that the minimum rate structure employed by the national's stock exchanges is not subject to the antitrust laws. Although resps support the decision of CA 2, they join petr in requesting review by this Court.

2. FACTS: Resps are the New York Stock Exchange, the American Stock Exchange, and two representative member firms of the exchanges.

Granted!  
11/15



Petr, suing on his own behalf and in behalf of a class of small investors, brought an antitrust action, complaining that resps' practice of offering commission discounts in large transactions and the availability of negotiated rates only on transactions in excess of \$500,000 (now \$300,000) constituted a system of price discrimination in violation of the Robinson-Patman Act. Petr also charged that the practice of the exchanges of fixing the commissions to be charged to those unable to avail themselves of negotiated rates constitutes a price-fixing scheme in violation of sections 1 and 2 of the Sherman Act.

The District Judge (SDNY -- Lasker) granted resps motion for summary judgment, characterizing the Robinson-Patman claim as frivolous. He also found that the Securities and Exchange Act of 1934 exempts fixing of commission rates by the exchanges from the coverages of the antitrust laws.

3. CA 2's DECISION: The court of appeals affirmed the decision of the DC. Like the DC, it characterized the Robinson-Patman claim as frivolous, and the claim has not been renewed here. On the Sherman Act issue, the court looked first to this Court's decision in Silver v. New York Stock Exchange, 373 U.S. 341 (1963). In that case, NYSE had approved, on a temporary basis, private wire connections between a non-member broker and member firms. Subsequently, however, NYSE ordered the connections suspended, without any notice or hearing, and the non-member broker sued NYSE for instituting a group boycott in violation of the antitrust laws. NYSE responded that it was engaged in self-regulation as contemplated by the 1934 Act and therefore could not be liable for antitrust violations for acts part

of the self-regulatory scheme. This Court held that NYSE's action could be subject to an antitrust action. The Court pointed out that the action taken by the exchange was not one under the direct control of the SEC, so that subjecting this NYSE practice to the antitrust laws served to ensure that anticompetitive practices would be curtailed by some governmental authority. ~~the absence of~~. The absence of ~~the~~ SEC responsibility also eliminated the dangers of duplicative and possibly inconsistent rulings from the courts and the agency. This Court noted, however, that "[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." 373 U.S. at 360. CA 2 held that this was that "different case."

CA 2 pointed out that under section 19(b) of the 1934 Act, the SEC is empowered to alter or supplement exchange rules with respect to, inter alia, "the fixing of reasonable rates of commission . . . ." Thus, SEC review of the challenged action -- the factor that was missing in Silver -- is present here, and under the reasoning of Silver, the antitrust laws should not apply.

The court <sup>(also)</sup> ~~pointed out that the decision in Silver was based on the interpretation of~~ ~~the~~ pointed to the language of section 19(b) of the 1934 Act as evincing the awareness of Congress that the exchanges would continue their long-standing practice of fixing commission rates with the modification that it be subject to SEC oversight.

Considerations of the evolution of sound regulatory policy were also important in the CA 2 opinion. The court pointed to the gradual elimination of fixed commissions being ordered by the SEC and asserted that abrupt application of the antitrust laws could threaten to disrupt a carefully planned period of transition.



4. CONTENTIONS: Petr contends that CA 2's decision conflicts with this Court's decision in Silver and with the decision of CA 7 in Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (CA 7 1970), in which the court held that NYSE's anti-rebate rule, which prohibits member division of commissions with non-members, violated the antitrust laws. Both CA 2 and resps agree that Thill is basically inconsistent with the decision of CA 2 in this case.

Petr further contends that the decision below is an incorrect departure from the policy announced in Silver that the antitrust laws should be applied to exchange action. Finally, petr for the first time raises some vague constitutional claim which is not to be taken seriously.

5. DISCUSSION: Both the Department of Justice and the SEC filed amicus briefs below, the SEC urging affirmance and the Department of Justice in favor of reversal.

CA 2's decision appears unassailable, both in its interpretation of Silver and of the 1934 Act. The fact that resps urge the granting of cert might seem to indicate their concern that this general problem will recur. The proposed SEC rule whereby all commission rates will be negotiated is scheduled to go into effect in April, 1975. Silver seems to contemplate a case-by-case evaluation of the relationship between particular exchange practices, the antitrust laws, and the 1934 Act; consequently, review of a nearly abandoned practice may not be called for.

There is a response.

Becker

Ops in appx to petn.

11/4/74

DK



74-304 GORDON v. NEW YORK STOCK EXCHANGE

Argued 3/25/75



Gordon v. N.Y. Stock Exchange 74-304

Bader (for Peter)

Immunity from Anti Trust laws  
must be determined on case by case  
basis.

I White asked "what if  
SEC had ordered a schedule  
of minimum fees"? Bader  
gave no answer except to say  
that he doubted SEC has  
power to do this.

Shapiro

Effective May 1, 1975, SEC has  
adopted Rule as to Rates.

Relies on Silver.

19(b) merely provides remedies -  
it is not a grant of affirmative power.

? A Once the New Rule becomes effective  
there will be no anti-trust juris

Jackson (for Resp).

SG is trying to exhaust Anti-Trust Law over all other laws.

SEC has made major changes (7 of them) in Exchange Rules over recent years - after hearings in which Anti-Trust Division took part.

If ~~the~~ A/T view prevailed here, there would have to be a trial de novo - under A/T principles - before a jury. This case by case approach would further ~~the~~ SEC regulation.

A/T Division has not challenged fixed commission rules of Exchange altho the practice of fixed rates has been open & notorious ~~for~~ ~~more than~~ since enactment of Anti Trust laws.

Existence of regulatory power is sufficient - whether exercised or not.

Relies on doctrine of repugnancy.

Jackson (Cont)

Two statutes cannot be harmonized;  
One says who shall not; the other  
says you may. Now SEC also  
says you may not. In ~~such~~  
either case, A/T is preempted.

Commission's power is exclusive  
over the Exchange - but not  
necessarily over members: i.e. if  
members ~~can~~ conspire among  
themselves to fix rates after  
the Exchange Rule as to rates  
terminates, anti-trust laws would  
then apply.

Exchanges are entitled to know  
what conduct is lawful & what is  
not.

~~But~~ Since SEC has power  
to reject a Rule of Exch, its failure  
to do so is - in legal effect -  
approval.



Perkins (for SEC) a plain repugnance  
exists

## Regulatory scheme of SEC

### Competitive considerations

- as well as economic - are considered  
by SEC

Congress chose to regulate  
fixed rates - not to outlaw them.

(Relied on Wase - written  
by Harry)

SEC may act vs any member

Under 19(a), SEC may revoke  
reg. of an Exchange.

What happens after May 1?

If members thereafter  
fix rates, anti-trust provisions would  
lie. Even today, if members  
agreed to divide markets (e.g.),  
A/T would apply.

Nerheim (SEC)

How process works in practice:

See studies in SEC

Documentary Appendix

If SEC thinks a Rule Change is OK, no express approval is required - but SEC considers this to be agency action.

Judicial  
Review

Responding to Byron, Nerheim said that Gordon could review this agency non-action in DC - on de novo basis - under Adm. Procedure Act.

Justice Dept. Reply Brief saying SEC has done nothing is "shockingly disingenuous".  
(See SEC Documentary Appendix)

Ricci doesn't extend Silver - there were factual issues that had to be resolved.



MEMORANDUM

TO: Mr. Justice Powell  
FROM: Lewis F. Powell, Jr.

DATE: March 27, 1975

No. 74-304 Gordon v. New York Stock Exchange

There are two distinct analytical elements in the problem in this case. One is <sup>(1)</sup>whether the Securities Exchange Act's unique regulatory scheme, compounded of self-regulation in the exchanges and regulatory oversight by the SEC, was intended to substitute for competitive forces in the industry. The second question is <sup>(2)</sup>whether the Exchange Act and the antitrust laws can be enforced in complementary fashion. The answer to each question depends in part on the other; so neither issue can be decided independently. Still, I think it helpful to think of these as discrete problems. The first is largely a matter of congressional intent; the second, parimarily a problem of administrative law.

In the time I have devoted to studying the Court's past cases on antitrust in the regulated industries, I have been unable to discern a consistent pattern. There are, however, several prevailing themes. First, the Court has regularly invoked the principle that repeal by implication (especially *True* of antitrust laws) is not favored. The Court has found a complete repeal by implication in very few cases; most cases have found some place for antitrust law in the regulatory scheme.

Second, a highly relevant consideration is whether the regulatory agency is required to weigh the effect on competition as one element of the public interest. An express statutory provision to this effect has persuaded the Court that Congress meant competition to be protected by the agency rather than the antitrust laws. Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963). But see, United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963). On the other hand, absence of emphasis on competitive considerations has helped the Court to the conclusion that Congress did not intend regulation to substitute for competition, United States v. RCA, 358 U.S. 334 (1959). See also Otter Tail Power Co. v. United States, 410 U.S. 366.

Third, the Court has been fairly consistent in holding that antitrust law is not ousted if the agency has no power to regulate the conduct in question. E.g., Georgia v. Pennsylvania R.Co., 324 U.S. 439 (1945); United States v. Borden Co., 308 U.S. 188 (1939).

Finally, active and continuing agency supervision based partly on competitive concerns was an apparent factor in the Hughes Tool case, where the Court held that CAB regulation had displaced antitrust scrutiny of post-merger dealings with an airline company. Hughes Tool Co. v. Trans World Air lines, Inc., 409 U.S. 363 (1973). I might add that I find no consistent reliance - except in dissents - on the presence or absence of a damages remedy for the party claiming injury.



The Court seems to have recognized that Congress could reasonably substitute regulation for competition without affording a damages remedy to parties injured by conduct the regulatory agency disapproves.

Silver v. New York Stock Exchange, 373 U.S. 341 (1963), fits into this loose structure rather well. There the Court began by emphasizing the unique structure of the Exchange Act, which relies on self-regulation in the industry to a greater degree than other regulatory statutes do. It recognized that the statutory scheme contemplated the continuing operation of the exchanges as membership organizations, with authority (even a duty) to exclude some persons from membership. The Court found no explicit repealer of antitrust laws, however, and invoked the no-repeal-by-implication principle to hold that the antitrust laws should be ousted only insofar as necessary to make the Exchange Act work. The guiding principle was "an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Id. at 357. Since the conduct challenged in Silver was not subject to SEC regulation, the Court easily concluded that regulation had not been substituted for competition in that narrow context and went on to use a "Rule of Reason" analysis and balance antitrust policies against the fundamental concept of exchange self-regulation to come up with its curious "due process" holding.

NYSE  
ordered a  
member  
to discontinue  
direct  
telephone  
lines to  
non-members.

Conduct  
in Silver  
not subject  
to A/T

The Court expressed no view on the result it would reach when the SEC <sup>has</sup> ~~had~~ express regulatory power over the challenged conduct. Id. at 358.

The express regulatory power, which is present here, is relevant in two respects. First, it is relevant in that ultimate control over exchange rules is in the SEC rather than the exchange itself. Thus it presents a much better case than Silver for saying that Congress intended to substitute this method of regulation for the antitrust laws. Second, even if Congress seems to have intended a dual system of regulation, the SEC's express authority over commission-fixing rules creates a potential for conflict between regulatory authorities. This prospect has more relevance to the administrative law problem than to the question of congressional intent.

*Primary  
jurisdiction*

The administrative law issue is a problem of choosing a procedure by which both the SEC and the antitrust court can perform their respective functions without conflict. The best procedure invokes the doctrine of primary jurisdiction. In order to assure uniformity of decision, and to get an informed assessment of conditions in the regulated industry, an antitrust court ordinarily should not entertain a private suit until the agency has been given an opportunity to rule on the challenged conduct. Thus, if the agency has authority to exempt certain transactions from the antitrust laws, Far East Conference v. United States, 342 U.S. 570, of if there



is a question whether the challenged conduct violated the regulatory act, Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), the antitrust court should not act until the agency has performed its function. (You joined a dissent in Ricci based primarily on the ground that waiting for agency's action in that case could not be expected to aid the antitrust court significantly.) If the agency disapproves the challenged conduct on the basis of the regulatory statute, the antitrust court may not have to proceed. If the agency renders an opinion balancing the competitive considerations against policies peculiar to the regulated industry, the court will have an informed basis upon which to apply a "Rule of Reason" analysis. United States v. RCA, 358 U.S. 334 (1959). But see United States v. Philadelphia National Bank, 374 U.S. 321, 353-354 (1963); California v. FPC, 369 U.S. 482 (1962).

The alternative to the "primary jurisdiction" model is to allow the antitrust and agency proceedings to run simultaneously, that is, to allow the antitrust court to decide the case without waiting for an agency decision on the matters entrusted to its processes. This presents a substantially greater danger of producing antitrust decisions that do not adequately consider the regulatory concerns. Under the "primary jurisdiction" model there is some potential for substantive conflict: the court may find an antitrust violation in some conduct that the agency has held legal under the regulatory



statute. Some degree of conflict, however, is inevitable given an initial decision that Congress did not mean to substitute regulation for competition. But it need not be serious. It is the same conflict that can arise in any other context where a business is subject to two unrelated schemes of regulation: its conduct may violate one statute but not the other. Unless the agency has determined that some conduct is affirmatively required by the regulatory statute, there is no conflict that cannot be ameliorated by applying a "Rule of Reason" (instead of a per se rule) in the antitrust court. (The "Rule of Reason," in hornbook terms, is simply a process of balancing the socially desirable aspects of the conduct against its anticompetitive effects.)

If the court and the agency are allowed to proceed simultaneously, however, the antitrust court may act without the agency's judgment under the regulatory statute. The court might then disregard the regulatory concerns, act on incomplete information, or reach a different conclusion on crucial facts. This state of affairs is generally less desirable, but the Court has approved it in various contexts. Philadelphia National Bank, supra; cf. California v. FPC, supra.

Now that I've introduced the question, the problem is to apply these two general inquiries to the SEC and the NYSE. First is the question whether Congress meant to make SEC regulation exclusive wherever applicable. The Exchange Act

contains no explicit repeal of the antitrust acts, and the SEC has no authority to exempt specific transactions from antitrust challenge. Instead there is a section purporting to supplement rather than supersede "all other rights and remedies that may exist at law or in equity." See U.S. brief at 70. Second, the statute does not require the SEC to weigh competitive considerations in determining what exchange practices will serve the public interest. Section 19(b) describes the relevant standard: "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." These factors, under the Court's prior decisions, weigh in favor of holding that antitrust law is not ousted. On the other side, though, the SEC claims that it does consider competitive factors even though the statute does not require it, and the SEC has closely regulated commission-fixing agreements over the last few years. These two factors are not particularly relevant to congressional intent, but they may deserve some weight on the other side.

I think the SEC is crying "wolf" when it claims that inconsistent regulation would be disastrous for the securities industry. It is not clear to me why the SEC's silent nondisapproval of a proposed exchange rule must be honored. The SEC admits that in deciding not to object to an exchange proposal, it may be deciding only that the proposal is not



inconsistent with the Exchange Act. If an antitrust court, after due consideration of the program of self-regulation and the public interest expressed in the Exchange Act, should decide that ~~the~~ anticompetitive aspects of the exchange's rule outweigh its benefits, this seems to me no different from the usual interplay between two regulatory schemes expressing different concerns. The exchanges would know that they are subject to antitrust regulation as well as SEC supervision, and they could tailor their rules to avoid anticompetitive conduct that is not expressly designed to protect investors, insure fair dealing, or insure fair administration of the exchange.

The only situation that would pose a true dilemma for the exchanges would arise from an SEC order to institute a particular anticompetitive rule. Then, I think the antitrust law - whether under an immunity principle or a simple "Rule of Reason" analysis - probably should not interfere with the SEC's balance of policies. Even this concession to the SEC, which all parties in this case have regarded as a minimum, is not mandated by the Court's prior cases. In RCA the Court overrode the FCC's assessment of the public interest in a radio acquisition, and in Philadelphia National Bank it allowed an antitrust court to disagree with the Comptroller's decision that a bank merger would be good for the Philadelphia economy despite the decrease in competition.

*But this  
is not  
always  
practicable  
- e.g. this  
case, rate  
fixing is  
per se anti-trust  
violation*

*but  
how have  
practical  
known to  
Congress  
since Act  
of 34 was  
adopted.*

The second issue, if the Court concludes that the antitrust laws are not inherently "repugnant" to the Exchange Act, is whether the two laws may be administered in a fashion that will avoid disruption of the regulatory scheme. Unfortunately, the answer offered by a "primary jurisdiction" model may be unavailable. I looked over the Exchange Act's procedural provisions and the SEC's rules of practice, and found nothing that generally authorizes an individual such as Mr. Gordon to institute SEC proceedings against an exchange rule already in existence. Anyone may file a petition seeking issuance or repeal of an SEC rule "of general application," Rule 4(a), but there is no explicit authorization for private complaints about exchange rules. Nor is there a rule authorizing private intervention in an SEC-instituted proceeding to review a proposal submitted by an exchange. Under Rule 9(a), only governmental bodies are entitled to intervene as of right in <sup>an</sup> ongoing SEC proceeding, and other persons may be allowed "limited participation" at the discretion of the hearing officer. But, if exchange rule proposals are reviewed informally, as the SEC counsel suggested at oral argument, even this limited participation may be unavailable.

