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Antitrust And Stock Exchange Minimum Commissions: A Jurisdictional Analysis

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ANTITRUST AND STOCK EXCHANGE MINIMUM COMMISSIONS: A JURISDICTIONAL ANALYSIS

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I. INTRODUCTION

Inquiry into the relative merits and legal basis of fixed minimum commission rates steadily continues before the Securities and Exchange Commission (SEC).[1] At stake is at least a substantial portion of the $1,200,000-000 paid annually to members of the New York Stock Exchange (NYSE) by the investing public for the privilege of trading in issues listed on the "Big Board."[2] In addition, it is asserted that the minimum commission rate structure is "to a large extent" responsible for no less than the nation's economic development, as well as the stability, efficiency, liquidity, depth and existence of the world's leading stock exchange.[3] However, a contrary view is urged by the Department of Justice which contends that the elimination of minimum rate structures will result in

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1. Proceedings were initiated by the SEC, Securities Exchange Act of 1934, Release No. 8239 (Jan. 26, 1968). Subsequent events are detailed in the following sources: Note, *The application of Antitrust Laws to the Securities Industry,* 10 WM. & MARY L. REV. 136, 163-68 (1968); Response of the United States Department of Justice to S.E.C. Release No. 34-8791. File No. 4-144, CCH FED. SEC. L. REP. ¶ 77,810 (current ed.) (summary of comments) [hereinafter cited as Memorandum of the Dep't of Justice].

2. The quoted dollar amount of NYSE commissions appears in Kaplan v. Lehman Bros., 389 U.S. 954, 955 (1967) (Warren, C.J., dissenting from the denial of certiorari). The Memorandum of the Dep't of Justice 71 notes that "transactions on the New York markets alone [results in] well over $2 billion in brokerage commissions annually." When the treble damage aspect of antitrust actions is applied to this already substantial amount, the result is spectacular, as evidenced by a $3 billion class action suit which has recently been filed against the "Big Board" and other major exchanges and brokerage houses attacking the minimum commission structure. *See* Wall Street J., Oct. 6, 1970, at 3, col. 2.

3. Memorandum on behalf of New York Stock Exchange, presented at S.E.C. hearing *In re Commission Rate Structure of Registered National Securities Exchanges,* No. 4-144 (S.E.C. Aug. 1968); statement of the American Stock Exchange submitted to the Securities and Exchange Commission *In re Commission Rate Structure of Registered National Securities Exchanges,* No. 4-144, C.C.H. FED. SEC. L. REP. ¶ 77,728 (current ed.) (summary of comments) [hereinafter cited as Statement of the Amex].

"healthy competition"[4] which "is likely to provide substantial benefits by lowering the ultimate cost to the investor, by eliminating detrimental practices associated with the noncompetitive rate structure, and by improving the quality of services to investors."[5]

The substantive economic merits of exchange minimum commission rates, as opposed to a competitive rate structure, raise complex analytical problems which have resulted in the inevitable split in expert opinion.[6] The various analyses and conclusions on the issue have been submitted to the SEC in both testimonial presentation and written form, but no decision has been announced by that agency as of this writing.

This article is not an attempt to decide the issue presently before the SEC. The substantive and economic merits of minimum commission rates have been extensively and forcefully presented by a number of interested and disinterested parties invited to participate in the hearings. Instead, emphasis will be placed on the relatively unarticulated jurisdictional and procedural issues. These issues, which are only of collateral significance in the SEC proceedings, usually become more sharply focused in litigation and are generally discussed in terms of exemptions from antitrust law coverage or under the doctrine of primary jurisdiction. A number of concepts are involved in addition to the two just mentioned. Included among these are: judicial review of administrative action; supersession of judicial remedies by exclusive administrative remedies; and exhausting of administrative remedies. The unfortunate failure of the courts to recognize both the characteristics and the proper application of these concepts has resulted in "essentially wasteful, time-consuming and costly" jurisdictional disputes.[7]

Before entering into a discussion of these procedural pitfalls, a few words should be said regarding the underlying substantive issues. In the context of the structure of brokerage commissions, the fundamental issue is the relationship between the Securities Exchange Act of 1934,[8] and the antitrust laws,[9] which are designed to ensure that competitive forces in the free market price goods for the maximum efficiency in resource allocation. More precisely, "what is the impact of the regulatory law upon the preexisting judicial sphere of antitrust influence? Are the antitrust

4. Memorandum of the Dep't of Justice 70. "Competition" is rarely permitted to stand on its own merits: it is either "healthy" or "destructive" depending upon its use by the Justice Department or members of the securities industry respectively. Presumably, both refer to the same meaning of the word regardless of euphemism or epithet.

5. *Id.*

6. *Compare* Memorandum of the Dep't of Justice 43-199 *with* NYSE Economic Brief *and* Statement of the Amex *supra* note 3.

7. McGovern, *Antitrust Exemptions for Regulated Industries*, 20 FED. B.J. 10, 11 (1960) [hereinafter cited as McGovern]. *See* Note, *Antitrust and the Stock Exchange: Minimum Commission or Free Competition?*, 18 STAN. L. REV. 213, 214 n.10 (1965) [hereinafter cited as *Antitrust*].

8. 48 Stat. 88 (1934), *as amended* 15 U.S.C. §§ 78(a)—(hh-1) (1967).

9. The relevant antitrust statute is the Sherman Act, 26 Stat. 209 (1890), *as amended* 15 U.S.C. § 1 *et seq.* (1964).

prohibitions, and the jurisdiction of the courts to enforce them, untouched, supplemented, or supplanted by regulation?"[10] "The fundamental difficulty is that the courts continue to emphasize the social undesirability of acts claimed to have anticompetitive consequences, while the regulatory agencies preside over areas where the social undesirability of unrestrained competition is assumed."[11]

As noted above, the SEC is now scrutinizing the assumption that a competitive commission rate structure is socially undesirable. The importance of the issue, as evidenced by the lively participation of the interested parties—particularly the NYSE and the Justice Department—suggests that regardless of the SEC determination court action is likely to follow. Such a case would present before the court the broad range of procedural and jurisdictional problems listed above, including "basic principles of antitrust law not previously decided by [the Supreme] Court, and, consequently . . . not controlled by precedent."[12] It is in anticipation of such litigation and the concomitant procedural and jurisdictional issues that this article is written. The author's purpose will be to analyze these procedural and jurisdictional problems and thus provide prospective litigants with information which may help them avoid being "chased from judicial pillar to administrative post, and back again."[13]

This analysis has two branches: first, the possibility of a Congressional antitrust exemption for the fixed minimum commission price structure; second, the roles of the SEC, the NYSE, and the courts with regard to the regulation of the securities industry in the area of minimum commission rates. Each of these branches will be examined with respect to the nonsubstantive question of whether the courts may hear and decide the merits of the minimum commission controversy.

II. CONGRESSIONAL EXEMPTION

The question presented for consideration under this heading is whether the Securities Exchange Act of 1934 mandates the minimum commission rate structure. The effect of a determination that Congressional intent was to preserve such a minimum rate structure would be twofold. First, the SEC would be powerless to change the commission rate structure; and second, a Congressional mandate adopting a mini-

10. Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812 (1967) [hereinafter cited as Kestenbaum].