Given this state of affairs, the only procedural framework seems to be allowing an antitrust court to proceed without waiting for the plaintiff to obtain an SEC ruling on the challenged practices. (In this particular case, of course,



the court would have the advantage of all the SEC's rulings on the fixed-commission structure). The disadvantage of the procedural situation pulls in both directions. On the one hand, it means there is some danger that an antitrust court would decide that a particular exchange practice is unduly anticompetitive without the benefit of the SEC's views, unless, of course, the SEC volunteered an amicus submission in the court proceeding. On the other hand, if the Court should hold that Congress meant the Exchange Act to supply the only remedy for anticompetitive rules issued by exchanges, an injured party would be entirely without remedy. He cannot initiate proceedings in the SEC, but must <sup>hope that</sup> ~~depend on~~ the SEC's staff - working under a statute that does not even include effects on competition as one of the public interests the SEC is required to protect - <sup>will</sup> ~~to~~ take interest in the exchange's rule. He may not be able even to participate in an agency proceeding on a limited basis, and he may have no resort to judicial review. Absent a clear conviction that Congress meant the exchanges to be entirely free of antitrust supervision, I would be most reluctant to reach such a result.

P.C.

ss



March 27, 1975

No. 74-304 Gordon v. New York Stock Exchange

This memorandum is to facilitate my discussion at the Court Conference on the above case.

We only have to decide whether, with respect to commission rates, antitrust jurisdiction has been displaced by SEC regulation. We need not address any broader issue. Express regulatory authority with respect to rates is vested in the SEC under § 19(a)(9). No such authority was present in Silver, where the New York Stock Exchange ordered its members to discontinue direct telephone line service with a nonmember.

Rate fixing by the stock exchange has been the practice, openly and notoriously, since the exchange commenced operation. It has existed since the Sherman Act was passed, and until this suit the Justice Department has not publicly criticized or attacked the practice (to my knowledge).

The legislative history indicates that Congress knew that the NYSE prescribed commission rates, and intended by §19(a)(9) to vest regulatory authority thereof in the SEC. Moreover, the SEC has exercised this authority (see its supplement to brief). \*

\*SEC counsel stated at oral argument (without contradiction) that the Justice Department had participated in hearings before the Commission on rates, and had asserted no overriding antitrust jurisdiction.

On the basis of this record, I think we are entitled to conclude that Congress did intend to foreclose antitrust intervention as to the rate regulation conferred by §19(a). The Justice Department, at least by acquiescence, has concurred in this view for nearly 40 years.

I should have noted above that, although the act does not require the SEC to consider competitive factors, SEC claims in its brief that these are considered. My own view is that the SEC's obligation under the statute to consider the public interest necessarily embraces competitive factors, as entitled to be weighed against other relevant factors.

Plaintiff, in this class action case, claims damages of \$1.5 billion, plus \$10 million in attorneys fees. This suit is directed only against the NYSE and Amex. There are 11 other registered national securities exchanges with rules fixing minimum commission rates. It would be grossly inequitable to impose liability of this magnitude upon private parties who have, for nearly 40 years, followed a practice to the knowledge of the government and with the full approval of the agency established by the Congress to regulate this business. While it can be said that disaster to individual parties should not deter enforcement of antitrust laws, this Court properly may consider - as relevant to a determination of congressional intent - the interpretation thereof in good faith over long periods of years by all concerned, including the regulatory agency primarily responsible and the

acquiescence of the Justice Department.

I may add that, as in Hughes Tool, we need not hold that the Act of 1934 vesting regulatory authority in the SEC completely displaced antitrust laws. We are concerned here only with the regulation of commission rates under 19(a).

In short, I would affirm the unanimous judgment of CA2 (Kaufman, Mansfield and Mulligan).

L.F.P., Jr.



The Chief Justice Affirm

CA 2 was right

Douglas, J. Affirmaffirm  
8-1

First Conference  
attended by WOD  
since his stroke  
on 12/31/74

Brennan, J. Reveria

Silver was a limited op.  
CA 2 went beyond Silver  
& held Act of '34 had preempted  
~~entirely~~ entirely Anti-Trust law.

There is A/T juris & court  
should give great weight to  
SEC views.

Concernous by SEC & Jackson  
as to existence of A/T juris  
in certain circumstances.

Stewart, J. Affirm

Basic issue is whether action  
by brokers in conformity with  
Exchange Rules may be  
sued in A/Trust. In Potter's  
view, ~~the~~ Act of '34  
preempts A/T.

Agrees largely with  
CA 2

Affirm

Does not buy  
all of CA 2

- but 19(a)9  
expressly vests  
auth. in SEC.

Failure of SEC  
to object is tantamount  
to approval. This  
is an exercise of  
duly authorized  
power. But would  
write cons

Powell, J. Affirm

I disclosed fact  
that a son-in-law  
is a stockholder  
in Rotan, Moseley  
- member of Stock  
Exchange. All  
further agreed no  
basis for disqualification  
x x x

See my memo. of  
3/27/75 for my  
views.

Affirm

Agrees with  
Byron

Blackmun, J.

Affirm

Agrees with  
Byron

Rehnquist, J.

Affirm . . . . .



March 31, 1975

No. 73-304 Gordon v. N.Y. Stock Exchange

It occurred to me, as I was preparing for the Conference, that Richard Smith is a small stockholder and an officer or employee of Rotan-Mosle, a member of the New York Stock Exchange.

The question was whether this presented a conflict of interest situation. On the afternoon before the Conference, I discussed this with Justice Stewart. His reaction was that the relationship was too "attenuated", to use his word. He noted that there are several hundred members of the Stock Exchange; that only a couple of the largest firms are parties to this litigation; that even if damage-suit judgments eventually were to be obtained against all members of the Stock Exchange, the effect on a small stockholder would be highly speculative.

In any event, Potter - who served on the ABA Committee - volunteered to review the matter. The next day, just prior to the Conference, he reported that he had examined the judicial Standards of Ethics and the Reporter's notes and was satisfied there was no problem. I nevertheless brought the matter up before the Conference prior to participating in the decision of the case. The unanimous view was that I should participate.

L.F.P., Jr.

In this case, we only have to decide whether with respect to commission rates anti-trust (A/T) juris has been displaced by SEC regulation. <sup>over</sup> We need not address broader issues.

Express regulatory authority with respect to rates is vested in SEC under § 19(a)(9). (no such authority existed in Silver).

Rate fixing by U.S. Stock Exchange has been the practice, openly & notoriously, since opening of Exchange. It has existed since Sherman Act was passed and until this suit the Justice Dept. has not criticized the practice. Leg. history indicated that Congress knew this and intended [§ 19(a)(9)] to vest regulatory authority in SEC. Moreover, SEC has exercised this authority, & it was said (a not contradicted in oral argument) that ~~Justice Dept.~~ <sup>Justice Dept.</sup> had participated in hearings on rates without asserting A/T juris. I deduce from this record that Congress did intend to foreclose Anti-trust intervention as to the rate ~~fixing~~ <sup>regulation</sup> conferred by § 19(a). The Justice Dept., at least by acquiescence <sup>inactivity</sup> for 40 years has concurred in this view.

It would be most inequitable, on basis of this record, by government itself, now to impose major damage liability for ~~conduct~~ a course of conduct long approved ~~and~~ by Gov't itself.

As in Hughes Tool, we need not hold that Act of '34 ~~overriding~~ <sup>neg.</sup> authority in SEC completely displaced A/T laws.



To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: 6/10/75

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 74-304

Richard A. Gordon et al., Petitioners, v. New York Stock Exchange, Inc., et al.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	--

[June —, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the problem of reconciliation of the antitrust laws with a federal regulatory scheme in the particular context of the practice of the securities exchanges and their members of using fixed rates of commission. The United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit concluded that fixed commission rates were immunized from antitrust attack because of the Securities and Exchange Commission's authority to approve or disapprove exchange commission rates and its exercise of that power.

I

In early 1971 petitioner Richard A. Gordon, individually and on behalf of an asserted class of small investors, filed this suit against the New York Stock Exchange, Inc. (NYSE), the American Stock Exchange, Inc. (Amex), and two member firms of the exchanges.<sup>1</sup>

<sup>1</sup> The member firms are Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Company, Inc.

*Renewed*  
*LJP*  
*6/11/75*  
*join*

## 2 GORDON v. NEW YORK STOCK EXCHANGE

The complaint challenged a variety of exchange rules and practices and, in particular, claimed that the system of fixed commission rates, utilized by the exchanges at that time for transactions less than \$500,000, violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. Other challenges in the complaint focused on (1) the volume discount on trades over 1,000 shares, and the presence of negotiated rather than fixed rates for transactions in excess of \$500,000;<sup>2</sup> (2) the rules limiting the number of exchange memberships; and (3) the rules denying discounted commission rates to nonmembers using exchange facilities.<sup>3</sup>

Respondents moved for summary judgment on the ground that the challenged actions were subject to the overriding supervision of the Securities and Exchange Commission (SEC) under § 19 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 18s (b), and, therefore, were not subject to the strictures of the antitrust laws. The District Court granted respondents' motion as to all claims. 366 F. Supp. 1261 (1973). Dismissing the exchange membership limitation and the Robinson-Patman Act contentions as without merit,<sup>4</sup> the court focused on

<sup>2</sup> Petitioner urged that these practices were in violation of the Robinson-Patman Price Discrimination Act, 15 U. S. C. § 13a.

<sup>3</sup> The relief requested included an injunction prohibiting the implementation of certain negotiated commission rates that were to be placed in effect on April 5, 1971, or, alternatively, requiring that negotiated rates be available for transactions of any size. Petitioner also requested trebled damages amounting to \$1.5 billion and an award of attorney's fees of \$10 million plus interest and costs.

<sup>4</sup> In short, the District Court concluded that (1) since petitioner had never applied for exchange membership, he was not in a position to complain that he was arbitrarily precluded from membership; (2) the Act's § 3 (a)(3), 15 U. S. C. § 78c (a)(3), by its definition of "member," specifically limited access of nonmembers to the exchanges; and (3) the Robinson-Patman Act did not apply to services or intangibles, but only to commodities or goods, and the latter ~~are~~ not involved in this litigation.

were



the relationship between the fixed commission rates and the Sherman Act mandates. It utilized the framework for analysis of antitrust immunity in the regulated securities area that was established a decade ago in *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963). Since § 19 (b)(9) of the Exchange Act authorized the SEC to supervise the exchanges "in respect of such matters as . . . the fixing of reasonable rates of commission," the court held applicable the antitrust immunity reserved in *Silver* for those cases where "review of exchange self-regulation [is] provided through a vehicle other than the antitrust laws." 373 U. S., at 360. It further noted that the practice of fixed commission rates had continued without substantial challenge after the enactment of the 1934 Act, and that the SEC had been engaged in detailed study of the rate structure for a decade, culminating in the requirement for abolition of fixed rates as of May 1, 1975.

On appeal, the Second Circuit affirmed. 498 F. 2d 1303 (1974). Characterizing petitioner's other challenges as frivolous, the appellate court devoted its opinion to the problem of antitrust immunity. It, too, used *Silver* as a basis for its analysis. Because the SEC, by § 19 (b)(9), was given specific review power over the fixing of commission rates, because of the language, legislative history, and policy of the Exchange Act, and because of the SEC's actual exercise of its supervisory power, the Court of Appeals determined that this case differed from *Silver*, and that antitrust immunity was proper.

By his petition for certiorari, petitioner sought review only of the determination that fixed commission rates are beyond the reach of the antitrust laws. Because of the vital importance of the question, and at the urging of all the parties, we granted certiorari. 419 U. S. 1018 (1974).

## II

Resolution of the issue of antitrust immunity for fixed commission rates may be made adequately only upon a thorough investigation of the practice in the light of statutory restrictions and decided cases. We begin with a brief review of the history of commission rates in the securities industry.

Commission rates for transactions on the stock exchanges have been set by agreement since the establishment of the first exchange in this country. The New York Stock Exchange was formed with the Buttonwood Tree Agreement of 1792, and from the beginning minimum fees were set and observed by the members. That Agreement itself stated:

"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 Special value, and that we will give a preference to each other in our Negotiations." F. Eames, *The New York Stock Exchange* 14 (1968 ed).

See generally, R. Doede, *The Monopoly Power of the New York Stock Exchange*, reprinted in *Hearings on S. 3169 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 2d Sess., 405, 412-427 (1972). Successive constitutions of the NYSE have carried forward this basic provision. Similarly, when Amex emerged in 1908-1910, a pattern of fixed commission rates was adopted there.

These fixed rate policies were not unnoticed by responsible congressional bodies. For example, the House



## GORDON v. NEW YORK STOCK EXCHANGE 5

Committee on Banking and Currency, in a general review of the stock exchanges undertaken in 1913, reported that the fixed commission rate rules were "rigidly enforced" in order "to prevent competition amongst the members." H. R. Rep. No. 1593, 62d Cong., 3d Sess., 39 (1913).<sup>5</sup> The report, known as the Pujo Report, did not recommend any change in this policy, for the Committee believed

"the present rates to be reasonable, except as to stocks, say, of \$25 or less in value, and that the exchange should be protected in this respect by the law under which it shall be incorporated against a kind of competition between members that would lower the service and threaten the responsibility of members. A very low or competitive commission rate would also promote speculation and destroy the value of membership." *Id.*, at 115-116.

---

<sup>5</sup> See, for example, the comments of the Report in reviewing evidence on fixed commissions:

"As stated by Mr. Sturgis, a former president of the exchange, since 1876 a governor, and now the chairman of the law committee . . . :

"The violation of the commission law we regard as one of the most infamous crimes that a man can commit against his fellow members in the exchange, and as a gross breach of good faith and wrongdoing of the most serious nature, and we consider it a crime that we should punish as severely as, in the judgment of the governing committee, the constitution permits.

"Q. . . . But the breach of that rule (referring to the rule for uniform commissions) by a broker you consider the most heinous crime he can commit?

"A. It is absolute bad faith to his fellow men."

"The rule is rigidly enforced by suspension from one to five years for a first violation and expulsion for a second. . . . The acknowledged object is to prevent competition amongst the members."

H. R. Rep. No. 1593, 62d Cong., 3d Sess., 39 (1913).

## 6 GORDON v. NEW YORK STOCK EXCHANGE

Despite the monopoly power of the few exchanges, exhibited not only in the area of commission rates but in a wide variety of other aspects, the exchanges remained essentially self-regulating and without significant supervision until the adoption of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78a *et seq.* At the lengthy hearings before adoption of that Act, some attention was given to the fixed commission rate practice and to its anticompetitive features. See Hearings before the Senate Comm. on Banking and Currency on S. Res. 84 (72d Cong.) and S. Res. 56 and 97 (73d Cong.), 73d Cong., 1st and 2d Sess., 6075, 6868, and 7705 (1934) (Senate Hearings). See also Hearings on S. Res. 84 before the Senate Comm. on Banking and Currency, 72d Cong., 1st Sess., 85 (1932); Hearings on H. R. 7852 and 8720 before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 320-321, 423 (1934).

Perhaps the most pertinent testimony in the hearings preparatory to enactment of the Exchange Act was proffered by Samuel Untermyer, formerly Chief Counsel to the committee that drafted the Pujo Report. In commenting on proposed S. 2693, Mr. Untermyer noted that although the bill would provide the federal supervisory commission with

“the right to prescribe uniform rates of commission, it does not otherwise authorize the Commission to fix rates, which it seems to me it should do and would do by striking out the word ‘uniform.’ That would permit the Commission to fix rates.

“The volume of the business transacted on the exchange has increased manyfold. Great fortunes have been made by brokers through this monopoly. The public has no access to the exchange by way of membership except by buying a seat and paying a very large sum for it. Therefore it is a monopoly.



## GORDON v. NEW YORK STOCK EXCHANGE 7

Probably it has to be something of a monopoly. But after all it is essentially a public institution. It is the greatest financial agency in the world, and should be not only controlled by the public but it seems to me its membership and the commissions charged should either be fixed by some governmental authority or be supervised by such authority. As matters now stand, the exchange can charge all that the traffic will bear, and that is a burden upon commerce." Senate Hearings 7705.

As finally enacted, the Exchange Act apparently reflected the Untermyer suggestion, for it gave the SEC the power to fix and insure "reasonable" rates. Section 19 (b) provided:

*"(b) 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 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."* (Emphasis added.)

This provision conformed to the Act's general policy of self-regulation by the exchanges coupled with oversight by the SEC. It is to be noted that the ninth cate-

## 8 GORDON v. NEW YORK STOCK EXCHANGE

gory is one of 12 specifically enumerated. In *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U. S. 117, 127-128 (1973), we observed:

"Two types of regulation are reflected in the Act. Some provisions impose direct requirements and prohibitions. Among these are mandatory exchange registration, restrictions on broker and dealer borrowing, and the prohibition of manipulative or deceptive practices. Other provisions are flexible and rely on the technique of self-regulation to achieve their objectives. . . . Supervised self-regulation, although consonant with the traditional private governance of exchanges, allows the Government to monitor exchange business in the public interest."

The congressional reports confirm that while the development of rules for the governing of exchanges, as enumerated in § 19 (b), was left to the exchanges themselves in the first instance, the SEC could compel adoption of those changes it felt were necessary to insure fair dealing and protection of the public. See H. R. Rep. No. 1383, 73d Cong., 2d Sess., 15 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 13 (1934). The latter report, at 15, noted that registered exchanges were required to provide the SEC with "complete information" regarding its rules.