11. A.B.A. Antitrust Sec. Rep., Antitrust Developments Vol. 1955-1968 190 (1968).

12. Kaplan v. Lehman Bros., 389 U.S. 954 (1967) (Warren, C.J., dissenting from the denial of certiorari). *See* Silver v. New York Stock Exchange, 373 U.S. 341, 358 n.12 (1963).

13. McGovern, *supra* note 7, at 10. *See, e.g.*, the discussion of Far East Conference v. United States, 342 U.S. 570 (1952) and Federal Maritime Board v. Isbrandtsen, 356 U.S. 481 (1958) in McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, A.B.A. ANTITRUST SEC. REP., Vol. 13 57-61 (1958) [hereinafter cited as *Types*].

mum commission rate structure would, by implication, immunize that structure from antitrust attack.

A. *Forum for Decision*

A preliminary issue raised by the Congressional exemption theory deals with the proper forum for decision. It should be made clear at the outset that this preliminary issue is not an exercise in the application of the primary jurisdiction doctrine. This fact, which cannot be taken for granted, is evidenced by a recent article[14] in which the author purported to find in the *Jewel Tea* case[15] "factors relevant to allocation of the function of resolving a claim of antitrust immunity."[16] He concluded that the "*Jewel Tea* criteria for allocating the decision of antitrust immunity are, the court's ability to proceed on its own, and the need, utility, and availability of agency decision."[17]

It is submitted that the author[18] of that article has both misinterpreted Mr. Justice White's opinion in *Jewel Tea* and misapplied the limited doctrine of primary jurisdiction. The Supreme Court in *Jewel Tea* carefully distinguished the union's primary jurisdiction contention from the argument of antitrust exemption.[19] The enunciation of criteria relied upon and quoted by Mr. Kestenbaum appears only in the Court's discussion of primary jurisdiction.[20] The Court had no difficulty deciding the antitrust exemption question without any need for enlightenment from the National Labor Relations Board, which is the relevant agency. The Board was never even mentioned in that part of the opinion in which the Court decided the antitrust exemption issue by "accommodating the coverage of the Sherman Act to the policy of the labor laws."[21]

There is, in fact, no such theory of "primary jurisdiction to decide antitrust jurisdiction." Primary jurisdiction is a judicial doctrine.[22] There can be no judicial doctrines without decided cases.[23] The value of Mr. Kestenbaum's article on this issue lies in his analysis of the factors supporting judicial decision of antitrust immunity questions,

14. Kestenbaum, *supra* note 10.

15. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

16. Kestenbaum, *supra* note 10, at 815.

17. *Id.* at 816. In support of this conclusion, Mr. Kestenbaum cites *Jewel Tea*, 381 U.S. at 684-88.

18. The author, Mr. Kestenbaum, is a member of the Department of Justice.

19. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 684 (1965).

20. *Id* at 684-88. *See* Note, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 708-10 (1968).

21. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 684, 689 (1965).

22. *Types*, *supra* note 13, at 57.

23. *See* Kestenbaum, *supra* note 10, at 820, quoted *infra* at 6-7; McGovern, *supra* note 13, at 60-61. *But cf.* Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transport Ass'n, 253 F.2d 877, 886 (D.C. Cir. 1958); Trienens, *Types of Questions Subject to the "Primary Jurisdiction" of Administrative Agencies*, A.B.A. ANTITRUST SEC. REP., Vol. 13, 42, 53 (1958) [hereinafter cited as Trienens].

and not in the theory of primary jurisdiction to decide antitrust jurisdiction.[24]

Genuine primary jurisdiction "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . ."[25] The Congressional antitrust exemption issue requires for its resolution the statutory interpretation of the Securities Exchange Act. The court could conclude either that "the antitrust claim [is] barred because the antitrust laws have been entirely displaced by" the regulatory scheme, or that "the antitrust claim is unaffected by the regulatory statute or by anything which might have been done or might be done under it."[26] Statutory construction and interpretation are traditional judicial functions, and, in fact, the Supreme Court has reached both of the above conclusions[27] without the aid of the particular agencies involved in the various regulatory schemes.[28]

The judicial power to determine the reach of antitrust law by means of statutory construction of the relevant regulatory scheme is consistent with the concept of true primary jurisdiction. Reference to the agency is made only after a judicial determination that either administrative expertise or the need for uniformity compels the result.[29]

In addition, an agency's "expertise, real or *ex officio*, can be said to be limited to administrative questions and not to extend to determining the ultimate reach of its authority, particularly when impinging on the courts' antitrust jurisdiction."[30] "[A] [statutory] grant of [agency] power implies a limit . . ." to be determined by the courts through the process of defining statutory purpose in such a way as "to make all the prescribed procedures workable."[31] This proposition is particularly well-expressed by Mr. Kestenbaum, who states:

> It is surely significant, however, that [no case calling for reference to a regulatory agency of issues of antitrust jurisdiction hinging upon interpretation of regulatory statutes] . . . has yet appeared before the Supreme Court. The uniform decisions are a silent tribute to the force of the arguments favoring the courts' retention of the decisive role by retention of jurisdiction. On the statutory issue of antitrust jurisdiction or immunity, the probability of enlightenment from an agency opinion

24. *See* text accompanying notes 28-32 *infra*.

25. United States v. Western Pacific, 352 U.S. 59, 64 (1956).

26. Kestenbaum, *supra* note 10, at 818.

27. *E.g.*, Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963) (exclusive agency jurisdiction); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (antitrust jurisdiction sustained).

28. Kestenbaum, *supra* note 10, at 818-19.

29. *Id.* at 819. *See also* Ailes, *Some Procedural Problems of Primary Jurisdiction*, A.B.A. ANTITRUST SEC. REP. Vol. 13, 82 (1958) [hereinafter cited as Ailes].

30. Kestenbaum, *supra* note 10, at 819.

31. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1041 (1964).

is usually not high enough to warrant the burden of an administrative proceeding; any agency interest can ordinarily be adequately expressed by means of *amicus* presentations in court.[32]

In spite of these considerations, and the apparent irrelevance of any SEC decision on the issue to an antitrust court, the principal participants to the hearings have each included in their filings to the SEC extensive analyses of the Securities Exchange Act with regard to the possibility of Congressional exemption of the minimum commission structure from antitrust law.[33] Nothing appears to be lost by presenting the issue to the SEC since the same arguments can be made to an antitrust court regardless of the SEC's decision. In fact, the exchanges and individual members of the securities industry have much to gain if they can successfully persuade the Commission that it has no power to alter the minimum rate structure.[34] Additionally, one should be aware of the compromising effect of the Justice Department's recently articulated policy of working more closely with administrative agencies in reaching what it considers to be the correct results under both regulatory standards and antitrust law.[35] If the dispute never reaches a court, any SEC decision would be determinative.

B. *Preliminary Generalities*

The analytical road to Congressional exemption is strewn with "general propositions [that] do not decide concrete cases."[36] The triggering device is the fact that "[t]he Securities Exchange Act contains no express exemption from the antitrust laws . . . [therefore] any repealer of the antitrust laws must be discerned as a matter of implication. . . ."[37] Implied exemption language is inevitably followed, "as the night the day,"[38] with the statement that "repeals by implication are not favored."[39]

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32. Kestenbaum, *supra* note 10, at 820.