## III

With this legislative history in mind, we turn to the actual post-1934 experience of commission rates on the NYSE and Amex. After these two exchanges had registered in 1934 under § 6 of the Exchange Act, 15 U. S. C. § 78f, both proceeded to prescribe minimum commission rates just as they had prior to the Act, App. A42, A216. These rates were changed periodically



by the exchanges," after their submission to the SEC pursuant to § 6(a)(4), 15 U. S. C. § 78f(a)(4), and SEC Rule 17a-8, 17 CFR § 240.17a-8. Although several rate changes appear to have been effectuated without comment by the SEC, in other instances the SEC thoroughly exercised its supervisory powers. Thus, for example, as early as 1958 a study of the NYSE commission rates to determine whether the rates were "reasonable and in accordance with the standards contemplated by applicable provisions of the Securities Exchange Act of 1934," was announced by the SEC. SEC Exchange Act Release No. 5678, April 14, 1958, App. A240. This study resulted in an agreement by the NYSE to reduce commission rates in certain transactions, to engage in further study of the rate structure by the NYSE in collaboration with the SEC, and to provide the SEC with greater advance notice of proposed rate changes. SEC Exchange Act Release No. 5889, February 20, 1959. App. A247. The SEC specifically stated that it had undertaken the study "in view of the responsibilities and duties imposed upon the Commission by Section 19(b) . . . with respect to the rules of national securities exchanges, including rules relating to the fixing of commission rates." *Ibid.*

Under subsection (d) of § 19 of the Act (which subsection was added in 1961), Pub. L. 87-196, 75 Stat. 465, the SEC was directed to investigate the adequacy of exchange rules for the protection of investors. Accordingly, the SEC began a detailed study of exchange rules in that year. In 1963 it released its conclusions in a six-volume study. SEC Report of Special Study of Securi-

---

<sup>6</sup> Since 1947, rates generally have been based on the value of stock in a round lot. SEC Report of Special Study of Securities Markets, H. Doc. No. 95, pt. 5, 88th Cong., 1st Sess., 103 (1963). There was no volume discount at the time of this SEC Report.

## 10 GORDON v. NEW YORK STOCK EXCHANGE

ties Markets, H. Doc. No. 95, 88th Cong., 1st Sess. The Study, among other things, focused on problems of the structure of commission rates and procedures, and standards for setting and reviewing rate levels. *Id.*, pt. 5, at 102. The SEC found that the rigid commission rate structure based on value of the round lot was causing a variety of "questionable consequences," such as "give-ups" and the providing of special services for certain large, usually institutional customers. These attempts indirectly to achieve rate alterations made more difficult the administration of the rate structure and clouded the cost data used as the basis for determination of rates. These effects were believed by the SEC to necessitate a complete study of the structure. Moreover, the SEC concluded that methods for determining the reasonableness of rates were in need of overhaul. Not only was there a need for more complete information about the economics of the securities business and commission rates in particular, but also for a determination and articulation of the criteria important in arriving at a reasonable rate structure. Hence, while the Study did not produce any major immediate changes in commission rate structure or levels, it did constitute a careful articulation of the problems in the structure and of the need for further studies that would be essential as a basis for future changes.

Meanwhile, the NYSE began an investigation of its own into the particular aspect of volume discounts from the fixed commission rates App. A219-A220. This study determined that a volume discount and various other changes were needed, and so recommended to the SEC. The Commission responded in basic agreement. Letter dated December 22, 1965, from SEC Chairman Cohen to NYSE President Funston, App. A249. The NYSE study continued over the next few years and final



conclusions were presented to the SEC in early 1968. App. A253.<sup>7</sup>

In 1968, the SEC, while continuing the study started earlier in the decade, began to submit a series of specific proposals for change and to require their implementation by the exchanges. Through its Exchange Act Release No. 8324, May 28, 1968, App. A286, the SEC requested the NYSE to revise its commission rate schedule, including a reduction of rates for orders for round lots in excess of 400 shares or, alternatively, the elimination of minimum rate requirements for orders in excess of \$50,000. These changes were viewed by the SEC as interim measures, to be pending further consideration "in the context of the Commission's responsibilities to consider the national policies embodied both in the securities laws and in the antitrust laws." Letter of May 28, 1968, from SEC Chairman Cohen to NYSE President Haack. App. A284, A285. In response to these communications, the NYSE (and Amex) eventually adopted a volume discount for orders exceeding 1,000 shares, as well as other alterations in rates, all approved by the SEC. See, *e. g.*, letter of August 30, 1968, from Chairman Cohen to President Haack, App. A310; memorandum dated September 20, 1968, Amex Subcommittee on Commission Structure, App. A104.

Members of the securities exchanges faced substantial declines in profits in the late 1960's and early 1970. These were attributed by the NYSE to be due, at least in part, to the fact that general commission rates had not been increased since 1958. Statement of February 13,

---

<sup>7</sup> The basic NYSE proposal included some volume discounts, continuation of limited give-ups if directed by the customers, termination of "rebative" reciprocal practices, discounts for certain non-members, and limitation of membership and discounts to "bona fide broker-dealers." App. A255.

1970, by President Haack to SEC. App. A313. The NYSE determined that a service charge of at least the lesser of \$15 or 50% of the required minimum commission on orders less than 1,000 shares should be imposed as an interim measure to restore financial health by bringing rates in line with costs. NYSE Proposed Rule 383, App. A331. See also letter dated March 19, 1970, from President Haack to members of the NYSE. App. A327. This proposal, submitted to the SEC pursuant to its Rule 17a-8, was permitted by the SEC to be placed into operation on a 90-day interim basis. Letter dated April 2, 1970, from SEC Chairman Budge to President Haack. App. A333. Continuation of the interim measure was thereafter permitted pending further rate structure hearings undertaken by the SEC. SEC Exchange Act Release No. 8923, July 2, 1970. App. A336. The interim rates remained in effect until the rate structure change of March 1972.

In 1971 the SEC concluded its hearings begun in 1968. Finding that "minimum commissions on institutional size orders are neither necessary nor appropriate," the SEC announced that it would not object to competitive rates on portions of orders above a stated level. Letter of February 3, 1971, from SEC Commissioner Smith to President Haack. App. A353. See also SEC Exchange Act Release No. 9007, October 22, 1970. App. A348. Although at first supporting a \$100,000 order as the cutoff below which fixed rates would be allowed, *ibid.*, the SEC later decided to permit use of \$500,000 as the breakpoint. After a year's use of this figure, the SEC required the exchanges to reduce the cutoff point to \$300,000 in April 1972. Statement of the SEC on the Future Structure of the Securities Markets, February 2, 1972. App. A369, A387, A388 (Policy Study).

The 1972 Policy Study emphasized the problems of the securities markets, and attributed as a major cause of



those problems the prevailing commission rate structure. The Policy Study noted:

"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 membership by institutions." *Id.*, at A385.

Since commission rates had been fixed for a long period of time, however, and since it was possible that revenue would decline if hasty changes were made, the SEC believed that there should be no rush to impose competitive rates. Rather, the effect of switching to competition should be gauged on a step-by-step basis, and changes should be made "at a measured, deliberate pace." *Id.*, at A387. The result of the introduction of competitive rates for orders exceeding \$500,000 was found to be a substantial reduction in commissions, with the rate depending on the size of the order. In view of this result, the SEC determined to institute competition in the \$300,000-\$500,000 range as well.

Further reduction followed relatively quickly. On January 16, 1973, the SEC announced it was considering requiring the reduction of the breakpoint on competitive rates to orders in excess of \$100,000. SEC Exchange Act Release No. 9950. In June, the SEC began hearings on the rate schedules, stimulated in part by a request by the NYSE to permit an increase of 15% of the current rate on all orders from \$5,000 to \$300,000, and to permit a minimum commission on small orders (below \$5,000) as well. SEC Exchange Act Release No. 10206, June 6, 1973. Documentary Appendix to Brief for SEC 24 (Doc. App.). Three months later, after completion of the

hearings, the SEC determined that it would allow the increases. SEC Exchange Act Release No. 10383, September 11, 1973.<sup>8</sup> Doc. App. 27. The SEC also announced, however: "It will act promptly to terminate the fixing of commission rates by stock exchanges after April 30, 1975, if the stock exchanges do not adopt rule changes achieving that result." *Id.*, at 28.

Elaboration of the SEC's rationale for this phasing out of fixed commission rates was soon forthcoming. In December 1973, SEC Chairman Garrett noted that the temporary increase in fixed rates (through April 1975) was permitted because of the inflation in the cost of operating the exchanges, the decline in the volume of transactions on the exchanges, and the consequently severe financial losses for the members. SEC Exchange Act Release No. 10560, December 14, 1973. Doc. App. 29. Indeed, without the rate increase, "the continued deterioration in the capital positions of many member firms was foreseeable, with significant capital impairment and indirect, but consequential, harm to investors the likely result." *Id.*, at 36. The rate increase also would forestall the possibility that the industry would be impaired during transition to competitive rates and other requirements. This view conformed to the suggestion of Senator Williams, Chairman of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs. See statement dated July 27, 1973, of Senator Williams submitted to the SEC, cited in Exchange Act Release No. 10560 n. 12. Although not purporting to elucidate fully its reasons for abolishing fixed rates, the SEC did suggest several considerations

---

<sup>8</sup> The increases were permitted through March 31, 1974, without restriction. Such increases could continue from April 1, 1974 through April 30, 1975, if the NYSE permitted its members to charge in excess of the old rate and also permitted reductions in brokerage services in return for discounts from the rate.



basic to its decision: the heterogeneous nature of the brokerage industry; the desirability of insuring trading on, rather than off, the exchanges; doubt that small investors are subsidized by large institutional investors under the fixed rate system; and doubt that small firms would be forced out of business if competitive rates were required.

In response to a request by the NYSE, the SEC permitted amendment to allow competitive rates on nonmember orders below \$2,000. SEC Exchange Act Release No. 10670, March 7, 1974. Doc. App. 42. Hearings on intramember commission rates began in April 1974. SEC Exchange Act Release No. 10751, April 23, 1974. Doc. App. 45. The SEC concluded that intramember rates should not be fixed beyond April 30, 1975. SEC Exchange Act Release No. 11019, September 19, 1974. Doc. App. 60. At this time the SEC stated:

"[I]t presently appears to the Commission that it is necessary and appropriate (1) for the protection of investors, (2) to insure fair dealing in securities traded in upon national securities exchanges, and (3) to insure the fair administration of such exchanges, that the rules and practices of such exchanges that require, or have the effect of requiring, exchange members to charge any persons fixed minimum rates of commission, should be eliminated." *Id.*, at 63.

The SEC formally requested the exchanges to make the appropriate changes in their rules. When negative responses were received from the NYSE and others, the SEC released for public comment proposed Securities Exchange Act Rules 19b-3 and 10b-22. Proposed Rule 19b-3, applicable to intra- and nonmember rates effective May 1, 1975, would prohibit the exchanges from using or compelling their members to use fixed rates of commis-

sion. It also would require the exchanges to provide explicitly in their rules that nothing therein requires or permits arrangements or agreements to fix rates. Proposed Rule 10b-22 would prohibit agreements with respect to the fixing of commission rates by brokers, dealers, or members of the exchanges. See SEC Exchange Act Release No. 11073, October 24, 1974. Doc. App. 65.

Upon the conclusion of hearings on the proposed rules, the SEC determined to adopt Rule 19b-3, but not Rule 10b-22. SEC Exchange Act Release No. 11203, January 23, 1975. Doc. App. 109. Effective May 1, 1975, competitive rates were to be utilized by exchange members in transactions of all sizes for persons other than members of the exchanges. Effective May 1, 1976, competitive rates were to be mandatory in transactions for members as well, *i. e.*, floor brokerage rates. Competition in floor brokerage rates was so deferred until 1976 in order to permit an orderly transition.<sup>9</sup> The required transition to competitive rates was based on the SEC's conclusion that competition, rather than fixed rates, would be in the best interests of the securities industry and markets, as well as in the best interest of the investing public and the national economy. *Ibid.* This determination was not based on a simplistic notion in favor of competition, but rather on demonstrated deficiencies of the fixed commission rate structure. Specifically mentioned by the SEC were factors such as the rigidity and delay inherent in the fixed rate system, the potential for distortion, evasion, and conflicts of interest, and fragmen-

<sup>9</sup>It was also believed that members of the exchanges had not expected that floor brokerage rates would be included among those required to be made competitive, and that extra time for planning and adjustment would be needed. The SEC noted, additionally, that the impact of floor brokerage rates on public investors was significantly less than the impact of public rates, *i. e.*, the rates on transactions for nonmembers. SEC Exchange Act Release No. 11203, January 23, 1975. Doc. App. 109, 110.



tation of markets caused by the fixed rate system. Acknowledging that the fixed rate system perhaps was not all bad in all periods of its use, the SEC explicitly declined to commit itself to permanent abolition of fixed rates in all cases: in the future circumstances might arise that would indicate that reinstitution of fixed rates in certain areas would be appropriate.

The SEC dismissed the arguments against competitive rates that had been raised by various proponents of the status quo. First, the SEC deemed the possibility of destructive competition to be slim, because of the nature of the cost curve in the industry.<sup>10</sup> Second, there was substantial doubt whether maintenance of fixed rates, in fact, provided various subsidies that would be beneficial to the operation of the securities markets. For example, it was unlikely that small investors reaped a subsidy from higher rates charged larger investors, because of separation of the business between large and small investors. Nor did the SEC believe that regional brokers were substantially benefited by maintenance of fixed rates. Third, the possibility of an exodus from membership on the exchanges was unlikely, and should be dealt with only as it occurred. In any event, inasmuch as the SEC anticipated that there would be detailed studies of the operation of the competitive rates effectuated by its orders, any problems that arose could be effectively resolved upon further consideration.

During this period of concentrated study and action by the SEC, lasting more than a decade, various congressional committees under took their own consideration of

---

<sup>10</sup> In order for destructive competition to occur on a large scale, fixed costs must be a high percentage of total costs, and there must be economies of scale in a wide range of production. Neither of these factors was found to be present in the brokerage industry. SEC Exchange Act Release No. 11203, January 23, 1975. Doc. App. 109, 138-139.

the matter of commission rates. Early in 1972, the Senate Subcommittee on Securities concluded that fixed commission rates must be eliminated on institutional-sized transactions, and that lower fees should be permitted for small transactions, with "unbundled" services, than those having the full range of brokerage services. Report of the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs (For the Period Ended February 4, 1972), 92d Cong., 2d Sess., 4 (1972). The Subcommittee objected particularly to the failure of the fixed rate system to produce "fair and economic" rates, *id.*, at 59, and to distortion in the rate structure in favor of the institutionally oriented firms.

The Subcommittee was perturbed at the SEC's actions regarding fixed commission rates for several reasons. First, the Subcommittee noted that in litigation the SEC had taken the position that it had not approved NYSE rate changes in 1971, but had merely failed to object to the introduction of the new rates, *id.*, at 58, referring to the SEC position in *Independent Investor Protective League v. SEC* (SDNY No. 71-1924), dismissed without opinion (CA2, 1971). This posture precluded review of the SEC action in the Court of Appeals.<sup>11</sup> Second, the Subcommittee was displeased with the length of time the SEC took in arriving at its decisions regarding commission rate structure and level. Third, the Subcommittee feared that statements of the SEC lacked clarity and perpetuated uncertainty as to the status of fixed rates on transactions exceeding \$100,000. Therefore, the Subcommittee Report stressed:

"[I]t is essential that fixed commission rates be

<sup>11</sup> This view has been rejected by the United States Court of Appeals for the District of Columbia. *Independent Broker-Dealers' Trades Assn. v. SEC*, 142 U. S. App. D. C. 384, 442 F. 2d 132, cert. denied, 404 U. S. 828 (1971). The SEC appears no longer to take this position. See Brief for the SEC 38-39, n. 45.



phased out in orderly and systematic manner, and that a date certain be set promptly for elimination of fixed commissions on institutional-size transactions, which have resulted in the most serious distortions. Based on the SEC's conclusions and on testimony submitted to the SEC and to this Subcommittee this could best be achieved by eliminating fixed rates on orders in excess of \$100,000." *Id.*, at 60.

The House Committee on Interstate and Foreign Commerce, in a report issued only six months after the Senate Report, *supra*, concluded that fixed rates of commission were not in the public interest and should be replaced by competitively determined rates for transactions of all sizes. Such action should occur "without excessive delay." Securities Industry Study, Report of the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce. H. R. Rep. No. 1519, 92d Cong., 2d Sess., xiv, 141, 144-145, 146 (1972). Although prodding the SEC to take quick measures to introduce competitive rates for transactions of all sizes, the House Committee determined to defer enacting legislation so long as reasonable progress was being made. These conclusions resulted from a detailed study, by the Subcommittee, of assorted costs and benefits of competitive versus fixed rates, and reflected information gained through lengthy hearings. *Id.*, at 131-146, and related Hearings before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce. 92d Cong., 1st and 2d Sess. (1971-1972). Similarly, after lengthy analysis, the Senate Subcommittee on Securities concluded both that competitive rates must be introduced at all transaction levels, and that legislation was not required at that time in view of the progress made by the SEC. Securities Industry Study Report of the Subcomm. on Securities of

the Senate Comm. on Banking, Housing and Urban Affairs, S. Doc. No. 93-13, 93d Cong., 1st Sess., 5-7, 43-68 (1973), and Hearings on S. 3169 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (1972).