33. *Compare* Memorandum of the Dep't of Justice 15-42 *with* Statement of the Amex 41-69 *and In the Matter of Commission Rate Structure of Registered National Securities Exchanges*, File No. 4-144, Memorandum on Behalf of New York Stock Exchange 5-16 (1968) [hereinafter cited as NYSE Legal Brief].

34. *See* note 2, *supra.*

35. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1238 (1969) [hereinafter cited as Turner]. The Justice Department appears to have worked more closely, and more successfully, with the SEC than with other administrative agencies: jurisdictional conflicts between the two have been avoided. *See* Bicks, *Antitrust and the New York Stock Exchange*, 21 BUS. LAW. 129, 157-58 (1965) [hereinafter cited as Bicks].

36. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), *cited in* Kestenbaum, *supra* note 10, at 820.

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

38. Hamlet, Act I, Scene III.

39. *E.g.*, Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963), and cases cited therein; McGovern, *supra* note 7, at 10. *See* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 142 (1965).

On the other hand, the Securities Exchange Act is one of a number of Congressional regulatory measures which subject the securities industry to some degree of administrative supervision and control. Such regulation can manifest a Congressional preference for control over competition, for it has been said "that the antitrust laws can have only limited application to industries regulated by specific statutes."[40] However, "[t]here is nothing novel about applying the antitrust laws to an industry which is otherwise subject to governmental regulation or control."[41] In sum, "immunity will not be implied except when the Court thinks it ought to be."[42]

Other generalities, also useless as tools of analysis but noted here to make the listing more complete, are expressed in terms of burden of proof rules. The Justice Department contends that the antitrust laws are applicable unless the securities industry can justify a departure from traditional treatment.[43] The industry, in turn, notes the longevity of the minimum commission rate structure[44] and asserts that in view of the uncertain, potentially disastrous and irrevocable impact of a competitive rate structure, the present system should be maintained until the Justice Department proves all fears groundless.[45]

These general propositions neither substitute for, nor aid analysis of, the Securities Exchange Act.[46] They are detailed above in order to illustrate the contradictions implicit among them and to emphasize the inherent weakness of any court decision relying upon any of them as a ground for decision. The appropriate judicial treatment appears to have been made in *Silver v. New York Stock Exchange*,[47] where Mr. Justice Goldberg recognized the inapplicability of these general rules before he began his antitrust exemption analysis, and thus eliminated any possible impact that they may have had upon his subsequent reasoning. The judicial inclination to rely upon labels rather than critical analysis must be guarded against,[48] particularly when the labels have been applied in the varying contexts of diverse regulatory schemes. Since judicial accommodation of the antitrust laws and the Securities Exchange Act

40. Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 234 (D.C. Cir. 1951), quoted in McGovern, *supra* note 7, at 10.

41. Nerenberg, *Applicability of the Antitrust Laws to the Securities Field*, 16 CASE W. RES. L. REV. 131, 132 (1964) [hereinafter cited as Nerenberg].

42. Kestenbaum, *supra* note 10, at 820.

43. Memorandum of the Dep't of Justice 42.

44. NYSE Legal Brief 14, *quoting* Kaplan v. Lehman Brothers, 250 F. Supp. 562 (N.D. Ill. 1966). *See Antitrust, supra* note 7, at 231: "Of all the factors supporting exemption, the fact that the minimum commission rule has been in existence for 173 (now 178) years probably is the most influential. Yet the wire service rule struck down in Silver was more than half as old." Nerenberg, *supra* note 41, at 147.

45. NYSE Economic Brief 6-9.

46. *Cf.* Kaplan v. Lehman Bros., 389 U.S. 954, 955 (1967).

47. 373 U.S. 341 (1963).

48. *See* Palko v. Connecticut, 302 U.S. 319, 323 (1937) (Cardozo, J., cautioning against "the tyranny of labels").

involves complex policy considerations, the mechanical application of generalities is particularly inappropriate.

C. *Silver v. New York Stock Exchange*

The framework for analysis is expressed in *Silver v. New York Stock Exchange*,[49] the only Supreme Court case to hold a stock exchange liable for violating the antitrust laws.[50] The federal district court had granted summary judgment for the plaintiff on the theory that stock exchanges were subject to unlimited antitrust liability and that the NYSE's action was a concerted refusal to deal which was *per se* unlawful.[51] The appellate court reversed, holding the NYSE exempt from antitrust attack when acting within its general scope of self-regulatory authority under the Securities Exchange Act.[52] The Supreme Court avoided the serious deficiencies inherent in each of the positions taken below[53] by adopting a more flexible approach to antitrust exemption " 'which reconciles the operation of both statutory schemes,' i.e., the antitrust laws and the Securities Exchange Act."[54]

The *Silver* Court stated that the issue was to what "extent the federal antitrust laws apply to securities exchanges" when the exchanges act "pursuant to rules . . . adopted under the Securities Exchange Act of 1934."[55] "[T]he *Silver* decision on the basic issue is clear: the NYSE is liable under antitrust laws even though it is acting pursuant to rules adopted under the machinery of the 1934 Act."[56] However, the Court did acknowledge some situations in which the antitrust laws might not apply. For instance, "[t]he Court recognized that concerted action by the exchange and its members, which limits competition in a way that would otherwise violate the antitrust laws, might be justified as falling within the scope and purposes of the Securities Exchange Act, in particular within the 'federally mandated duty' of exchange self-regulation."[57] The *Silver* analysis is focused in these terms:

49. 373 U.S. 341 (1963).

50. *Antitrust*, *supra* note 7, at 217. *Cf.* Chicago Board of Trade v. United States, 246 U.S. 231 (1918); Kaplan v. Lehman Bros., 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir. 1967), *cert den.*, 389 U.S. 954 (1967); *See also* United States v. Morgan, 118 F. Supp. 631 (S.D.N.Y. 1953). Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir. 1952); American Fed'n of Tobacco Growers v. Neal, 183 F.2d 869 (4th Cir. 1950); United States v. Tarpon Springs Sponge Exch., 142 F.2d 125 (5th Cir. 1944).

51. Silver v. New York Stock Exch., 196 F. Supp. 209 (S.D.N.Y. 1961).

52. Silver v. New York Stock Exch., 302 F.2d 714 (2d Cir. 1962).

53. Unlimited antitrust liability would hamper effective Exchange self-regulation; complete antitrust exemption would leave the Exchange free "to engage in almost any practices without fear of antitrust reprisals." Note, 10 WM. & MARY L. REV. 136, 155 (1968).

54. Memorandum of the Dep't of Justice 15.

55. Silver v. New York Stock Exch., 373 U.S. 341, 342-43 (1963).

56. Note, *The Application of Antitrust Laws to the Securities Industry*, 10 WM. & MARY L. REV. 136, 154 (1968) [hereinafter cited as *Application*].

57. Memorandum of the Dep't of Justice 15-16.

Antitrust "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes."[58]

The particular NYSE action in *Silver*, failure to give any notice or to give an opportunity for a hearing on charges of violating an exchange rule, was seen by the Supreme Court clearly contrary to the purposes of the Securities Exchange Act, and so obviously outside the scope of the exchange's self-regulatory powers under the act, that the situation did not even approach one in which a justification for the acts might be considered. Simply stated, antitrust liability was clear.[59] "By thus making antitrust liability rest on concepts of fair play instead of on reconciliation of antitrust and securities statutes, the Court in effect sidestepped the issue of interpreting the statutes."[60]

The issue of antitrust exemption for NYSE minimum commission rate structures requires the interpretive analysis that the *Silver* Court was able to avoid. The role of the *Silver* case in this context has been stated in the following terms:

> Antitrust now probes beyond particular NYSE enforcement or disciplining moves to question the legality of the complex of rules that comprise and buttress the Exchange's basic rate structure. Involved here are legal issues passed on only obliquely by *Silver*, and policy questions that run deep in terms of the NYSE's future role.[61]

D. *Securities Exchange Act of 1934*

Statutory construction generally begins with the Securities Exchange Act of 1934.[62] Of primary concern is section 19(b) of the Act:

> The Commission is further authorized if . . . [it] determines that . . . changes [in the Exchange's rules] are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules . . . in respect of such matters as . . . (9) the fixing of reasonable rates of commission . . . and (13) similar matters.[63]

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

59. *Id.* at 365. *Application, supra* note 56, at 155.

60. *Application, supra* note 56, at 155; Bicks, *supra* note 35, at 130, Nerenberg, *supra* note 41, at 137-38; *see* Asch, *The Antitrust Laws and the Regulated Securities Market*, 11 ANTITRUST BULL. 209, 223 (1966) [hereinafter cited as Asch].

61. Bicks, *supra* note 35, at 145.

62. The Securities Act of 1933, 48 Stat. 74 (1933), *as amended*, 15 U.S.C. §§ 77(aa) *et seq.* (1967), is mainly concerned with the distribution of new issues of stock. *See* Bicks, *supra* note 35, at 131.

63. 15 U.S.C. § 78s(b) (1962). Sections 3(a)(3), 15 U.S.C. § 78c(a)(3) (1964), and 6(d), 15 U.S.C. § 78f(d) (1950) are also relevant and are discussed *infra*.

The powers conferred on the Commission by section 19(b) must be interpreted within the more general principle articulated in section 6(d) that the rules of an exchange be "just and adequate to insure fair dealing and to protect investors." Section 19(b) appears to be the means of achieving this insurance and protection.[64]

The relevant statutory language quoted above does not explicitly refer to the minimum commission rate structure, much less expressly exempt that structure from the antitrust sphere. For Judge Medina in *United States v. Morgan*,[65] that was enough to defeat the exemption theory.

> It must be borne in mind that this whole statutory scheme was worked out with the greatest care by members of the Congress thoroughly aware of antitrust problems, often in close contact and cooperation with those who were later to administer the intricate phases of this well articulated and comprehensive plan of regulation of the securities business, and in possession of the fruits of many prolonged and penetrating investigations. They intended no exemption to the Sherman Act; and it is hardly probable that they would inadvertently accomplish such a result.[66]

Nevertheless, the statutory silence on the status of the minimum commission rate structure, particularly in light of the durable nature of the rate structure,[67] and the apparently clear conflict between it and the Sherman Act, apart from Congressional or regulatory exemption,[68] renders questionable Judge Medina's characterization of the Securities Exchange Act as "well articulated and comprehensive," at least in this context. "[T]he act neither defines 'reasonable rates of commission' nor specifies how they are to be 'fixed.' Nor are other pertinent statutory standards—'just and adequate,' 'fair dealing,' 'necessary or appropriate,' 'fixing [of rates]'—anywhere defined."[69] Absence of exemption language and lack of adequate definitional standards has made these sections ambiguous. In fact, even the suggestion "that such a patently ambiguous and cryptic conferral of powers upon the Commission was also intended to establish blanket antitrust immunity is unreasonable."[70]

This statutory ambiguity has enabled both the NYSE and the

64. Memorandum of the Dep't of Justice 22.

65. United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

66. *Id.* at 697. The *Morgan* court was not presented with the minimum commission rate structure as a violation of the Sherman Act, but the exemption language applied equally across the board. *See* Nerenberg, *supra* note 41 at 132-33; *Antitrust, supra* note 7 at 218.

67. *See* note 44, *supra*.

68. Nerenberg, *supra* note 41, at 149; *Antitrust, supra* note 7, at 218; Memorandum of the Dep't of Justice 16; *but cf.* Board of Trade v. United States, 246 U.S. 231 (1918).

69. *Antitrust, supra* note 7, at 218-19 & n.36.

70. *Id.* at 218.

Justice Department to argue that nothing refutes their opposing positions as to the exempt status of the minimum commission rate structure. Neither, of course, admits that the statutory language is ambiguous. In fact, both, surprisingly enough, find the Securities Exchange Act and its legislative history clear and unambiguous—while reaching totally contradictory conclusions.[71]

The NYSE contends that "[t]he Congressional policy favoring continuation of the Exchange's practice of fixing minimum commission rates has been clearly expressed not only in the 1934 Act but also in the legislative history preceding its enactment . . . ."[72] In support of this contention, the NYSE quotes section 19(b) of the act and concludes that unless the Exchange sets commission rates, there would be nothing for the SEC to "alter or supplement."[73] However, does this conclusion which appears to be quite valid, necessarily express a "clear" Congressional policy favoring minimum commission rates? The statute empowers the SEC to alter or supplement Exchange commission rules to insure their reasonableness. Presumably, under this standard, an exchange would be free to adopt any one of a variety of differing commission rate structures[74]—subject only to SEC scrutiny. Although no specific rates or rate structures are imposed upon the exchanges to the express exclusion of any others, the statute does not shield any particular level or structure of rates from either the application of the reasonableness standard by the Commission or from antitrust attack.

Also wide of the mark is the second NYSE statutory argument.

> It defies both law and logic to suggest that despite the language of Section 19(b)(9) Congress intended to leave it up to the SEC or some other federal agency to determine whether exchanges should be allowed to fix commissions or should be required to permit their members to set them independently. Where Congress intended to give the SEC the power to abolish or eliminate specific exchange practices it made this intention unmistakeably clear. . . . Section 19(b) . . . confers no power on the SEC to prevent the exchanges from fixing commission rates or to abolish exchange rules which do so.[75]

One of the problems with this argument is that the issue is not who

71. *Compare* NYSE Legal Brief 5-16 *with* Memorandum of the Dep't of Justice 15-42.

72. NYSE Legal Brief 5.

73. *Id.* at 6. *See* text accompanying note 63 *supra.*

74. A number of rate structures have been discussed as a possible alternative to the present minimum system. The Justice Department suggests a maximum rate structure in combination with competitive rates above a specified level of transaction size. Memorandum of the Dep't of Justice 187. Another possibility is a minimum-maximum range of rates. Nerenberg, *supra* note 41, at 149. A minimum mark-up over costs has also been proposed. Crossland & Sehr, *The Gods of the Marketplace: An Examination of the Regulation of the Securities Business*, 48 B.U.L. REV. 515, 546 (1968) [hereinafter cited as Crossland & Sehr].

75. NYSE Legal Brief 7.

sets exchange commission rates, but whether the rate structure set by the exchange is reasonable. The Exchange does not contend that it has the power to establish commission rate structures for itself. Instead, the NYSE is simply arguing that the statute clearly sets a limit of reasonableness upon exchange commission rates, and that the SEC is instructed to enforce that limit.