In 1975 both Houses of the Congress did in fact enact legislation dealing directly with commission rates. Although the bills initially passed by each chamber differed somewhat, the Conference Committee compromised the differences. Compare H. R. 4111, § 6 (p), as discussed in H. R. Rep. No. 94-123, 94th Cong., 1st Sess., 51-53, 67-68 (1975), with S. 249, § 6 (e), as discussed in S. Rep. No. 94-75, 94th Cong., 1st Sess., 71-72, 98 (1975). The measure, as so compromised, was signed by the President on June 5, 1975.

The new legislation amends § 19 (b) of the Securities Exchange Act to substitute for the heretofore existing provision a scheme for SEC review of proposed rules and rule changes of the various self-regulatory organizations. Reference to commission rates is now found in the new § 6 (e), generally providing that after the date of enactment "no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members." An exception is made for floor brokerage rates which may be fixed by the exchanges until May 1, 1976. Further exceptions from the ban against fixed commissions are provided if approved by the SEC after certain findings: prior to November 1, 1976, the Commission may allow the exchanges to fix commissions if it finds this to be "in the public interest," § 6 (e)(1)(A); after November 1, 1976, the exchanges may be permitted by the SEC to fix rates of commission if the SEC finds (1) the rates are reasonable in relation to costs of service (to be determined pursuant to standards of reasonableness published by the SEC), and (2) if the rates "do not impose any burden on competition not necessary or appropriate



in furtherance of the purposes of this title, 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 title." § 6 (e)(1)(B)(ii). The statute specifically provides that even if the SEC does permit the fixing of rates pursuant to one of these exceptions, the SEC by rule may abrogate such practice if it finds that the fixed rates "are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this title." § 6 (e)(2).

The new section also provides a detailed procedure which the SEC must follow in arriving at its decision to permit fixed commission rates. § 6 (e)(4). This procedure was described in the Conference Report as "comparable to that provided for in Section 18 of the Federal Trade Commission Act, 15 U. S. C. 58, which is more formal than normal notice and comment rulemaking under Section 553 of title 5 U. S. C. but less formal than 'on the record' procedure under Section 556 and 557 of title 5 U. S. C." Securities Acts Amendments of 1975, Conference Report, H. R. Rep. No. 94-229, 94th Cong., 1st Sess., 108 (1975). Finally, the amendments require the SEC to file regularly until December 31, 1976, with both branches of Congress, reports concerning the effect of competitive rates on the public interest, investors, and the securities markets. § 6 (e)(3).<sup>12</sup>

<sup>12</sup> One further change in the 1975 amendments should be noted. The 1934 Act defined the term "member" of an exchange as any person who, among other things, is permitted "to make use of the facilities of an exchange for transactions thereon . . . with the payment of a commission or fee which is less than that charged the general public." § 3 (a)(3). This implied a likelihood of fixed rates for the general public, for otherwise it would have been difficult to determine that a member, in fact, was given lower rates. This definition was deleted in 1975 amendments and has been replaced with a general definition of a member of an exchange. § 3 (a)(3)(A).

As of May 1, 1975, pursuant to order of the SEC, fixed commission rates were eliminated and competitive rates effectuated. Although it is still too soon to determine the total effect of this alteration, there have been no reports of disastrous effects for the public, investors, the industry, or the markets.

This lengthy history can be summarized briefly: In enacting the Securities Exchange Act of 1934, the Congress gave clear authority to the SEC to supervise exchange self-regulation with respect to the "fixing of reasonable rates of commission." Upon SEC determination that exchange rules or practices regarding commission rates required change in order to protect investors or to insure fair dealing, the SEC was authorized to require adoption of such changes as were deemed necessary or appropriate. This legislative permission for the fixing of commission rates under the supervision of the SEC occurred seven years *after* this Court's decision in *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927), to the effect that price fixing was a *per se* violation of the Sherman Act. Since the Exchange Act's adoption, and primarily in the last 15 years, the SEC has been engaged in thorough review of exchange commission rate practices. The committees of the Congress, while recently expressing some dissatisfaction with the progress of the SEC in implementing competitive rates, have generally been content to allow the SEC to proceed without new legislation. As of May 1, 1975, the SEC, by order, has abolished fixed rates. And new legislation, enacted into law June 5, 1975, codifies this result, although still permitting the SEC some discretion to reimpose fixed rates if warranted.

#### IV

This Court has considered the issue of implied replacement of the antitrust laws in the context of a variety of



regulatory schemes and procedures. Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a "plain repugnancy between the antitrust and regulatory provisions" will repeal be implied. *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963). See also *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U. S. 117, 126 (1973); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U. S. 363, 385-389 (1973); *Carnation Co. v. Pacific Conference*, 383 U. S. 213, 217-218 (1966). *Silver v. New York Stock Exchange*, 373 U. S., at 357-358; *United States v. Borden Co.*, 308 U. S. 188, 198-199 (1939). We have reaffirmed these basic principles elsewhere this Term. *United States v. National Association of Securities Dealers*, — U. S. —, — (1975) (slip op. 23, 33).

The starting point for our consideration of the particular issue presented by this case, *viz.*, whether the antitrust laws are impliedly repealed or replaced as a result of the statutory provisions and administrative and congressional experience concerning fixed commission rates, of course, is our decision in *Silver*. There the Court considered the relationship between the antitrust laws and the Securities Exchange Act, and did so specifically with respect to the action of an exchange in ordering its members to remove private direct telephone connections with the offices of a nonmember. Such action, absent any immunity derived from the regulatory laws, would be a *per se* violation of § 1 of the Sherman Act, 373 U. S., at 347. Concluding that the proper approach to the problem was to reconcile the operation of the antitrust laws with a regulatory scheme, the Court established a "guiding principle" for the achievement of this reconciliation. Under this principle, "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange

## 24 GORDON v. NEW YORK STOCK EXCHANGE

Act work, and even then only to the minimum extent necessary." *Id.*, at 357.

In *Silver*, the Court concluded that there was no implied repeal of the antitrust laws in that factual context because the Exchange Act did not provide for SEC jurisdiction or review of particular applications of rules enacted by the exchanges. It noted:

"Although the Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules, § 19 (b), 15 U. S. C. § 78s (b), and impliedly, therefore, to disapprove any rules adopted by an exchange, see also § 6 (a)(4), 15 U. S. C. § 78f (a)(4), it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules." *Ibid.*

At the time *Silver* was decided, both the rules and constitution of the NYSE provided that the exchange could require discontinuance of wire service between the office of a member and a nonmember at any time. There was no provision for notice or statement of reasons. While these rules were permissible under the general power of the exchanges to adopt rules regulating relationships between members and nonmembers, and the SEC could disapprove the rules, the SEC could not forbid or regulate any particular application of the rules. Hence, the regulatory agency could not prevent application of the rules that would have undesirable anticompetitive effects; there was no governmental oversight of the exchange's self-regulatory action, and no method of insuring that some attention at least was given to the public interest in competition.

The Court, therefore, concluded that the absence in *Silver* of regulatory supervision over the application of the exchange rules prevented any conflict arising between the regulatory scheme and the antitrust laws. See also



*Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 455-457 (1945), where the Court found no conflict because the regulatory agency (the ICC) had no jurisdiction over the rate fixing combination involved. The Court in *Silver* cautioned, however, that "[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." 373 U. S., at 360. It amplified this statement in a footnote:

"Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." 373 U. S., at 358 n. 12.

It is patent that the case presently at bar is, indeed, that "different case" to which the Court in *Silver* referred. In contrast to the circumstances of *Silver*, § 19 (b) gave the SEC direct regulatory power over exchange rules and practices with respect to "the fixing of reasonable rates of commission." Not only was the SEC authorized to disapprove rules and practices concerning commission rates, but the agency also was permitted to require alteration or supplementation of the rules and practices when "necessary or appropriate for the protection of investors or to insure fair dealings in securities traded in upon such exchange." Since 1934 all rate changes have been brought to the attention of the SEC, and it has taken an active role in review of proposed rate changes during the last 15 years. Thus, rather than presenting a case of SEC impotence to affect application of exchange rules in particular circumstances, this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with

rates of commission and resultant SEC continuing activity.

Having determined that this case is, in fact, the "different case," we must then make inquiry as to the proper reconciliation of the regulatory and antitrust statutes involved here, keeping in mind the principle that repeal of the antitrust laws will be "implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.*, at 357. We hold that these requirements for implied repeal are clearly satisfied here. To permit operation of the antitrust laws with respect to commission rates, as urged by petitioner Gordon and the United States as *amicus curiae*, would unduly interfere, in our view, with the operation of the Securities Exchange Act.

As a threshold matter, we believe that the determination of whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work is a matter for the courts, and in particular, for the courts in which the antitrust claims are raised. *Silver* exemplifies this responsibility. In some cases, however, the courts may defer to the regulatory agency involved, in order to take advantage of its special expertise. The decision in the end, however, is for the courts. *Ricci v. Chicago Mercantile Exchange*, 409 U. S. 289, 306-308 (1973).

The United States, as *amicus curiae*, suggests not only that the immunity issue is ultimately for the courts to decide, but also that the courts may reach the decision only on a full record. A summary record, as compiled in this case on motions for summary judgment, though voluminous, is said to be an inadequate basis for resolution of the question. We disagree. In *this* case nothing is to be gained from any further factual development that might be possible with a trial on the merits. We have before us the detailed experience of the SEC regu-



latory activities, and we have the debates in the Congress culminating in the 1975 legislation. This information is sufficient to permit an informed decision as to the existence of an implied repeal.

Our disposition of this case differs from that of the Seventh Circuit in *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (1970), cert. denied, 401 U. S. 994 (1971), where antitrust immunity for the NYSE's antirebate rule was claimed and denied. The Court of Appeals reversed a grant of summary judgment in favor of the NYSE, and remanded for further evidence regarding the effects of the antirebate rule on competition, the degree of actual review by the SEC, and the extent to which the rule was necessary to make the Exchange Act work. 433 F. 2d, at 270. This ruling is persuasively distinguishable on at least two grounds from the case at bar: First, there was no evidence presented regarding the extent of SEC review of the challenged rule. Second, the antirebate practice differs from fixed commission rates in that (1) it was not among the items specifically listed in § 19b, although the practice might reasonably be thought to be related to the fixing of commission rates, and (2) it does not necessarily apply uniformly, and may be applied in a discriminatory manner. We do not believe it necessary, in the circumstances of this case, to take further evidence concerning the competitive effects of fixed rates, or the necessity of fixed rates as a keystone of the operation of exchanges under the Exchange Act. To the extent that the Court of Appeals in *Thill* viewed the question of implied repeal as a question of fact, concerning whether the particular rule itself is necessary to make the Act work, we decline to follow that lead.

We also regard our specific disposition in *Ricci v. Chicago Mercantile Exchange*, *supra*, as inapposite for this case. In *Ricci*, an antitrust complaint charged that

the Mercantile Exchange arbitrarily transferred a membership, in violation of both the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, and the exchange rules. We held that consideration of the antitrust claims should be stayed pending determination by the Commodity Exchange Commission as to whether the actions taken were in violation of the Act or the rules. Although we noted that the Act did not confer a general antitrust immunity, we stated that if the actions complained of were in conformity with the Act and exchange rules, a substantial question would be presented concerning whether the actions were insulated from antitrust attack. It is manifest, then, that *Ricci* involved a deference to the expertise of a regulatory agency in determining if the activities violated the Act or rules, and did not represent a decision on antitrust immunity where the conduct charged was clearly encompassed by the legislation or rules and where there was no factual dispute.

We believe that the United States, as *amicus*, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question 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. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity.

The United States appears to suggest that only if there is a pervasive regulatory scheme, as in the public utility



area, can it be concluded that the regulatory scheme ousts the antitrust laws. Brief for the United States 16, 35. It is true that in some prior cases we have been concerned with the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws. See, e. g., *Otter Tail Power Co. v. United States*, 410 U. S. 366, 373-375 (1973). In the present case, however, respondents do not claim that repeal should be implied because of a pervasive regulatory scheme, but because of the specific provision of § 19 (b)(9) and the regulatory action thereunder. Brief for Respondents 35. Hence, whether the Exchange Act amounts to pervasive legislation ousting the antitrust acts is not a question before us.

We agree with the District Court and the Court of Appeals, and with respondents, that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. It is clear from our discussion in Part III, *supra*, that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC.<sup>13</sup> If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of

---

<sup>13</sup> We believe that this degree of scrutiny and approval by the SEC is not significantly different for our purposes here than an affirmative order to the exchanges to follow fixed rates. The United States, as *amicus curiae*, agrees that if the SEC "were to order the exchanges to adhere to a fixed commission rate system of some kind, no antitrust liability could arise." Brief for the United States 48. We conclude that immunity should not rest on the existence of a formal order by the SEC, but that the actions taken by the SEC pursuant to § 19 (b)(9), as outlined in Part III, are to be viewed as having an effect equivalent to that of a formal order.

antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry.<sup>14</sup> Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.<sup>15</sup>

In Part III, *supra*, we outlined the legislative and regulatory agency concern with the fixing of commission rates. Beginning with the enactment of the Securities Exchange Act in 1934, the Congress persistently has provided for SEC authority to regulate commission rates. Although SEC action in the early years appears to have been minimal, it is clear that since 1959 the SEC has been engaged in deep and serious study of the commission rate practices of the exchanges and of their members, and has required major changes in those practices. The ultimate result of this long-term study has been a

---

<sup>14</sup> Compare *Pan American World Airways v. United States*, 371 U. S. 296, 305-310 (1963), with *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-352 (1963). In the latter case two factors pointed against antitrust immunity: (1) congressional intent in the Bank Merger Act not to immunize activities from antitrust legislation, and (2) the lack of conflict between the Bank Merger Act and Clayton Act standards. Also, there was an absence of continuing oversight by the Comptroller General of the Currency. These factors are not present in, and are inapplicable to, the case at bar.

<sup>15</sup> We note, of course, that judicial review of SEC action is available under the Administrative Procedure Act, 5 U. S. C. §§ 702 and 704, or under § 25 of the Securities Exchange Act, 15 U. S. C. § 78y. See also *Independent Broker-Dealers' Trade Assn. v. SEC*, 142 U. S. App. D. C. 384, 442 F. 2d 132, cert. denied, 404 U. S. 828 (1971).



regulatory decree requiring abolition of the practice of fixed rates of commission as of May 1, 1975, and the institution of full and complete competition. Significantly, in the new legislation enacted subsequent to the SEC's abolition of commission rate fixing, the Congress has indicated its continued approval of SEC review of the commission rate structure. Although legislatively enacting the SEC regulatory provision banning fixed rates, the Congress has explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates.

In sum, the statutory provision authorizing regulation, § 19 (b) (9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as *per se* violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.

*Affirmed.*

*It is so ordered.*

MR. JUSTICE DOUGLAS took no part in the decision of this case.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

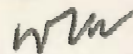
June 11, 1975

Re: No. 74-304 - Gordon v. NYSE

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference



June 12, 1975

No. 74-304 Gordon v. New York Stock  
Exchange

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE


June 16, 1975

Re: 74-304 - Gordon v. New York Stock Exchange

Dear Harry:

Please join me in your June 10 circulation.

Regards,

A large, stylized handwritten signature in dark ink, likely belonging to William Brennan, is written over the word "Regards,".

Mr. Justice Blackmun

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 17, 1975



RE: No. 74-304 Gordon v. New York Stock Exchange

Dear Potter:

Please join me in your concurring opinion in  
the above.

Sincerely,

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 18, 1975

Re: No. 74-304, Richard A. Gordon v. New York  
Stock Exchange, Inc.

Dear Harry:

Please join me.

Sincerely,

*T.M.*  
T. M.

Mr. Justice Blackmun

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 18, 1975

Re: No. 74-304 - Gorden v. New York Stock  
Exchange, Inc.

---

Dear Harry:

Understanding that the change we chatted  
about on page 23 will be made, I join your  
circulating opinion in this case.

Sincerely,




Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 20, 1975



Re: No. 74-304 - Gordon v. New York Stock Exchange

Dear Harry:

Please join me. I will file a brief con-  
curring opinion as well.

Sincerely,

William O. Douglas

Mr. Justice Blackmun

cc: The Conference



THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
Join HAB 6-16-75	Join HAB 6-20-75 Concur 6-21-75 1st Draft 6-23-75	Join PS 6-17-75	Concur 6-16-75 1st draft 6-18-75	Join HAB 6-18-75	Join HAB 6-18-75	3/31/75 1st draft 6-10-75 2nd draft 6-19-75	Join HAB 6/12/75	Join HAB 6-11-75
							74-304 Gordon v. New York Stock Exchange	

D

DISCUSS

CA 2 ~~dis~~ dismissed Petr's  
anti-trust suit vs NY Stock  
Exchange: its rules not  
subject to Anti-Trust laws  
(Sherman Act).

Silver v NY Stock Exchange  
on controlling

Deary -  
CA 2 seems entirely  
correct on Silver.

RC

PRELIMINARY MEMORANDUM

November 15, 1974 Conference  
List 1, Sheet 4

No. 74-304

GORDON

v.

Cert to CA 2

(Kaufman, Mansfield &  
Mulligan)

Federal/Civil

NEW YORK STOCK EXCHANGE

Timely

1. SUMMARY: Petr challenges a CA 2 ruling that the minimum rate structure employed by the national's stock exchanges is not subject to the antitrust laws. Although resps support the decision of CA 2, they join petr in requesting review by this Court.