A second problem with the above argument is that the Exchange's reference to the explicitness of the Securities Exchange Act in other contexts has put them into a position where they are feeling the bite of their own two-edged sword. This follows from a comparison of the Exchange's earlier characterization of the Act as explicit with the general proposition that Congressional exemption provisions are traditionally explicitly indicated[76] and here the Act is silent.

Another problem with the position taken by the NYSE is their assumption that the continuous use of minimum commission rates from 1792 to the present in some way insulates that rate structure from being abolished or eliminated by the SEC, particularly since Congress did not specifically give the Commission the power to prevent the exchanges from fixing commission rates.[77] While Congress certainly did not contemplate the elimination of all commission rates, it did in terms require the SEC to "alter or supplement" those which were found to be unreasonable. Presumably, if a particular rate structure were determined to be unreasonable, the SEC, through corrective action, could effect the substitution of a reasonable commission rate structure since there is no clear-cut distinction between "abolish or eliminate" and "alter or supplement." In fact, even a minor alteration might be enough to eliminate the adverse consequences of an unreasonable commission structure, and perhaps even the form of the exchange's structure.

Furthermore, the reasonableness standard used by Congress implies continuing agency review since a previously existing rate level or structure, determined to be reasonable and approved in the past may "become unreasonable as conditions change . . . .[Therefore] the logical interpretation is that the SEC should have . . . power to deal with an exchange rule retroactively."[78] Thus, Congressional recognition of the existence of the minimum commission structure in 1934, which, when standing by itself, is a neutral fact,[79] ought not to prevent the SEC from carrying out its responsibilities under section 19(b)(9) of the Securities Exchange

76. Memorandum of the Dep't of Justice 37-42.

77. Viewed in the light most favorable to the NYSE, this conclusion finds scant support for the following reason:

> Notwithstanding that the criticized practices [minimum commissions and limited membership] existed in some form prior to the enactment of the Securities Exchange Act, Congress gave no clue as to whether it intended merely to recognize the existence of the fixed commission schedules and attendant practices, or whether it authorized such schedules for antitrust purposes.

Nerenberg, *supra* note 41, at 150.

78. *Antitrust*, *supra* note 7, at 217.

79. *Id.* at 234. *See* Nerenberg, *supra* note 41, at 146 n.71.

Act by applying the reasonableness standard specified therein to Exchange commission rate rules. A contrary interpretation would render that section nugatory: "reasonableness" would be frozen to 1934 conditions.

In any event, the scope of SEC power is not necessarily the only determinative factor on the issue of Congressional antitrust exemption for the minimum commission rate structure.[80] The antitrust laws are themselves vehicles for economic control which can work alongside of and complement regulatory schemes.[81] As such, antitrust standards have been constantly applied to members of regulated industries.[82] Consequently, lack of SEC jurisdiction to eliminate minimum commissions bears a doubtful relationship to the scope of antitrust in the courts. In fact, if the NYSE position that the SEC has no jurisdiction over Exchange commission rate structures is accepted, the posture of the case would be analagous to *Silver*:[83]

> The absence of Commission jurisdiction, besides defining the limits of the inquiry, contributes to its solution. There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply to its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. . . . [T]he antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges . . . .[84]

Thus, in the context of *Silver*, the stronger Exchange position would appear to be one which emphasized, rather than pared, the SEC's power over commission rate structures.[85]

The final NYSE statutory argument is based upon section 3(a)(3) of the Securities Exchange Act, the section which defines a member of a national securities exchange in these terms:

> The term "member" when used with respect to an exchange means any person who is permitted either to effect transactions on the exchange without the services of another person acting as broker, or to make use of the facilities of an exchange for transactions thereon without payment of a commission or fee or with the payment of a commission or fee which is less than that charged the general public, and includes any firm

80. *But see* Kaplan v. Lehman Bros., 371 F.2d 409 (7th Cir. 1967) (alternative holding).

81. *E.g.*, Silver v. New York Stock Exch., 373 U.S. 341, 359-60 (1963). *See* Stokes, *A Few Irreverent Comments About Antitrust, Agency Regulation, and Primary Jurisdiction*, 33 GEO. WASH. L. REV. 529, 532-37 (1964) [hereinafter cited as Stokes].

82. *E.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963).

83. *Id.* at 358.

84. *Id.* at 360.

85. *See* text accompanying note 12, *supra*; Statement of the Amex 61-69.

> transacting a business as broker or dealer of which a member is a partner, and any partner of any such firm.[86]

On the basis of the foregoing language, the NYSE makes the following argument:

> These provisions obviously contemplate the fixing by exchanges of a uniform minimum rate of commission to be charged the general public, since in the absence of such a uniform minimum rate there would be no yardstick with which to determine whether the commission or fee charged to members is 'less than' that charged the public.[87]

The primary difficulty with this contention is the premise that "to read into a definition a positive Congressional intent to impliedly repeal the antitrust laws would be to establish statutory construction beyond permissible bounds."[88] More specifically, section 3(a)(3) would still satisfactorily define an exchange member even if a competitive rate structure would eliminate commission differentials between members and the general public.[89]

E. *Legislative History*

Numerous factors, collectively referred to as "legislative history," can often aid in the task of statutory interpretation when the language of the statute itself is inconclusive or ambiguous.[90] The end sought is the determination of legislative intent and purpose when more than one Congressional policy is possible in the statutory context. "To this end the court may properly consider not only the language of the statute but also general public knowledge about the evil sought to be remedied, prior law, accompanying legislation, enacted statements of purpose, formal public pronouncements, and internal legislative history."[91] Thus, we turn to such ancillary materials in an effort to resolve the issue of Congressional exemption of the minimum commission rate structure from the antitrust laws.

"Before the securities laws were enacted, the stock exchanges were

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86. Section 3(a)(3), 15 U.S.C. § 78c(a)(3) (1964).

87. NYSE Legal Brief 7. *See* Statement of the Amex 43.

88. Memorandum of the Dep't of Justice 31.

89. *Id.* at 30-31. *But see* Statement of the Amex 43: "If members were free to negotiate commissions to be charged to the public there might be no difference between such rates and those charged to other members, and the definition would be meaningless." The AMEX, unlike the Justice Department, ignores the total definitive language set out in section 3(a)(3).

90. Whether statutory language is ever clear enough on its face to justify the nonuse of legislative history as an aid in construction is a matter of some dispute. *See* H.M. HART & A. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1267-68 (tent. ed. 1958) [hereinafter cited as HART & SACKS].

91. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077 (1969), *citing* HART & SACKS, *supra* note 90, at 1413-16.

viewed by the courts, Congress and the industry as private clubs, and as such were generally exempt from any antitrust liability."[92] "Congressional concern over the assumed lack of federal control led in the years 1912–1914 to the introduction of eight resolutions to investigate and nine bills to regulate the stock exchanges and to a formal investigation by the Pujo Committee."[93] The Committee concluded that it was doubtful whether federal regulatory power extended to exchange activity and thus advised no Congressional action "in reference to the exchange's rule regulating commissions" except to recommend that the exchange be protected "against a kind of competition between members that would lower the service and threaten the responsibility of members."[94]

> As exchanges became a more and more important element in our Nation's economic and financial system, however, the private-club analogy became increasingly inapposite and the ungoverned self-regulation became more and more obviously inadequate, with acceleratingly grave consequences. This impotency ultimately led to the enactment of the 1934 Act.[95]

The "fierce controversy" surrounding the enactment of the Securities Exchange Act as well as "the great evils of manipulation and speculation" diverted Congressional attention from generally considering the "subsidiary antitrust aspects in its hearings, reports, and resulting legislation."[96] In addition, it is safe to say that the minimum commission rate structure, rarely criticized as an element of abuse, was hardly a hot issue and received scant attention.[97]

The Congressional draft bills, forerunners of present section 19(b)(9), gave the Commission the power to "fix or prescribe the method of fixing uniform rates of commission."[98] Mr. Samuel Untermeyer, a New

92. *Application*, *supra* note 56, at 140, *citing* Jennings, *Self-Regulation In the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROB. 663, 667-69 (1964) [hereinafter cited as Jennings]; *Antitrust*, *supra* note 7, at 223. *See* Silver v. New York Stock Exch., 373 U.S. 341, 351 (1963).

93. *Antitrust*, *supra* note 7, at 223, *citing* Westwood & Howard, *Self-Government in the Securities Business*, 17 LAW & CONTEMP. PROB. 518, 523 (1952) [footnote omitted].

94. Report of the Committee Appointed Pursuant to House Resolutions 429 and 504 to Investigate the Concentration of Control of Money and Credit, H.R. REP. No. 1593, 62d Cong., 3d Sess. 115 (1913). *Cf.* Memorandum of the Dep't of Justice 35: "The 1934 Act is based on the proposition that Congress could reach, under the commerce clause, all aspects of exchange operation."

95. Silver v. New York Stock Exch., 373 U.S. 341, 351 (1963). The Court also referred to a House Committee Report, H.R. Rep. No. 1383, 73d Cong., 2d Sess. 3 (1934), which blamed "inertia, pressure of vested interests, lack of organization" for the "repetition in the summer of 1933 of the blindness and abuses of 1929." The report concluded that "private leadership seeking to make changes must be given Government help and protection."

96. *Antitrust*, *supra* note 7, at 224.

97. *Id.*; Comment, 45 N.C. L. REV. 301, 304 (1966); Memorandum of the Dep't of Justice 24. *But see* NYSE Legal Brief 9: "[M]inimum commission rates [were] repeatedly referred to . . . [and] specifically mentioned in the House and Senate debates."

98. H.R. 7852, S. 2693, 73d Cong., 2d Sess. (1934).

York attorney who had served as counsel for the Pujo Committee, had objected to the "uniform rates" language and had recommended striking "uniform," arguing that to do so would give the SEC power to fix all commission rates and remove the "burden on commerce" allegedly resulting from the exchanges charging "all that the traffic will bear."[99] Despite this testimony, however, the bill reported retained the "uniform rates" provision.[100] Nevertheless, without further explanation,[101] the bill was enacted in its present form[102] with "reasonable" substituted for the original "uniform."

The lack of explanation for the deletion of the "uniform rates" wording has produced a number of conflicting opinions. One commentator concludes that "[b]y relating this change [from "uniform" to "reasonable"] to the original committee objections, one could justifiably infer that Congress had no intention of empowering the exchanges to establish commission rates free from antitrust liability."[103] But another observer doubts the validity of this conclusion:

> [T]he legislative history is of no help in determining whether the statute also impliedly grants rate-fixing power to the exchanges themselves or immunizes their rate-fixing from antitrust liability. Applying a *post hoc, ergo propter hoc* analysis to the Untermeyer objections and the subsequent, unexplained change from "uniform" to "reasonable" before the act's passage, one could justifiably infer that the exchanges were not intended to have such immunity. Yet this inference seems too frail a foundation for a conclusion of such practical magnitude.[104]

The search for Congressional intent is further confused by the peculiar relationship of the SEC as regulator and supervisor of the securities industry.

> The Commission's relationship to the business it regulates is fundamentally different from that of other Federal independent administrative agencies; it is not only regulator, but also supervisor of "self" regulators. There are, no doubt, many other instances in which the policy of entrusting a degree of social control to "private" groups has been adopted, but securities

99. *Hearings on Stock Exchange Practices Before the Senate Committee on Banking and Currency*, 73d Cong. 1st & 2d Sess. at 7705 (1933-1934); *Antitrust, supra* note 7, at 224; Memorandum of the Dep't of Justice 26; NYSE Legal Brief 9-10.

100. *Antitrust, supra* note 7, at 224. *But see* Memorandum of the Dep't of Justice 26: "'Uniform' . . . replaced by 'reasonable' . . . apparently is result of . . . testimony given by Mr. Untermeyer." *See also* NYSE Legal Brief 10, drawing conclusions from Mr. Untermeyer's testimony.

101. Nerenberg, *supra* note 41, at 150-51; *Antitrust, supra* note 7, at 225.

102. *See* text accompanying note 63, *supra*.

103. Note, *Monopolies—Immunity From Antitrust Liability—Minimum Commission Rates of Stock Exchanges*, 19 CASE W. RES. L. REV. 167, 170 n.21 (1967).

104. *Antitrust, supra* note 7, at 225.

> regulation is unique in featuring self-regulation as an essential and officially sanctioned part of the regulatory pattern.[105]

While this system of SEC overseeing of exchange self-regulation is seen as desirable for a number of reasons,[106] its deference to the actions of the regulated industry in the first instance would seem to argue against implied antitrust exemption. Mr. Cary, former chairman of the SEC, believes that "SEC supervision need not, and should not, stifle initiative for self-regulation by the exchanges."[107] But even an antitrust court can appreciate that a certain amount of *lebensraum* is necessary to enable an exchange "to carry out the mandate of the Securities Exchange Act."[108] "[P]articular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim."[109]

Moreover, despite the apparent pervasiveness of the regulatory scheme and the SEC's general oversight, it has been observed that there still remain "significant gaps" in the regulations resulting from the lack of uniformity in the application of the regulations and from the SEC's lack of authority over the means of applying various rules.[110] Thus, the regulatory controls established by Congress over the securities industry may not be sufficiently thorough to warrant antitrust exemption.[111] The Justice Department points out that the SEC has no control over entry and exit, no control to require unprofitable service in the public interest, no control over mergers, and no power to limit the profits of exchange members in contrast to other regulatory schemes where these controls would make antitrust exemption more appropriate.[112] In addition, the SEC has no jurisdiction over an exchange member's breach of an exchange rule[113] and it is unable to consider individual grievances.[114]

Conversely, the regulatory machinery established by Congress re-

105. SEC, REP. OF THE SPECIAL STUDY OF SECURITIES MARKETS pt. IV, at 501 (1963) [hereinafter cited as SPECIAL STUDY].

106. *Id.*, pt. II, at 328-29.

107. *Application*, *supra* note 56, at 143, *quoting* Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A.J. 244, 246 (1963).

108. Silver v. New York Stock Exch., 373 U.S. 341, 360 (1963).

109. *Id.* at 361.

110. *Application*, *supra* note 56, at 141, *citing* Asch, *supra* note 60 at 214; Bicks, *supra* note 35, at 146; Nerenberg, *supra* note 41, at 138.