2. FACTS: Resps are the New York Stock Exchange, the American Stock Exchange, and two representative member firms of the exchanges.

Granted!  
11/15



Petr, suing on his own behalf and in behalf of a class of small investors, brought an antitrust action, complaining that resps' practice of offering commission discounts in large transactions and the availability of negotiated rates only on transactions in excess of \$500,000 (now \$300,000) constituted a system of price discrimination in violation of the Robinson-Patman Act. Petr also charged that the practice of the exchanges of fixing the commissions to be charged to those unable to avail themselves of negotiated rates constitutes a price-fixing scheme in violation of sections 1 and 2 of the Sherman Act.

The District Judge (SDNY -- Lasker) granted resps motion for summary judgment, characterizing the Robinson-Patman claim as frivolous. He also found that the Securities and Exchange Act of 1934 exempts fixing of commission rates by the exchanges from the coverages of the antitrust laws.

3. CA 2's DECISION: The court of appeals affirmed the decision of the DC. Like the DC, it characterized the Robinson-Patman claim as frivolous, and the claim has not been renewed here. On the Sherman Act issue, the court looked first to this Court's decision in Silver v. New York Stock Exchange, 373 U.S. 341 (1963). In that case, NYSE had approved, on a temporary basis, private wire connections between a non-member broker and member firms. Subsequently, however, NYSE ordered the connections suspended, without any notice or hearing, and the non-member broker sued NYSE for instituting a group boycott in violation of the antitrust laws. NYSE responded that it was engaged in self-regulation as contemplated by the 1934 Act and therefore could not be liable for antitrust violations for acts part

of the self-regulatory scheme. This Court held that NYSE's action could be subject to an antitrust action. The Court pointed out that the action taken by the exchange was not one under the direct control of the SEC, so that subjecting this NYSE practice to the antitrust laws served to ensure that anticompetitive practices would be curtailed by some governmental authority. ~~the absence of~~. The absence of ~~the~~ SEC responsibility also eliminated the dangers of duplicative and possibly inconsistent rulings from the courts and the agency. This Court noted, however, that "[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." 373 U.S. at 360. CA 2 held that this was that "different case."

CA 2 pointed out that under section 19(b) of the 1934 Act, the SEC is empowered to alter or supplement exchange rules with respect to, inter alia, "the fixing of reasonable rates of commission . . . ." Thus, SEC review of the challenged action -- the factor that was missing in Silver -- is present here, and under the reasoning of Silver, the antitrust laws should not apply.

The court <sup>(also)</sup> ~~pointed out that the decision in Silver was based on the interpretation of~~ ~~the~~ pointed to the language of section 19(b) of the 1934 Act as evincing the awareness of Congress that the exchanges would continue their long-standing practice of fixing commission rates with the modification that it be subject to SEC oversight.

Considerations of the evolution of sound regulatory policy were also important in the CA 2 opinion. The court pointed to the gradual elimination of fixed commissions being ordered by the SEC and asserted that abrupt application of the antitrust laws could threaten to disrupt a carefully planned period of transition.



4. CONTENTIONS: Petr contends that CA 2's decision conflicts with this Court's decision in Silver and with the decision of CA 7 in Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (CA 7 1970), in which the court held that NYSE's anti-rebate rule, which prohibits member division of commissions with non-members, violated the antitrust laws. Both CA 2 and resps agree that Thill is basically inconsistent with the decision of CA 2 in this case.

Petr further contends that the decision below is an incorrect departure from the policy announced in Silver that the antitrust laws should be applied to exchange action. Finally, petr for the first time raises some vague constitutional claim which is not to be taken seriously.

5. DISCUSSION: Both the Department of Justice and the SEC filed amicus briefs below, the SEC urging affirmance and the Department of Justice in favor of reversal.

CA 2's decision appears unassailable, both in its interpretation of Silver and of the 1934 Act. The fact that resps urge the granting of cert might seem to indicate their concern that this general problem will recur. The proposed SEC rule whereby all commission rates will be negotiated is scheduled to go into effect in April, 1975. Silver seems to contemplate a case-by-case evaluation of the relationship between particular exchange practices, the antitrust laws, and the 1934 Act; consequently, review of a nearly abandoned practice may not be called for.

There is a response.

Becker

Ops in appx to petn.

11/4/74

DK

Court .....  
Argued ....., 19...  
Submitted ....., 19...

Voted on ....., 19...  
Assigned ....., 19...  
Announced ....., 19...

No. 74-304

RICHARD A. GORDON, ET AL., Petitioners

vs.

NEW YORK STOCK EXCHANGE, INC., ET AL.

9/19/74 Cert. filed.

*There is a  
conflict, according  
to Brennan, White,  
& others*

*Grant*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.			✓											
Blackmun, J.			✓											
Marshall, J.		✓												
White, J.		✓												
Stewart, J.			✓											
Brennan, J.		✓												
Douglas, J.														
Burger, Ch. J.			✓											

*Hold for Nat Ass'n Securities Dealers  
73-1701*

*Join 3*



74-304 GORDON v. NEW YORK STOCK EXCHANGE

Argued 3/25/75

Gordon v. N.Y. Stock Exchange 74-304

Bader (for Peter)

Immunity from Anti Trust laws  
must be determined on case by case  
basis.

I White asked "what if  
SEC had ordered a schedule  
of minimum fees"? Bader  
gave no answer except to say  
that he doubted SEC has  
power to do this.

Shapiro

Effective May 1, 1975, SEC has  
adopted Rule as to Rates.

Relies on Silver.

19(b) merely provides remedies -  
it is not a grant of affirmative power.

? A Once the New Rule becomes effective  
there will be no anti-trust issues



Jackson (for Resp).

SG is trying to exhaust Anti-Trust Law over all other laws.

SEC has made major changes (7 of them) in Exchange Rules over recent years - after hearings in which Anti-Trust Division took part.

If ~~the~~ A/T view prevailed here, there would have to be a trial de novo - under A/T principles - before a jury. This case by case approach would further ~~the~~ SEC regulation.

A/T Division has not challenged fixed commission rules of Exchange altho the practice of fixed rates has been open & notorious ~~for~~ ~~more than~~ since enactment of Anti Trust laws.

Existence of regulatory power is sufficient - whether exercised or not.

Relies on doctrine of repugnancy.

Jackson (Cont)

Two statutes cannot be harmonized;  
One says who shall not; the other  
says you may. Now SEC also  
says you may not. In ~~such~~  
either case, A/T is preempted.

Commission's power is exclusive  
over the Exchange - but not  
necessarily over members: i.e. if  
members ~~can~~ conspire among  
themselves to fix rates after  
the Exchange Rule as to rates  
terminates, anti-trust laws would  
then apply.

Exchanges are entitled to know  
what conduct is lawful & what is  
not.

~~But~~ Since SEC has power  
to reject a Rule of Exch, its failure  
to do so is - in legal effect -  
approval.

Perkins (for SEC) a plain repugnance  
exists

## Regulatory scheme of SEC

### Competitive considerations

- as well as economic - are considered  
by SEC

Congress chose to regulate  
fixed rates - not to outlaw them.

(Relied on Wase - written  
by Harry)

SEC may act vs any member

Under 19(a), SEC may revoke  
reg. of an Exchange.

What happens after May 1?

If members thereafter  
fix rates, anti-trust provisions would  
lie. Even today, if members  
agreed to divide markets (e.g.),  
A/T would apply.



Nerheim (SEC)

How process works in practice:

See studies in SEC

Documentary Appendix

If SEC thinks a Rule Change is OK, no express approval is required - but SEC considers this to be agency action.

Judicial  
Review

Responding to Byrum, Nerheim said that Gordon could review this agency non-action in DC - on de novo basis - under Adm. Procedure Act.

Justice Dept. Reply Brief saying SEC has done nothing is "shockingly disingenuous".  
(See SEC Documentary Appendix)

Ricci doesn't extend Silver - there were factual issues that had to be resolved.

MEMORANDUM

TO: Mr. Justice Powell  
FROM: Lewis F. Powell, Jr.

DATE: March 27, 1975

No. 74-304 Gordon v. New York Stock Exchange

There are two distinct analytical elements in the problem in this case. One is <sup>(1)</sup>whether the Securities Exchange Act's unique regulatory scheme, compounded of self-regulation in the exchanges and regulatory oversight by the SEC, was intended to substitute for competitive forces in the industry. The second question is <sup>(2)</sup>whether the Exchange Act and the antitrust laws can be enforced in complementary fashion. The answer to each question depends in part on the other; so neither issue can be decided independently. Still, I think it helpful to think of these as discrete problems. The first is largely a matter of congressional intent; the second, parimarily a problem of administrative law.

In the time I have devoted to studying the Court's past cases on antitrust in the regulated industries, I have been unable to discern a consistent pattern. There are, however, several prevailing themes. First, the Court has regularly invoked the principle that repeal by implication (especially *True* of antitrust laws) is not favored. The Court has found a complete repeal by implication in very few cases; most cases have found some place for antitrust law in the regulatory scheme.



Second, a highly relevant consideration is whether the regulatory agency is required to weigh the effect on competition as one element of the public interest. An express statutory provision to this effect has persuaded the Court that Congress meant competition to be protected by the agency rather than the antitrust laws. Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963). But see, United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963). On the other hand, absence of emphasis on competitive considerations has helped the Court to the conclusion that Congress did not intend regulation to substitute for competition, United States v. RCA, 358 U.S. 334 (1959). See also Otter Tail Power Co. v. United States, 410 U.S. 366.

ye Third, the Court has been fairly consistent in holding that antitrust law is not ousted if the agency has no power to regulate the conduct in question. E.g., Georgia v. Pennsylvania R.Co., 324 U.S. 439 (1945); United States v. Borden Co., 308 U.S. 188 (1939).

Finally, active and continuing agency supervision based partly on competitive concerns was an apparent factor in the Hughes Tool case, where the Court held that CAB regulation had displaced antitrust scrutiny of post-merger dealings with an airline company. Hughes Tool Co. v. Trans World Air lines, Inc., 409 U.S. 363 (1973). I might add that I find no consistent reliance - except in dissents - on the presence or absence of a damages remedy for the party claiming injury.



The Court seems to have recognized that Congress could reasonably substitute regulation for competition without affording a damages remedy to parties injured by conduct the regulatory agency disapproves.

Silver v. New York Stock Exchange, 373 U.S. 341 (1963), fits into this loose structure rather well. There the Court began by emphasizing the unique structure of the Exchange Act, which relies on self-regulation in the industry to a greater degree than other regulatory statutes do. It recognized that the statutory scheme contemplated the continuing operation of the exchanges as membership organizations, with authority (even a duty) to exclude some persons from membership. The Court found no explicit repealer of antitrust laws, however, and invoked the no-repeal-by-implication principle to hold that the antitrust laws should be ousted only insofar as necessary to make the Exchange Act work. The guiding principle was "an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Id. at 357. Since the conduct challenged in Silver was not subject to SEC regulation, the Court easily concluded that regulation had not been substituted for competition in that narrow context and went on to use a "Rule of Reason" analysis and balance antitrust policies against the fundamental concept of exchange self-regulation to come up with its curious "due process" holding.

NYSE  
ordered a  
member  
to discontinue  
direct  
telephone  
lines to  
non-members.

Conduct  
in Silver  
not subject  
to A/T

The Court expressed no view on the result it would reach when the SEC <sup>has</sup> ~~had~~ express regulatory power over the challenged conduct. Id. at 358.

The express regulatory power, which is present here, is relevant in two respects. First, it is relevant in that ultimate control over exchange rules is in the SEC rather than the exchange itself. Thus it presents a much better case than Silver for saying that Congress intended to substitute this method of regulation for the antitrust laws. Second, even if Congress seems to have intended a dual system of regulation, the SEC's express authority over commission-fixing rules creates a potential for conflict between regulatory authorities. This prospect has more relevance to the administrative law problem than to the question of congressional intent.

*Primary  
Jurisdiction*

The administrative law issue is a problem of choosing a procedure by which both the SEC and the antitrust court can perform their respective functions without conflict. The best procedure invokes the doctrine of primary jurisdiction. In order to assure uniformity of decision, and to get an informed assessment of conditions in the regulated industry, an antitrust court ordinarily should not entertain a private suit until the agency has been given an opportunity to rule on the challenged conduct. Thus, if the agency has authority to exempt certain transactions from the antitrust laws, Far East Conference v. United States, 342 U.S. 570, of if there



is a question whether the challenged conduct violated the regulatory act, Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), the antitrust court should not act until the agency has performed its function. (You joined a dissent in Ricci based primarily on the ground that waiting for agency's action in that case could not be expected to aid the antitrust court significantly.) If the agency disapproves the challenged conduct on the basis of the regulatory statute, the antitrust court may not have to proceed. If the agency renders an opinion balancing the competitive considerations against policies peculiar to the regulated industry, the court will have an informed basis upon which to apply a "Rule of Reason" analysis. United States v. RCA, 358 U.S. 334 (1959). But see United States v. Philadelphia National Bank, 374 U.S. 321, 353-354 (1963); California v. FPC, 369 U.S. 482 (1962).

The alternative to the "primary jurisdiction" model is to allow the antitrust and agency proceedings to run simultaneously, that is, to allow the antitrust court to decide the case without waiting for an agency decision on the matters entrusted to its processes. This presents a substantially greater danger of producing antitrust decisions that do not adequately consider the regulatory concerns. Under the "primary jurisdiction" model there is some potential for substantive conflict: the court may find an antitrust violation in some conduct that the agency has held legal under the regulatory



statute. Some degree of conflict, however, is inevitable given an initial decision that Congress did not mean to substitute regulation for competition. But it need not be serious. It is the same conflict that can arise in any other context where a business is subject to two unrelated schemes of regulation: its conduct may violate one statute but not the other. Unless the agency has determined that some conduct is affirmatively required by the regulatory statute, there is no conflict that cannot be ameliorated by applying a "Rule of Reason" (instead of a per se rule) in the antitrust court. (The "Rule of Reason," in hornbook terms, is simply a process of balancing the socially desirable aspects of the conduct against its anticompetitive effects.)

If the court and the agency are allowed to proceed simultaneously, however, the antitrust court may act without the agency's judgment under the regulatory statute. The court might then disregard the regulatory concerns, act on incomplete information, or reach a different conclusion on crucial facts. This state of affairs is generally less desirable, but the Court has approved it in various contexts. Philadelphia National Bank, supra; cf. California v. FPC, supra.

Now that I've introduced the question, the problem is to apply these two general inquiries to the SEC and the NYSE. First is the question whether Congress meant to make SEC regulation exclusive wherever applicable. The Exchange Act

contains no explicit repeal of the antitrust acts, and the SEC has no authority to exempt specific transactions from antitrust challenge. Instead there is a section purporting to supplement rather than supersede "all other rights and remedies that may exist at law or in equity." See U.S. brief at 70. Second, the statute does not require the SEC to weigh competitive considerations in determining what exchange practices will serve the public interest. Section 19(b) describes the relevant standard: "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." These factors, under the Court's prior decisions, weigh in favor of holding that antitrust law is not ousted. On the other side, though, the SEC claims that it does consider competitive factors even though the statute does not require it, and the SEC has closely regulated commission-fixing agreements over the last few years. These two factors are not particularly relevant to congressional intent, but they may deserve some weight on the other side.

I think the SEC is crying "wolf" when it claims that inconsistent regulation would be disastrous for the securities industry. It is not clear to me why the SEC's silent nondisapproval of a proposed exchange rule must be honored. The SEC admits that in deciding not to object to an exchange proposal, it may be deciding only that the proposal is not



inconsistent with the Exchange Act. If an antitrust court, after due consideration of the program of self-regulation and the public interest expressed in the Exchange Act, should decide that ~~the~~ anticompetitive aspects of the exchange's rule outweigh its benefits, this seems to me no different from the usual interplay between two regulatory schemes expressing different concerns. The exchanges would know that they are subject to antitrust regulation as well as SEC supervision, and they could tailor their rules to avoid anticompetitive conduct that is not expressly designed to protect investors, insure fair dealing, or insure fair administration of the exchange.

The only situation that would pose a true dilemma for the exchanges would arise from an SEC order to institute a particular anticompetitive rule. Then, I think the antitrust law - whether under an immunity principle or a simple "Rule of Reason" analysis - probably should not interfere with the SEC's balance of policies. Even this concession to the SEC, which all parties in this case have regarded as a minimum, is not mandated by the Court's prior cases. In RCA the Court overrode the FCC's assessment of the public interest in a radio acquisition, and in Philadelphia National Bank it allowed an antitrust court to disagree with the Comptroller's decision that a bank merger would be good for the Philadelphia economy despite the decrease in competition.

*But this  
is not  
always  
practicable  
- e.g. this  
case, rate  
fixing is  
per se anti-trust  
violation*

*but  
how have  
practical  
known to  
Congress  
since Act  
of 34 was  
adopted.*



The second issue, if the Court concludes that the antitrust laws are not inherently "repugnant" to the Exchange Act, is whether the two laws may be administered in a fashion that will avoid disruption of the regulatory scheme. Unfortunately, the answer offered by a "primary jurisdiction" model may be unavailable. I looked over the Exchange Act's procedural provisions and the SEC's rules of practice, and found nothing that generally authorizes an individual such as Mr. Gordon to institute SEC proceedings against an exchange rule already in existence. Anyone may file a petition seeking issuance or repeal of an SEC rule "of general application," Rule 4(a), but there is no explicit authorization for private complaints about exchange rules. Nor is there a rule authorizing private intervention in an SEC-instituted proceeding to review a proposal submitted by an exchange. Under Rule 9(a), only governmental bodies are entitled to intervene as of right in <sup>an</sup> ongoing SEC proceeding, and other persons may be allowed "limited participation" at the discretion of the hearing officer. But, if exchange rule proposals are reviewed informally, as the SEC counsel suggested at oral argument, even this limited participation may be unavailable.

Given this state of affairs, the only procedural framework seems to be allowing an antitrust court to proceed without waiting for the plaintiff to obtain an SEC ruling on the challenged practices. (In this particular case, of course,

the court would have the advantage of all the SEC's rulings on the fixed-commission structure). The disadvantage of the procedural situation pulls in both directions. On the one hand, it means there is some danger that an antitrust court would decide that a particular exchange practice is unduly anticompetitive without the benefit of the SEC's views, unless, of course, the SEC volunteered an amicus submission in the court proceeding. On the other hand, if the Court should hold that Congress meant the Exchange Act to supply the only remedy for anticompetitive rules issued by exchanges, an injured party would be entirely without remedy. He cannot initiate proceedings in the SEC, but must <sup>hope that</sup> ~~depend on~~ the SEC's staff - working under a statute that does not even include effects on competition as one of the public interests the SEC is required to protect - <sup>will</sup> ~~to~~ take interest in the exchange's rule. He may not be able even to participate in an agency proceeding on a limited basis, and he may have no resort to judicial review. Absent a clear conviction that Congress meant the exchanges to be entirely free of antitrust supervision, I would be most reluctant to reach such a result.

P.C.

ss



March 27, 1975

No. 74-304 Gordon v. New York Stock Exchange

This memorandum is to facilitate my discussion at the Court Conference on the above case.

We only have to decide whether, with respect to commission rates, antitrust jurisdiction has been displaced by SEC regulation. We need not address any broader issue. Express regulatory authority with respect to rates is vested in the SEC under § 19(a)(9). No such authority was present in Silver, where the New York Stock Exchange ordered its members to discontinue direct telephone line service with a nonmember.

Rate fixing by the stock exchange has been the practice, openly and notoriously, since the exchange commenced operation. It has existed since the Sherman Act was passed, and until this suit the Justice Department has not publicly criticized or attacked the practice (to my knowledge).

The legislative history indicates that Congress knew that the NYSE prescribed commission rates, and intended by §19(a)(9) to vest regulatory authority thereof in the SEC. Moreover, the SEC has exercised this authority (see its supplement to brief). \*

\*SEC counsel stated at oral argument (without contradiction) that the Justice Department had participated in hearings before the Commission on rates, and had asserted no overriding antitrust jurisdiction.



On the basis of this record, I think we are entitled to conclude that Congress did intend to foreclose antitrust intervention as to the rate regulation conferred by §19(a). The Justice Department, at least by acquiescence, has concurred in this view for nearly 40 years.

I should have noted above that, although the act does not require the SEC to consider competitive factors, SEC claims in its brief that these are considered. My own view is that the SEC's obligation under the statute to consider the public interest necessarily embraces competitive factors, as entitled to be weighed against other relevant factors.

Plaintiff, in this class action case, claims damages of \$1.5 billion, plus \$10 million in attorneys fees. This suit is directed only against the NYSE and Amex. There are 11 other registered national securities exchanges with rules fixing minimum commission rates. It would be grossly inequitable to impose liability of this magnitude upon private parties who have, for nearly 40 years, followed a practice to the knowledge of the government and with the full approval of the agency established by the Congress to regulate this business. While it can be said that disaster to individual parties should not deter enforcement of antitrust laws, this Court properly may consider - as relevant to a determination of congressional intent - the interpretation thereof in good faith over long periods of years by all concerned, including the regulatory agency primarily responsible and the

acquiescence of the Justice Department.

I may add that, as in Hughes Tool, we need not hold that the Act of 1934 vesting regulatory authority in the SEC completely displaced antitrust laws. We are concerned here only with the regulation of commission rates under 19(a).

In short, I would affirm the unanimous judgment of CA2 (Kaufman, Mansfield and Mulligan).

L.F.P., Jr.



The Chief Justice Affirm

CA 2 was right

Douglas, J. Affirmaffirm  
8-1

First Conference  
attended by WOD  
since his stroke  
on 12/31/74

Brennan, J. Reveria

Silver was a limited op.  
CA 2 went beyond Silver  
& held Act of '34 had preempted  
~~entirely~~ entirely Anti-Trust law.

There is A/T juris & court  
should give great weight to  
SEC views.

Concernous by SEC & Jackson  
as to existence of A/T juris  
in certain circumstances.

Stewart, J. Affirm

Basic issue is whether action  
by brokers in conformity with  
Exchange Rules may be  
sued in A/Trust. In Potler's  
view, ~~the~~ Act of '34  
preempts A/T.

Agrees largely with  
CA 2

Affirm

Does not buy  
all of CA 2

- but 19(a)9  
expressly vests  
auth. in SEC.

Failure of SEC  
to object is tantamount  
to approval. This  
is an exercise of  
duly authorized  
power. But would  
write cons

Powell, J. Affirm

I disclosed fact  
that a son-in-law  
is a stockholder  
in Rotan, Moseley  
- member of Stock  
Exchange. All  
further agreed no  
basis for disqualification  
x x x

See my memo. of  
3/27/75 for my  
views.

Affirm

Agrees with  
Byron

Blackmun, J.

Affirm

Agrees with  
Byron

Rehnquist, J.

Affirm . . . . .



March 31, 1975

No. 73-304 Gordon v. N.Y. Stock Exchange

It occurred to me, as I was preparing for the Conference, that Richard Smith is a small stockholder and an officer or employee of Rotan-Mosle, a member of the New York Stock Exchange.

The question was whether this presented a conflict of interest situation. On the afternoon before the Conference, I discussed this with Justice Stewart. His reaction was that the relationship was too "attenuated", to use his word. He noted that there are several hundred members of the Stock Exchange; that only a couple of the largest firms are parties to this litigation; that even if damage-suit judgments eventually were to be obtained against all members of the Stock Exchange, the effect on a small stockholder would be highly speculative.

In any event, Potter - who served on the ABA Committee - volunteered to review the matter. The next day, just prior to the Conference, he reported that he had examined the judicial Standards of Ethics and the Reporter's notes and was satisfied there was no problem. I nevertheless brought the matter up before the Conference prior to participating in the decision of the case. The unanimous view was that I should participate.

L.F.P., Jr.

In this case, we only have to decide whether with respect to commission rates anti-trust (A/T) juris has been displaced by SEC regulation. <sup>over</sup> We need not address broader issues ~~whether~~.

Express regulatory authority with respect to rates is vested in SEC under § 19(a)(9). (no such authority existed in Silver).

Rate fixing by U.S. Stock Exchange has been the practice, openly & notoriously, since opening of Exchange. It has existed since Sherman Act was passed and until this suit the Justice Dept. has not criticized the practice. Leg. history indicated that Congress knew this and intended [§ 19(a)(9)] ~~to~~ to vest regulatory authority in SEC. Moreover, SEC has exercised this authority, & it was said (a not contradicted in oral argument) that ~~Justice Dept.~~ <sup>Justice Dept.</sup> had participated in hearings on rates without asserting A/T juris. I deduce from this record that Congress did intend to foreclose Anti-trust intervention as to the rate ~~fixing~~ regulation conferred by § 19(a). The Justice Dept., at least by acquiescence <sup>inactivity</sup> for 40 years has concurred in this view.

It would be most inequitable, on basis of this record, by government itself, now to impose major damage liability for ~~conduct~~ a course of conduct long approved ~~and~~ by Gov't itself.

As in Hughes Tool, we need not hold that Act of '34 ~~conveying~~ reg. authority in SEC completely displaced A/T laws.



To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: 6/10/75

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 74-304

Richard A. Gordon et al., Petitioners, v. New York Stock Exchange, Inc., et al.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	--

[June —, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the problem of reconciliation of the antitrust laws with a federal regulatory scheme in the particular context of the practice of the securities exchanges and their members of using fixed rates of commission. The United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit concluded that fixed commission rates were immunized from antitrust attack because of the Securities and Exchange Commission's authority to approve or disapprove exchange commission rates and its exercise of that power.

I

In early 1971 petitioner Richard A. Gordon, individually and on behalf of an asserted class of small investors, filed this suit against the New York Stock Exchange, Inc. (NYSE), the American Stock Exchange, Inc. (Amex), and two member firms of the exchanges.<sup>1</sup>

<sup>1</sup> The member firms are Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Company, Inc.

*Reviewed*  
*LJP*  
*6/11/75*  
*join*

## 2 GORDON v. NEW YORK STOCK EXCHANGE

The complaint challenged a variety of exchange rules and practices and, in particular, claimed that the system of fixed commission rates, utilized by the exchanges at that time for transactions less than \$500,000, violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. Other challenges in the complaint focused on (1) the volume discount on trades over 1,000 shares, and the presence of negotiated rather than fixed rates for transactions in excess of \$500,000;<sup>2</sup> (2) the rules limiting the number of exchange memberships; and (3) the rules denying discounted commission rates to nonmembers using exchange facilities.<sup>3</sup>

Respondents moved for summary judgment on the ground that the challenged actions were subject to the overriding supervision of the Securities and Exchange Commission (SEC) under § 19 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 18s (b), and, therefore, were not subject to the strictures of the antitrust laws. The District Court granted respondents' motion as to all claims. 366 F. Supp. 1261 (1973). Dismissing the exchange membership limitation and the Robinson-Patman Act contentions as without merit,<sup>4</sup> the court focused on

<sup>2</sup> Petitioner urged that these practices were in violation of the Robinson-Patman Price Discrimination Act, 15 U. S. C. § 13a.

<sup>3</sup> The relief requested included an injunction prohibiting the implementation of certain negotiated commission rates that were to be placed in effect on April 5, 1971, or, alternatively, requiring that negotiated rates be available for transactions of any size. Petitioner also requested trebled damages amounting to \$1.5 billion and an award of attorney's fees of \$10 million plus interest and costs.

<sup>4</sup> In short, the District Court concluded that (1) since petitioner had never applied for exchange membership, he was not in a position to complain that he was arbitrarily precluded from membership; (2) the Act's § 3 (a)(3), 15 U. S. C. § 78c (a)(3), by its definition of "member," specifically limited access of nonmembers to the exchanges; and (3) the Robinson-Patman Act did not apply to services or intangibles, but only to commodities or goods, and the latter ~~are~~ not involved in this litigation.

were

7



the relationship between the fixed commission rates and the Sherman Act mandates. It utilized the framework for analysis of antitrust immunity in the regulated securities area that was established a decade ago in *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963). Since § 19 (b)(9) of the Exchange Act authorized the SEC to supervise the exchanges "in respect of such matters as . . . the fixing of reasonable rates of commission," the court held applicable the antitrust immunity reserved in *Silver* for those cases where "review of exchange self-regulation [is] provided through a vehicle other than the antitrust laws." 373 U. S., at 360. It further noted that the practice of fixed commission rates had continued without substantial challenge after the enactment of the 1934 Act, and that the SEC had been engaged in detailed study of the rate structure for a decade, culminating in the requirement for abolition of fixed rates as of May 1, 1975.

On appeal, the Second Circuit affirmed. 498 F. 2d 1303 (1974). Characterizing petitioner's other challenges as frivolous, the appellate court devoted its opinion to the problem of antitrust immunity. It, too, used *Silver* as a basis for its analysis. Because the SEC, by § 19 (b)(9), was given specific review power over the fixing of commission rates, because of the language, legislative history, and policy of the Exchange Act, and because of the SEC's actual exercise of its supervisory power, the Court of Appeals determined that this case differed from *Silver*, and that antitrust immunity was proper.

By his petition for certiorari, petitioner sought review only of the determination that fixed commission rates are beyond the reach of the antitrust laws. Because of the vital importance of the question, and at the urging of all the parties, we granted certiorari. 419 U. S. 1018 (1974).

## II

Resolution of the issue of antitrust immunity for fixed commission rates may be made adequately only upon a thorough investigation of the practice in the light of statutory restrictions and decided cases. We begin with a brief review of the history of commission rates in the securities industry.

Commission rates for transactions on the stock exchanges have been set by agreement since the establishment of the first exchange in this country. The New York Stock Exchange was formed with the Buttonwood Tree Agreement of 1792, and from the beginning minimum fees were set and observed by the members. That Agreement itself stated:

"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 Special value, and that we will give a preference to each other in our Negotiations." F. Eames, *The New York Stock Exchange* 14 (1968 ed).

See generally, R. Doede, *The Monopoly Power of the New York Stock Exchange*, reprinted in *Hearings on S. 3169 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 2d Sess., 405, 412-427 (1972). Successive constitutions of the NYSE have carried forward this basic provision. Similarly, when Amex emerged in 1908-1910, a pattern of fixed commission rates was adopted there.

These fixed rate policies were not unnoticed by responsible congressional bodies. For example, the House



## GORDON v. NEW YORK STOCK EXCHANGE 5

Committee on Banking and Currency, in a general review of the stock exchanges undertaken in 1913, reported that the fixed commission rate rules were "rigidly enforced" in order "to prevent competition amongst the members." H. R. Rep. No. 1593, 62d Cong., 3d Sess., 39 (1913).<sup>5</sup> The report, known as the Pujo Report, did not recommend any change in this policy, for the Committee believed

"the present rates to be reasonable, except as to stocks, say, of \$25 or less in value, and that the exchange should be protected in this respect by the law under which it shall be incorporated against a kind of competition between members that would lower the service and threaten the responsibility of members. A very low or competitive commission rate would also promote speculation and destroy the value of membership." *Id.*, at 115-116.

---

<sup>5</sup> See, for example, the comments of the Report in reviewing evidence on fixed commissions:

"As stated by Mr. Sturgis, a former president of the exchange, since 1876 a governor, and now the chairman of the law committee . . . :

"The violation of the commission law we regard as one of the most infamous crimes that a man can commit against his fellow members in the exchange, and as a gross breach of good faith and wrongdoing of the most serious nature, and we consider it a crime that we should punish as severely as, in the judgment of the governing committee, the constitution permits.

"Q. . . . But the breach of that rule (referring to the rule for uniform commissions) by a broker you consider the most heinous crime he can commit?

"A. It is absolute bad faith to his fellow men."

"The rule is rigidly enforced by suspension from one to five years for a first violation and expulsion for a second. . . . The acknowledged object is to prevent competition amongst the members."

H. R. Rep. No. 1593, 62d Cong., 3d Sess., 39 (1913).

## 6 GORDON v. NEW YORK STOCK EXCHANGE

Despite the monopoly power of the few exchanges, exhibited not only in the area of commission rates but in a wide variety of other aspects, the exchanges remained essentially self-regulating and without significant supervision until the adoption of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78a *et seq.* At the lengthy hearings before adoption of that Act, some attention was given to the fixed commission rate practice and to its anticompetitive features. See Hearings before the Senate Comm. on Banking and Currency on S. Res. 84 (72d Cong.) and S. Res. 56 and 97 (73d Cong.), 73d Cong., 1st and 2d Sess., 6075, 6868, and 7705 (1934) (Senate Hearings). See also Hearings on S. Res. 84 before the Senate Comm. on Banking and Currency, 72d Cong., 1st Sess., 85 (1932); Hearings on H. R. 7852 and 8720 before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 320-321, 423 (1934).

Perhaps the most pertinent testimony in the hearings preparatory to enactment of the Exchange Act was proffered by Samuel Untermyer, formerly Chief Counsel to the committee that drafted the Pujo Report. In commenting on proposed S. 2693, Mr. Untermyer noted that although the bill would provide the federal supervisory commission with

“the right to prescribe uniform rates of commission, it does not otherwise authorize the Commission to fix rates, which it seems to me it should do and would do by striking out the word ‘uniform.’ That would permit the Commission to fix rates.

“The volume of the business transacted on the exchange has increased manyfold. Great fortunes have been made by brokers through this monopoly. The public has no access to the exchange by way of membership except by buying a seat and paying a very large sum for it. Therefore it is a monopoly.



## GORDON v. NEW YORK STOCK EXCHANGE 7

Probably it has to be something of a monopoly. But after all it is essentially a public institution. It is the greatest financial agency in the world, and should be not only controlled by the public but it seems to me its membership and the commissions charged should either be fixed by some governmental authority or be supervised by such authority. As matters now stand, the exchange can charge all that the traffic will bear, and that is a burden upon commerce." Senate Hearings 7705.

As finally enacted, the Exchange Act apparently reflected the Untermyer suggestion, for it gave the SEC the power to fix and insure "reasonable" rates. Section 19 (b) provided:

*"(b) 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 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."* (Emphasis added.)

This provision conformed to the Act's general policy of self-regulation by the exchanges coupled with oversight by the SEC. It is to be noted that the ninth cate-

## 8 GORDON v. NEW YORK STOCK EXCHANGE

gory is one of 12 specifically enumerated. In *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U. S. 117, 127-128 (1973), we observed:

"Two types of regulation are reflected in the Act. Some provisions impose direct requirements and prohibitions. Among these are mandatory exchange registration, restrictions on broker and dealer borrowing, and the prohibition of manipulative or deceptive practices. Other provisions are flexible and rely on the technique of self-regulation to achieve their objectives. . . . Supervised self-regulation, although consonant with the traditional private governance of exchanges, allows the Government to monitor exchange business in the public interest."