111. AREEDA, ANTITRUST ANALYSIS 56 (1967). *But see* Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 57 (1962): "Under the mushroom doctrine, however, it is safe to assume that expansion will shortly take place; intervention will soon reach out to fill the gaps in the existing structure of controls; hence it is foolish to confuse matters by applying antitrust legislation in the interim." The Hales' analysis is criticized in *Antitrust*, *supra* note 7, at 240 n.203.

112. Memorandum of the Dep't of Justice 37-42.

113. Jennings, *supra* note 92, at 671-72.

114. *Application*, *supra* note 56, at 142, *citing* Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); Bicks, *supra* note 35, at 137. *Cf.* Sterling, *Stockbrokers Going Public: Antitrust Aspects of Exchange Rules*, 13 U.C.L.A. L. REV. 563, 574 & n.58 (1966) [hereinafter cited as Sterling].

lies heavily upon exchange self-regulation to achieve the purposes of the Securities Exchange Act, and it has been suggested that extensive immunity from the antitrust laws is a necessary concomitant since the threat of antitrust attack would have the effect of making the exchanges timorous in implementing their self-regulatory responsibility.[115]

The legislative history of section 19(b)(9) and the mechanics of securities regulation established by the Exchange Act permit inferences which can logically support both conclusions. In this instance, then, it is of little value in determining Congressional intent.

F. *Kaplan v. Lehman Bros., and a Suggestion*

The most recent judicial consideration of the legal status of the minimum commission rate structure was *Kaplan v. Lehman Bros.*,[116] which involved a detailed analysis of *Silver v. New York Stock Exchange.*[117] A close reading of the *Kaplan* decision compels a reexamination of *Silver*'s guiding principle of "reconciliation of the two statutory schemes."[118] In *Kaplan*, the plaintiffs claimed that the action was instituted on behalf of five mutual funds and their shareholders.[119] The five named defendant firms, brokers for the funds, were nominal defendants only; the actual defendants were the NYSE and four Exchange members.[120] In other words, *Kaplan* was an action by mutual fund shareholders against the NYSE and Exchange members who managed the funds.[121]

The *Kaplan* cause of action was based on the theory that the minimum commission rates charged the funds pursuant to NYSE rules "amounts to a combination and conspiracy in restraint of trade in violation of Section (1) of the Sherman Anti-trust Act. . . ."[122] Consistent with the allegation of per se illegality, the case was decided on motion for summary judgment entered for the defendants.[123] Indeed, if *Kaplan* were read as holding only that NYSE commission rates were not amenable to antitrust attack on a per se theory, the case would be of little interest,[124] for such has been the law since 1918.[125]

115. Sterling, *supra* note 114, at 573.

116. Kaplan v. Lehman Bros., 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir. 1967), *cert. den.*, 389 U.S. 954 (1967).

117. Silver v. New York Stock Exch., 373 U.S. 341 (1963).

118. *Id.* at 357.

119. Kaplan v. Lehman Bros., 250 F. Supp. 562 (N.D. Ill. 1966).

120. *Id.* at 562-63.

121. *Application*, *supra* note 56, at 157.

122. Kaplan v. Lehman Bros., 250 F. Supp. 562, 563 (N.D. Ill. 1966).

123. *Id.* at 566.

124. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

125. The Justice Department prefers to read *Kaplan* narrowly in this way. *See* Memorandum of the Dep't of Justice 32-33 & n.9. While there are substantial qualitative differences between the NYSE minimum rate structure and the temporary overnight freeze of prices in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), the "rule of reason" applied equally to determine the justification for the practice in each.

Nevertheless, the district court in *Kaplan* purported to find additional support for its decision in *Silver*, even though *Silver* expressly refused to decide the case in which Exchange activity is subject to administrative review.[126] "Where the action in question in *Silver*—the means of applying an exchange rule—was beyond the scope of SEC review and thus not subject to any regulation [except by means of antitrust], the rule in question in *Kaplan* was clearly within the SEC's power to review[127] and thus was subject to regulation."[128] Thus, an alternative holding in *Kaplan* is that an antitrust action cannot be maintained when an Exchange rule is subject to SEC regulatory power.[129]

Kaplan is criticized not so much for the decision reached but for the "blunderbuss" analysis used.[130] Both the district court and the Seventh Circuit failed to recognize that *Silver* provides the starting point for analysis rather than the end result. *Silver* emphasized that each of the Congressional schemes, antitrust and regulatory, is to be construed "to make the Exchange Act work." Perhaps, in recognition of the unfortunate ambiguity in the Exchange Act with regard to the legal status of minimum commission rates, the *Silver* mandate should be more specifically stated in this context to require an analysis and result which would make the NYSE work. Thus, the mere presence of a clause in the Exchange Act would be but a factor in the process of accommodating the two legal systems and not the stopping point as in *Kaplan*.[131] It is recognized that accomodation itself is a rather euphemistic term which tends to conceal the fact that, while one sphere of law is being applied, another legal scheme is being rejected, despite the fact that there is a reasonable basis for the rejected scheme's application.[132] Ideally, the accommodation will advance the purpose of the law chosen without frustrating or seriously impairing the purpose of the law that is rejected.[133]

> Strictly as a matter of antitrust law, the existence of so important and pervasive a structure of commission rates ought to rest

126. Kaplan v. Lehman Bros., 250 F. Supp. 562, 566 (N.D. Ill. 1966), *quoting* Silver v. New York Stock Exch., 373 U.S. 341, 360 (1963).

127. *But see* Comment, 45 N.C. L. REV. 301, 307 (1966): "The right to have such rates reviewed by the SEC is in reality illusory since that review is of the reasonableness of the commissions and presupposes a fixed minimum." It is submitted that this statement presupposes more than can be assumed without analysis. *See Antitrust, supra* note 7, at 218-19; Memorandum of the Dep't of Justice 29.

128. *Application, supra* note 56, at 158.

129. *Application, supra* note 56, at 158; Crossland & Sehr, *supra* note 74, at 553; Comment, *supra* note 97, at 303. This is the holding relied upon by the NYSE. NYSE Legal Brief 14-16.

130. Kaplan v. Lehman Bros., 389 U.S. 954, 957 (Warren, C.J., dissenting from the denial of certiorari).

131. It is fair to note that the principal participants in the SEC hearings have each recognized the full import of the *Silver* analysis by presenting extensive economic data and conclusions on the role of the minimum commission rate structure in the context of exchange functions. *See* note 6, *supra*.

132. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 120 (1965).

133. *Id.* at 151.

on a sounder legal foundation. If there is sufficient economic justification to insist upon a minimum rate structure, then classification by way of a limited antitrust exemption by statute would be appropriate. Otherwise, in the absence of further regulatory control by the Commission, it would appear that the present rate structure may be susceptible to antitrust enforcement.[134]

III. JURISDICTIONAL ASPECTS OF SECURITIES REGULATION IN THE MINIMUM COMMISSION CONTEXT

A. *Preclusive SEC Jurisdiction*

At this point, the writer indulges in two assumptions, each of which is subject to dispute, but necessary for further development of the analysis under this heading. The first is that Congress has not immunized the minimum commission rate structure by mandating it in the Securities Exchange Act. Second, that section 19(b)(9) of the Act gives the SEC authority to examine the minimum commission structure and alter it should it decide to do so. The issue presented is whether a grant of adjudicatory power over the commission rate structure to the SEC completely deprives the courts of subject matter jurisdiction, particularly in view of the absence of statutory provision for judicial review. This is the question expressly left open in *Silver*, but subsequently decided in favor of SEC preclusive jurisdiction in *Kaplan*. As previously noted,[135] the *Kaplan* decision on this issue was little better than conclusory, an approach, it is further assumed, that does not preclude a more extensive analysis.