The congressional reports confirm that while the development of rules for the governing of exchanges, as enumerated in § 19 (b), was left to the exchanges themselves in the first instance, the SEC could compel adoption of those changes it felt were necessary to insure fair dealing and protection of the public. See H. R. Rep. No. 1383, 73d Cong., 2d Sess., 15 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 13 (1934). The latter report, at 15, noted that registered exchanges were required to provide the SEC with "complete information" regarding its rules.

## III

With this legislative history in mind, we turn to the actual post-1934 experience of commission rates on the NYSE and Amex. After these two exchanges had registered in 1934 under § 6 of the Exchange Act, 15 U. S. C. § 78f, both proceeded to prescribe minimum commission rates just as they had prior to the Act, App. A42, A216. These rates were changed periodically



by the exchanges," after their submission to the SEC pursuant to § 6(a)(4), 15 U. S. C. § 78f(a)(4), and SEC Rule 17a-8, 17 CFR § 240.17a-8. Although several rate changes appear to have been effectuated without comment by the SEC, in other instances the SEC thoroughly exercised its supervisory powers. Thus, for example, as early as 1958 a study of the NYSE commission rates to determine whether the rates were "reasonable and in accordance with the standards contemplated by applicable provisions of the Securities Exchange Act of 1934," was announced by the SEC. SEC Exchange Act Release No. 5678, April 14, 1958, App. A240. This study resulted in an agreement by the NYSE to reduce commission rates in certain transactions, to engage in further study of the rate structure by the NYSE in collaboration with the SEC, and to provide the SEC with greater advance notice of proposed rate changes. SEC Exchange Act Release No. 5889, February 20, 1959. App. A247. The SEC specifically stated that it had undertaken the study "in view of the responsibilities and duties imposed upon the Commission by Section 19(b) . . . with respect to the rules of national securities exchanges, including rules relating to the fixing of commission rates." *Ibid.*

Under subsection (d) of § 19 of the Act (which subsection was added in 1961), Pub. L. 87-196, 75 Stat. 465, the SEC was directed to investigate the adequacy of exchange rules for the protection of investors. Accordingly, the SEC began a detailed study of exchange rules in that year. In 1963 it released its conclusions in a six-volume study. SEC Report of Special Study of Securi-

---

<sup>6</sup> Since 1947, rates generally have been based on the value of stock in a round lot. SEC Report of Special Study of Securities Markets, H. Doc. No. 95, pt. 5, 88th Cong., 1st Sess., 103 (1963). There was no volume discount at the time of this SEC Report.

## 10 GORDON v. NEW YORK STOCK EXCHANGE

ties Markets, H. Doc. No. 95, 88th Cong., 1st Sess. The Study, among other things, focused on problems of the structure of commission rates and procedures, and standards for setting and reviewing rate levels. *Id.*, pt. 5, at 102. The SEC found that the rigid commission rate structure based on value of the round lot was causing a variety of "questionable consequences," such as "give-ups" and the providing of special services for certain large, usually institutional customers. These attempts indirectly to achieve rate alterations made more difficult the administration of the rate structure and clouded the cost data used as the basis for determination of rates. These effects were believed by the SEC to necessitate a complete study of the structure. Moreover, the SEC concluded that methods for determining the reasonableness of rates were in need of overhaul. Not only was there a need for more complete information about the economics of the securities business and commission rates in particular, but also for a determination and articulation of the criteria important in arriving at a reasonable rate structure. Hence, while the Study did not produce any major immediate changes in commission rate structure or levels, it did constitute a careful articulation of the problems in the structure and of the need for further studies that would be essential as a basis for future changes.

Meanwhile, the NYSE began an investigation of its own into the particular aspect of volume discounts from the fixed commission rates App. A219-A220. This study determined that a volume discount and various other changes were needed, and so recommended to the SEC. The Commission responded in basic agreement. Letter dated December 22, 1965, from SEC Chairman Cohen to NYSE President Funston, App. A249. The NYSE study continued over the next few years and final



conclusions were presented to the SEC in early 1968. App. A253.<sup>7</sup>

In 1968, the SEC, while continuing the study started earlier in the decade, began to submit a series of specific proposals for change and to require their implementation by the exchanges. Through its Exchange Act Release No. 8324, May 28, 1968, App. A286, the SEC requested the NYSE to revise its commission rate schedule, including a reduction of rates for orders for round lots in excess of 400 shares or, alternatively, the elimination of minimum rate requirements for orders in excess of \$50,000. These changes were viewed by the SEC as interim measures, to be pending further consideration "in the context of the Commission's responsibilities to consider the national policies embodied both in the securities laws and in the antitrust laws." Letter of May 28, 1968, from SEC Chairman Cohen to NYSE President Haack. App. A284, A285. In response to these communications, the NYSE (and Amex) eventually adopted a volume discount for orders exceeding 1,000 shares, as well as other alterations in rates, all approved by the SEC. See, *e. g.*, letter of August 30, 1968, from Chairman Cohen to President Haack, App. A310; memorandum dated September 20, 1968, Amex Subcommittee on Commission Structure, App. A104.

Members of the securities exchanges faced substantial declines in profits in the late 1960's and early 1970. These were attributed by the NYSE to be due, at least in part, to the fact that general commission rates had not been increased since 1958. Statement of February 13,

---

<sup>7</sup> The basic NYSE proposal included some volume discounts, continuation of limited give-ups if directed by the customers, termination of "rebative" reciprocal practices, discounts for certain non-members, and limitation of membership and discounts to "bona fide broker-dealers." App. A255.

1970, by President Haack to SEC. App. A313. The NYSE determined that a service charge of at least the lesser of \$15 or 50% of the required minimum commission on orders less than 1,000 shares should be imposed as an interim measure to restore financial health by bringing rates in line with costs. NYSE Proposed Rule 383, App. A331. See also letter dated March 19, 1970, from President Haack to members of the NYSE. App. A327. This proposal, submitted to the SEC pursuant to its Rule 17a-8, was permitted by the SEC to be placed into operation on a 90-day interim basis. Letter dated April 2, 1970, from SEC Chairman Budge to President Haack. App. A333. Continuation of the interim measure was thereafter permitted pending further rate structure hearings undertaken by the SEC. SEC Exchange Act Release No. 8923, July 2, 1970. App. A336. The interim rates remained in effect until the rate structure change of March 1972.

In 1971 the SEC concluded its hearings begun in 1968. Finding that "minimum commissions on institutional size orders are neither necessary nor appropriate," the SEC announced that it would not object to competitive rates on portions of orders above a stated level. Letter of February 3, 1971, from SEC Commissioner Smith to President Haack. App. A353. See also SEC Exchange Act Release No. 9007, October 22, 1970. App. A348. Although at first supporting a \$100,000 order as the cutoff below which fixed rates would be allowed, *ibid.*, the SEC later decided to permit use of \$500,000 as the breakpoint. After a year's use of this figure, the SEC required the exchanges to reduce the cutoff point to \$300,000 in April 1972. Statement of the SEC on the Future Structure of the Securities Markets, February 2, 1972. App. A369, A387, A388 (Policy Study).

The 1972 Policy Study emphasized the problems of the securities markets, and attributed as a major cause of



those problems the prevailing commission rate structure. The Policy Study noted:

"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 membership by institutions." *Id.*, at A385.

Since commission rates had been fixed for a long period of time, however, and since it was possible that revenue would decline if hasty changes were made, the SEC believed that there should be no rush to impose competitive rates. Rather, the effect of switching to competition should be gauged on a step-by-step basis, and changes should be made "at a measured, deliberate pace." *Id.*, at A387. The result of the introduction of competitive rates for orders exceeding \$500,000 was found to be a substantial reduction in commissions, with the rate depending on the size of the order. In view of this result, the SEC determined to institute competition in the \$300,000-\$500,000 range as well.

Further reduction followed relatively quickly. On January 16, 1973, the SEC announced it was considering requiring the reduction of the breakpoint on competitive rates to orders in excess of \$100,000. SEC Exchange Act Release No. 9950. In June, the SEC began hearings on the rate schedules, stimulated in part by a request by the NYSE to permit an increase of 15% of the current rate on all orders from \$5,000 to \$300,000, and to permit a minimum commission on small orders (below \$5,000) as well. SEC Exchange Act Release No. 10206, June 6, 1973. Documentary Appendix to Brief for SEC 24 (Doc. App.). Three months later, after completion of the

hearings, the SEC determined that it would allow the increases. SEC Exchange Act Release No. 10383, September 11, 1973.<sup>8</sup> Doc. App. 27. The SEC also announced, however: "It will act promptly to terminate the fixing of commission rates by stock exchanges after April 30, 1975, if the stock exchanges do not adopt rule changes achieving that result." *Id.*, at 28.

Elaboration of the SEC's rationale for this phasing out of fixed commission rates was soon forthcoming. In December 1973, SEC Chairman Garrett noted that the temporary increase in fixed rates (through April 1975) was permitted because of the inflation in the cost of operating the exchanges, the decline in the volume of transactions on the exchanges, and the consequently severe financial losses for the members. SEC Exchange Act Release No. 10560, December 14, 1973. Doc. App. 29. Indeed, without the rate increase, "the continued deterioration in the capital positions of many member firms was foreseeable, with significant capital impairment and indirect, but consequential, harm to investors the likely result." *Id.*, at 36. The rate increase also would forestall the possibility that the industry would be impaired during transition to competitive rates and other requirements. This view conformed to the suggestion of Senator Williams, Chairman of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs. See statement dated July 27, 1973, of Senator Williams submitted to the SEC, cited in Exchange Act Release No. 10560 n. 12. Although not purporting to elucidate fully its reasons for abolishing fixed rates, the SEC did suggest several considerations

---

<sup>8</sup> The increases were permitted through March 31, 1974, without restriction. Such increases could continue from April 1, 1974 through April 30, 1975, if the NYSE permitted its members to charge in excess of the old rate and also permitted reductions in brokerage services in return for discounts from the rate.



basic to its decision: the heterogeneous nature of the brokerage industry; the desirability of insuring trading on, rather than off, the exchanges; doubt that small investors are subsidized by large institutional investors under the fixed rate system; and doubt that small firms would be forced out of business if competitive rates were required.

In response to a request by the NYSE, the SEC permitted amendment to allow competitive rates on nonmember orders below \$2,000. SEC Exchange Act Release No. 10670, March 7, 1974. Doc. App. 42. Hearings on intramember commission rates began in April 1974. SEC Exchange Act Release No. 10751, April 23, 1974. Doc. App. 45. The SEC concluded that intramember rates should not be fixed beyond April 30, 1975. SEC Exchange Act Release No. 11019, September 19, 1974. Doc. App. 60. At this time the SEC stated:

"[I]t presently appears to the Commission that it is necessary and appropriate (1) for the protection of investors, (2) to insure fair dealing in securities traded in upon national securities exchanges, and (3) to insure the fair administration of such exchanges, that the rules and practices of such exchanges that require, or have the effect of requiring, exchange members to charge any persons fixed minimum rates of commission, should be eliminated." *Id.*, at 63.

The SEC formally requested the exchanges to make the appropriate changes in their rules. When negative responses were received from the NYSE and others, the SEC released for public comment proposed Securities Exchange Act Rules 19b-3 and 10b-22. Proposed Rule 19b-3, applicable to intra- and nonmember rates effective May 1, 1975, would prohibit the exchanges from using or compelling their members to use fixed rates of commis-

sion. It also would require the exchanges to provide explicitly in their rules that nothing therein requires or permits arrangements or agreements to fix rates. Proposed Rule 10b-22 would prohibit agreements with respect to the fixing of commission rates by brokers, dealers, or members of the exchanges. See SEC Exchange Act Release No. 11073, October 24, 1974. Doc. App. 65.

Upon the conclusion of hearings on the proposed rules, the SEC determined to adopt Rule 19b-3, but not Rule 10b-22. SEC Exchange Act Release No. 11203, January 23, 1975. Doc. App. 109. Effective May 1, 1975, competitive rates were to be utilized by exchange members in transactions of all sizes for persons other than members of the exchanges. Effective May 1, 1976, competitive rates were to be mandatory in transactions for members as well, *i. e.*, floor brokerage rates. Competition in floor brokerage rates was so deferred until 1976 in order to permit an orderly transition.<sup>9</sup> The required transition to competitive rates was based on the SEC's conclusion that competition, rather than fixed rates, would be in the best interests of the securities industry and markets, as well as in the best interest of the investing public and the national economy. *Ibid.* This determination was not based on a simplistic notion in favor of competition, but rather on demonstrated deficiencies of the fixed commission rate structure. Specifically mentioned by the SEC were factors such as the rigidity and delay inherent in the fixed rate system, the potential for distortion, evasion, and conflicts of interest, and fragmen-

---

<sup>9</sup>It was also believed that members of the exchanges had not expected that floor brokerage rates would be included among those required to be made competitive, and that extra time for planning and adjustment would be needed. The SEC noted, additionally, that the impact of floor brokerage rates on public investors was significantly less than the impact of public rates, *i. e.*, the rates on transactions for nonmembers. SEC Exchange Act Release No. 11203, January 23, 1975. Doc. App. 109, 110.



tation of markets caused by the fixed rate system. Acknowledging that the fixed rate system perhaps was not all bad in all periods of its use, the SEC explicitly declined to commit itself to permanent abolition of fixed rates in all cases: in the future circumstances might arise that would indicate that reinstitution of fixed rates in certain areas would be appropriate.

The SEC dismissed the arguments against competitive rates that had been raised by various proponents of the status quo. First, the SEC deemed the possibility of destructive competition to be slim, because of the nature of the cost curve in the industry.<sup>10</sup> Second, there was substantial doubt whether maintenance of fixed rates, in fact, provided various subsidies that would be beneficial to the operation of the securities markets. For example, it was unlikely that small investors reaped a subsidy from higher rates charged larger investors, because of separation of the business between large and small investors. Nor did the SEC believe that regional brokers were substantially benefited by maintenance of fixed rates. Third, the possibility of an exodus from membership on the exchanges was unlikely, and should be dealt with only as it occurred. In any event, inasmuch as the SEC anticipated that there would be detailed studies of the operation of the competitive rates effectuated by its orders, any problems that arose could be effectively resolved upon further consideration.

During this period of concentrated study and action by the SEC, lasting more than a decade, various congressional committees under took their own consideration of

---

<sup>10</sup> In order for destructive competition to occur on a large scale, fixed costs must be a high percentage of total costs, and there must be economies of scale in a wide range of production. Neither of these factors was found to be present in the brokerage industry. SEC Exchange Act Release No. 11203, January 23, 1975. Doc. App. 109, 138-139.

the matter of commission rates. Early in 1972, the Senate Subcommittee on Securities concluded that fixed commission rates must be eliminated on institutional-sized transactions, and that lower fees should be permitted for small transactions, with "unbundled" services, than those having the full range of brokerage services. Report of the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs (For the Period Ended February 4, 1972), 92d Cong., 2d Sess., 4 (1972). The Subcommittee objected particularly to the failure of the fixed rate system to produce "fair and economic" rates, *id.*, at 59, and to distortion in the rate structure in favor of the institutionally oriented firms.

The Subcommittee was perturbed at the SEC's actions regarding fixed commission rates for several reasons. First, the Subcommittee noted that in litigation the SEC had taken the position that it had not approved NYSE rate changes in 1971, but had merely failed to object to the introduction of the new rates, *id.*, at 58, referring to the SEC position in *Independent Investor Protective League v. SEC* (SDNY No. 71-1924), dismissed without opinion (CA2, 1971). This posture precluded review of the SEC action in the Court of Appeals.<sup>11</sup> Second, the Subcommittee was displeased with the length of time the SEC took in arriving at its decisions regarding commission rate structure and level. Third, the Subcommittee feared that statements of the SEC lacked clarity and perpetuated uncertainty as to the status of fixed rates on transactions exceeding \$100,000. Therefore, the Subcommittee Report stressed:

"[I]t is essential that fixed commission rates be

<sup>11</sup> This view has been rejected by the United States Court of Appeals for the District of Columbia. *Independent Broker-Dealers' Trades Assn. v. SEC*, 142 U. S. App. D. C. 384, 442 F. 2d 132, cert. denied, 404 U. S. 828 (1971). The SEC appears no longer to take this position. See Brief for the SEC 38-39, n. 45.



phased out in orderly and systematic manner, and that a date certain be set promptly for elimination of fixed commissions on institutional-size transactions, which have resulted in the most serious distortions. Based on the SEC's conclusions and on testimony submitted to the SEC and to this Subcommittee this could best be achieved by eliminating fixed rates on orders in excess of \$100,000." *Id.*, at 60.

The House Committee on Interstate and Foreign Commerce, in a report issued only six months after the Senate Report, *supra*, concluded that fixed rates of commission were not in the public interest and should be replaced by competitively determined rates for transactions of all sizes. Such action should occur "without excessive delay." Securities Industry Study, Report of the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce. H. R. Rep. No. 1519, 92d Cong., 2d Sess., xiv, 141, 144-145, 146 (1972). Although prodding the SEC to take quick measures to introduce competitive rates for transactions of all sizes, the House Committee determined to defer enacting legislation so long as reasonable progress was being made. These conclusions resulted from a detailed study, by the Subcommittee, of assorted costs and benefits of competitive versus fixed rates, and reflected information gained through lengthy hearings. *Id.*, at 131-146, and related Hearings before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce. 92d Cong., 1st and 2d Sess. (1971-1972). Similarly, after lengthy analysis, the Senate Subcommittee on Securities concluded both that competitive rates must be introduced at all transaction levels, and that legislation was not required at that time in view of the progress made by the SEC. Securities Industry Study Report of the Subcomm. on Securities of

the Senate Comm. on Banking, Housing and Urban Affairs, S. Doc. No. 93-13, 93d Cong., 1st Sess., 5-7, 43-68 (1973), and Hearings on S. 3169 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (1972).

In 1975 both Houses of the Congress did in fact enact legislation dealing directly with commission rates. Although the bills initially passed by each chamber differed somewhat, the Conference Committee compromised the differences. Compare H. R. 4111, § 6 (p), as discussed in H. R. Rep. No. 94-123, 94th Cong., 1st Sess., 51-53, 67-68 (1975), with S. 249, § 6 (e), as discussed in S. Rep. No. 94-75, 94th Cong., 1st Sess., 71-72, 98 (1975). The measure, as so compromised, was signed by the President on June 5, 1975.

The new legislation amends § 19 (b) of the Securities Exchange Act to substitute for the heretofore existing provision a scheme for SEC review of proposed rules and rule changes of the various self-regulatory organizations. Reference to commission rates is now found in the new § 6 (e), generally providing that after the date of enactment "no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members." An exception is made for floor brokerage rates which may be fixed by the exchanges until May 1, 1976. Further exceptions from the ban against fixed commissions are provided if approved by the SEC after certain findings: prior to November 1, 1976, the Commission may allow the exchanges to fix commissions if it finds this to be "in the public interest," § 6 (e)(1)(A); after November 1, 1976, the exchanges may be permitted by the SEC to fix rates of commission if the SEC finds (1) the rates are reasonable in relation to costs of service (to be determined pursuant to standards of reasonableness published by the SEC), and (2) if the rates "do not impose any burden on competition not necessary or appropriate



in furtherance of the purposes of this title, 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 title." § 6 (e)(1)(B)(ii). The statute specifically provides that even if the SEC does permit the fixing of rates pursuant to one of these exceptions, the SEC by rule may abrogate such practice if it finds that the fixed rates "are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this title." § 6 (e)(2).

The new section also provides a detailed procedure which the SEC must follow in arriving at its decision to permit fixed commission rates. § 6 (e)(4). This procedure was described in the Conference Report as "comparable to that provided for in Section 18 of the Federal Trade Commission Act, 15 U. S. C. 58, which is more formal than normal notice and comment rulemaking under Section 553 of title 5 U. S. C. but less formal than 'on the record' procedure under Section 556 and 557 of title 5 U. S. C." Securities Acts Amendments of 1975, Conference Report, H. R. Rep. No. 94-229, 94th Cong., 1st Sess., 108 (1975). Finally, the amendments require the SEC to file regularly until December 31, 1976, with both branches of Congress, reports concerning the effect of competitive rates on the public interest, investors, and the securities markets. § 6 (e)(3).<sup>12</sup>

<sup>12</sup> One further change in the 1975 amendments should be noted. The 1934 Act defined the term "member" of an exchange as any person who, among other things, is permitted "to make use of the facilities of an exchange for transactions thereon . . . with the payment of a commission or fee which is less than that charged the general public." § 3 (a)(3). This implied a likelihood of fixed rates for the general public, for otherwise it would have been difficult to determine that a member, in fact, was given lower rates. This definition was deleted in 1975 amendments and has been replaced with a general definition of a member of an exchange. § 3 (a)(3)(A).

As of May 1, 1975, pursuant to order of the SEC, fixed commission rates were eliminated and competitive rates effectuated. Although it is still too soon to determine the total effect of this alteration, there have been no reports of disastrous effects for the public, investors, the industry, or the markets.

This lengthy history can be summarized briefly: In enacting the Securities Exchange Act of 1934, the Congress gave clear authority to the SEC to supervise exchange self-regulation with respect to the "fixing of reasonable rates of commission." Upon SEC determination that exchange rules or practices regarding commission rates required change in order to protect investors or to insure fair dealing, the SEC was authorized to require adoption of such changes as were deemed necessary or appropriate. This legislative permission for the fixing of commission rates under the supervision of the SEC occurred seven years *after* this Court's decision in *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927), to the effect that price fixing was a *per se* violation of the Sherman Act. Since the Exchange Act's adoption, and primarily in the last 15 years, the SEC has been engaged in thorough review of exchange commission rate practices. The committees of the Congress, while recently expressing some dissatisfaction with the progress of the SEC in implementing competitive rates, have generally been content to allow the SEC to proceed without new legislation. As of May 1, 1975, the SEC, by order, has abolished fixed rates. And new legislation, enacted into law June 5, 1975, codifies this result, although still permitting the SEC some discretion to reimpose fixed rates if warranted.

#### IV

This Court has considered the issue of implied replacement of the antitrust laws in the context of a variety of



regulatory schemes and procedures. Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a "plain repugnancy between the antitrust and regulatory provisions" will repeal be implied. *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963). See also *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U. S. 117, 126 (1973); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U. S. 363, 385-389 (1973); *Carnation Co. v. Pacific Conference*, 383 U. S. 213, 217-218 (1966). *Silver v. New York Stock Exchange*, 373 U. S., at 357-358; *United States v. Borden Co.*, 308 U. S. 188, 198-199 (1939). We have reaffirmed these basic principles elsewhere this Term. *United States v. National Association of Securities Dealers*, — U. S. —, — (1975) (slip op. 23, 33).

The starting point for our consideration of the particular issue presented by this case, *viz.*, whether the antitrust laws are impliedly repealed or replaced as a result of the statutory provisions and administrative and congressional experience concerning fixed commission rates, of course, is our decision in *Silver*. There the Court considered the relationship between the antitrust laws and the Securities Exchange Act, and did so specifically with respect to the action of an exchange in ordering its members to remove private direct telephone connections with the offices of a nonmember. Such action, absent any immunity derived from the regulatory laws, would be a *per se* violation of § 1 of the Sherman Act, 373 U. S., at 347. Concluding that the proper approach to the problem was to reconcile the operation of the antitrust laws with a regulatory scheme, the Court established a "guiding principle" for the achievement of this reconciliation. Under this principle, "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange

## 24 GORDON v. NEW YORK STOCK EXCHANGE

Act work, and even then only to the minimum extent necessary." *Id.*, at 357.

In *Silver*, the Court concluded that there was no implied repeal of the antitrust laws in that factual context because the Exchange Act did not provide for SEC jurisdiction or review of particular applications of rules enacted by the exchanges. It noted:

"Although the Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules, § 19 (b), 15 U. S. C. § 78s (b), and impliedly, therefore, to disapprove any rules adopted by an exchange, see also § 6 (a)(4), 15 U. S. C. § 78f (a)(4), it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules." *Ibid.*

At the time *Silver* was decided, both the rules and constitution of the NYSE provided that the exchange could require discontinuance of wire service between the office of a member and a nonmember at any time. There was no provision for notice or statement of reasons. While these rules were permissible under the general power of the exchanges to adopt rules regulating relationships between members and nonmembers, and the SEC could disapprove the rules, the SEC could not forbid or regulate any particular application of the rules. Hence, the regulatory agency could not prevent application of the rules that would have undesirable anticompetitive effects; there was no governmental oversight of the exchange's self-regulatory action, and no method of insuring that some attention at least was given to the public interest in competition.

The Court, therefore, concluded that the absence in *Silver* of regulatory supervision over the application of the exchange rules prevented any conflict arising between the regulatory scheme and the antitrust laws. See also



*Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 455-457 (1945), where the Court found no conflict because the regulatory agency (the ICC) had no jurisdiction over the rate fixing combination involved. The Court in *Silver* cautioned, however, that "[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." 373 U. S., at 360. It amplified this statement in a footnote:

"Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." 373 U. S., at 358 n. 12.

It is patent that the case presently at bar is, indeed, that "different case" to which the Court in *Silver* referred. In contrast to the circumstances of *Silver*, § 19 (b) gave the SEC direct regulatory power over exchange rules and practices with respect to "the fixing of reasonable rates of commission." Not only was the SEC authorized to disapprove rules and practices concerning commission rates, but the agency also was permitted to require alteration or supplementation of the rules and practices when "necessary or appropriate for the protection of investors or to insure fair dealings in securities traded in upon such exchange." Since 1934 all rate changes have been brought to the attention of the SEC, and it has taken an active role in review of proposed rate changes during the last 15 years. Thus, rather than presenting a case of SEC impotence to affect application of exchange rules in particular circumstances, this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with

rates of commission and resultant SEC continuing activity.

Having determined that this case is, in fact, the "different case," we must then make inquiry as to the proper reconciliation of the regulatory and antitrust statutes involved here, keeping in mind the principle that repeal of the antitrust laws will be "implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.*, at 357. We hold that these requirements for implied repeal are clearly satisfied here. To permit operation of the antitrust laws with respect to commission rates, as urged by petitioner Gordon and the United States as *amicus curiae*, would unduly interfere, in our view, with the operation of the Securities Exchange Act.

As a threshold matter, we believe that the determination of whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work is a matter for the courts, and in particular, for the courts in which the antitrust claims are raised. *Silver* exemplifies this responsibility. In some cases, however, the courts may defer to the regulatory agency involved, in order to take advantage of its special expertise. The decision in the end, however, is for the courts. *Ricci v. Chicago Mercantile Exchange*, 409 U. S. 289, 306-308 (1973).

The United States, as *amicus curiae*, suggests not only that the immunity issue is ultimately for the courts to decide, but also that the courts may reach the decision only on a full record. A summary record, as compiled in this case on motions for summary judgment, though voluminous, is said to be an inadequate basis for resolution of the question. We disagree. In *this* case nothing is to be gained from any further factual development that might be possible with a trial on the merits. We have before us the detailed experience of the SEC regu-



latory activities, and we have the debates in the Congress culminating in the 1975 legislation. This information is sufficient to permit an informed decision as to the existence of an implied repeal.

Our disposition of this case differs from that of the Seventh Circuit in *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (1970), cert. denied, 401 U. S. 994 (1971), where antitrust immunity for the NYSE's antirebate rule was claimed and denied. The Court of Appeals reversed a grant of summary judgment in favor of the NYSE, and remanded for further evidence regarding the effects of the antirebate rule on competition, the degree of actual review by the SEC, and the extent to which the rule was necessary to make the Exchange Act work. 433 F. 2d, at 270. This ruling is persuasively distinguishable on at least two grounds from the case at bar: First, there was no evidence presented regarding the extent of SEC review of the challenged rule. Second, the antirebate practice differs from fixed commission rates in that (1) it was not among the items specifically listed in § 19b, although the practice might reasonably be thought to be related to the fixing of commission rates, and (2) it does not necessarily apply uniformly, and may be applied in a discriminatory manner. We do not believe it necessary, in the circumstances of this case, to take further evidence concerning the competitive effects of fixed rates, or the necessity of fixed rates as a keystone of the operation of exchanges under the Exchange Act. To the extent that the Court of Appeals in *Thill* viewed the question of implied repeal as a question of fact, concerning whether the particular rule itself is necessary to make the Act work, we decline to follow that lead.

We also regard our specific disposition in *Ricci v. Chicago Mercantile Exchange*, *supra*, as inapposite for this case. In *Ricci*, an antitrust complaint charged that

the Mercantile Exchange arbitrarily transferred a membership, in violation of both the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, and the exchange rules. We held that consideration of the antitrust claims should be stayed pending determination by the Commodity Exchange Commission as to whether the actions taken were in violation of the Act or the rules. Although we noted that the Act did not confer a general antitrust immunity, we stated that if the actions complained of were in conformity with the Act and exchange rules, a substantial question would be presented concerning whether the actions were insulated from antitrust attack. It is manifest, then, that *Ricci* involved a deference to the expertise of a regulatory agency in determining if the activities violated the Act or rules, and did not represent a decision on antitrust immunity where the conduct charged was clearly encompassed by the legislation or rules and where there was no factual dispute.

We believe that the United States, as *amicus*, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question 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. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity.

The United States appears to suggest that only if there is a pervasive regulatory scheme, as in the public utility



area, can it be concluded that the regulatory scheme ousts the antitrust laws. Brief for the United States 16, 35. It is true that in some prior cases we have been concerned with the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws. See, e. g., *Otter Tail Power Co. v. United States*, 410 U. S. 366, 373-375 (1973). In the present case, however, respondents do not claim that repeal should be implied because of a pervasive regulatory scheme, but because of the specific provision of § 19 (b)(9) and the regulatory action thereunder. Brief for Respondents 35. Hence, whether the Exchange Act amounts to pervasive legislation ousting the antitrust acts is not a question before us.

We agree with the District Court and the Court of Appeals, and with respondents, that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. It is clear from our discussion in Part III, *supra*, that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC.<sup>13</sup> If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of

---

<sup>13</sup> We believe that this degree of scrutiny and approval by the SEC is not significantly different for our purposes here than an affirmative order to the exchanges to follow fixed rates. The United States, as *amicus curiae*, agrees that if the SEC "were to order the exchanges to adhere to a fixed commission rate system of some kind, no antitrust liability could arise." Brief for the United States 48. We conclude that immunity should not rest on the existence of a formal order by the SEC, but that the actions taken by the SEC pursuant to § 19 (b)(9), as outlined in Part III, are to be viewed as having an effect equivalent to that of a formal order.

antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry.<sup>14</sup> Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.<sup>15</sup>

In Part III, *supra*, we outlined the legislative and regulatory agency concern with the fixing of commission rates. Beginning with the enactment of the Securities Exchange Act in 1934, the Congress persistently has provided for SEC authority to regulate commission rates. Although SEC action in the early years appears to have been minimal, it is clear that since 1959 the SEC has been engaged in deep and serious study of the commission rate practices of the exchanges and of their members, and has required major changes in those practices. The ultimate result of this long-term study has been a

<sup>14</sup> Compare *Pan American World Airways v. United States*, 371 U. S. 296, 305-310 (1963), with *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-352 (1963). In the latter case two factors pointed against antitrust immunity: (1) congressional intent in the Bank Merger Act not to immunize activities from antitrust legislation, and (2) the lack of conflict between the Bank Merger Act and Clayton Act standards. Also, there was an absence of continuing oversight by the Comptroller General of the Currency. These factors are not present in, and are inapplicable to, the case at bar.

<sup>15</sup> We note, of course, that judicial review of SEC action is available under the Administrative Procedure Act, 5 U. S. C. §§ 702 and 704, or under § 25 of the Securities Exchange Act, 15 U. S. C. § 78y. See also *Independent Broker-Dealers' Trade Assn. v. SEC*, 142 U. S. App. D. C. 384, 442 F. 2d 132, cert. denied, 404 U. S. 828 (1971).



regulatory decree requiring abolition of the practice of fixed rates of commission as of May 1, 1975, and the institution of full and complete competition. Significantly, in the new legislation enacted subsequent to the SEC's abolition of commission rate fixing, the Congress has indicated its continued approval of SEC review of the commission rate structure. Although legislatively enacting the SEC regulatory provision banning fixed rates, the Congress has explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates.

In sum, the statutory provision authorizing regulation, § 19 (b) (9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as *per se* violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.

*Affirmed.*

*It is so ordered.*

MR. JUSTICE DOUGLAS took no part in the decision of this case.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

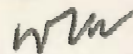
June 11, 1975

Re: No. 74-304 - Gordon v. NYSE

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference



June 12, 1975

No. 74-304 Gordon v. New York Stock  
Exchange

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 16, 1975

Re: 74-304 - Gordon v. New York Stock Exchange

Dear Harry:

Please join me in your June 10 circulation.

Regards,



Mr. Justice Blackmun

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 17, 1975



RE: No. 74-304 Gordon v. New York Stock Exchange

Dear Potter:

Please join me in your concurring opinion in  
the above.

Sincerely,

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 18, 1975

Re: No. 74-304, Richard A. Gordon v. New York  
Stock Exchange, Inc.

Dear Harry:

Please join me.

Sincerely,

*T.M.*  
T. M.

Mr. Justice Blackmun

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 18, 1975

Re: No. 74-304 - Gorden v. New York Stock  
Exchange, Inc.

---

Dear Harry:

Understanding that the change we chatted  
about on page 23 will be made, I join your  
circulating opinion in this case.

Sincerely,




Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 20, 1975



Re: No. 74-304 - Gordon v. New York Stock Exchange

Dear Harry:

Please join me. I will file a brief con-  
curring opinion as well.

Sincerely,

William O. Douglas

Mr. Justice Blackmun

cc: The Conference



THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
Join HAB 6-16-75	Join HAB 6-20-75 Concur 6-21-75 1st Draft 6-23-75	Join PS 6-17-75	Concur 6-16-75 1st draft 6-18-75	Join HAB 6-18-75	Join HAB 6-18-75	3/31/75 1st draft 6-10-75 2nd draft 6-19-75	Join HAB 6/12/75	Join HAB 6-11-75
							74-304 Gordon v. New York Stock Exchange	