Once again, it is important to distinguish the doctrine of primary jurisdiction from the present discussion of preclusive jurisdiction.[136] The primary jurisdiction doctrine, properly applied, "must be limited to its legitimate function of accommodating both court and agency where concurrent, original jurisdictional exists, rather than applied *carte blanche* in situations ranging from review of agency decisions to questions of exemptions and exclusive agency jurisdiction."[137] The difference between primary jurisdiction and preclusive jurisdiction is crucial, because when the two are confused,[138] there is the danger that the application of pri-

134. Nerenberg, *supra* note 41, at 151.

135. *See* text related to notes 126-31 *supra*.

136. At p. 735-37 *supra*, primary jurisdiction was distinguished from the issue of the proper forum to decide implied Congressional exemption.

137. Stokes, *supra* note 81, at 532. The term "preclusive jurisdiction" is taken from *Antitrust*, *supra* note 7, at 214, and is used in place of "exclusive agency jurisdiction" primarily to avoid possible confusion with another doctrine of "exclusive jurisdiction," apparently a term of art in the administrative context in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 709 (1965), as meaning the "ownership of the case—its parties, its facts, and its questions" which "changes hands when it crosses the boundary between" court and agency. Under this version of the exclusive jurisdiction doctrine, neither court nor agency can act while "the case" is before the other.

138. *See, e.g.*, the hybrid term "exclusive primary jurisdiction" in Local 189, Amal-

mary jurisdiction criteria will lead a court to dismiss a case; an action proper only in the context of preclusive jurisdiction and wholly inappropriate under the primary jurisdiction doctrine.[139] At best, such an unwarranted dismissal results in expense, inconvenience, and delay. At worst, it can leave the plaintiff remediless: The plaintiff might be told, in effect, to exhaust his administrative remedies when it may be impossible for him to present his case to the relevant agency, the statute of limitations may run while matters are before the agency, or the agency may be unable to provide the relief sought.[140]

The issue of preclusive SEC jurisdiction is grounded in the purpose of the Securities Exchange Act and can be presented as a question of whether it is necessary for the "effective discharge" of its duties for the SEC to have sole control of exchange rate setting.[141]

> It is undoubtedly an implied aspect of the statutory purpose that a specialized administrative tribunal has been created to deal with problems in a certain area; statutes setting up agencies may be assumed to focus the solution of the problem in terms of the development of special competence.[142]

But we have previously seen that the SEC differs, perhaps significantly in this context, from agencies created by other regulatory systems. In addition, the SEC has maintained regulatory control over the securities industry for approximately thirty-five years without the exercise of its section 19(b)(9) powers and without "comprehensive and consistent public articulation . . . of the principles or criteria to be applied in interpreting the [reasonable rate of commission] standard . . . ."[143]

The Special Study of the securities markets undertaken by the SEC reported three conclusions regarding the general supervision of stock exchanges: there is a need to insure effective self-regulation; there is a need to prevent the inherent anti-competitiveness of exchange self-regulation from exceeding its justification; and to the extent the exchanges function as public utilities, the need and reasons for public supervision are much the same as for any other utility.[144] "These are usually summed

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gamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 684 (1964). Potential difficulty from this confusion was avoided since the Court held the doctrine inapplicable.

139. General Am. Tank Car. Co. v. El Dorado Terminal Corp., 308 U.S. 422 (1940); Ailes, *supra* note 29, at 87 and n.16; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 138 (1965).

140. *See* Montana Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951); Seatrain Lines, Inc. v. Pennsylvania R.R., 207 F.2d 255 (3rd Cir. 1953); Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L.J. 315, 332-35 (1956) [hereinafter cited as Convisser].

141. *Antitrust*, *supra* note 7, at 229.

142. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 124 (1965).

143. Special Study pt. II, at 343, *quoted in Antitrust*, *supra* note 7, at 228-29. There are recurring references to the factors of fair return, efficiency, prudence, and quality, but their significance in fixing commission rates has never been spelled out.

144. Special Study pt. II, at 328-29; Bicks, *supra* note 35, at 156-57; Jennings, *supra* note 92, at 680; Nerenberg, *supra* note 41, at 133-34; *Antitrust*, *supra* note 7, at 232; *Application*, *supra* note 56, at 143.

up in the proposition that due to the many subtle aspects and intricate interworkings of the securities industry, the SEC is best able to control all aspects of regulation."[145] The anti-trust laws, seen as a complementary means of industry regulation, ought to be applied to the securities industry only by the SEC, because "only the SEC has the necessary experience to balance the conflicting demands of the antitrust and securities laws and to keep the interrelationships in the securities laws in equilibrium."[146] While it is disputed whether the SEC can in fact order rule changes under section 19(b)(9) on antitrust grounds,[147] a 1941 decision of the SEC struck down a NYSE rule which would have restricted the ability of NYSE members to deal in multiple-listed securities because that rule "would operate as an unreasonable and unjustified restraint upon interstate commerce . . . ."[148] Even conceding this SEC power, however, does not resolve the issue of sole agency responsibility to implement the antitrust laws in the securities field. It is submitted that judicial review of antitrust application would not only have the advantage of SEC expertise but also correct improper use of antitrust doctrine. Moreover, the SEC "has itself helped to determine the form of the industry and is understandably hostile to potential disturbers of the status quo."[149] Professor Jaffe notes in this context that "[t]he French insight, *tout comprendre c'est tout pardonner*, is not without a certain relevance."[150] Thus, the close relationship between agency and industry may have created a bias which necessitates judicial review; a disinterested forum free to consider the merits.[151] This position is somewhat weakened when it is observed that the SEC has never before scrutinized or expressly approved the minimum commission rate structure, but the fact that it has not acted could be taken as implied approval under the Exchange Act and antitrust standards.[152] In addition, it should be noted that antitrust principles have traditionally been enforced by both the government and private parties, and that preclusive SEC jurisdiction necessarily means the elimination of private suits since section 19(b) powers are initiated by the SEC alone. Finally, SEC expertise and its responsibility under section 19(b) are "not the enforcement of antitrust laws but

145. *Antitrust*, *supra* note 7, at 232. Sterling, *supra* note 114, at 572.

146. Sterling, *supra* note 114, at 572. *Compare* NYSE Legal Brief 2-4 *with* SEC Release No. 8239, *supra* note 1 *and* Memorandum of the Dep't of Justice 18.

147. *Antitrust*, *supra* note 7, at 232-33.

148. Rules of the New York Stock Exchange, 10 S.E.C. 270, 287 (1941), *quoted in* Sterling, *supra* note 114, at 572. *See also*, *In the Matter of Nat'l Ass'n of Sec. Dealers*, 19 S.E.C. 424, 443 (1945) (dictum).

149. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 142 (1965).

150. *Id.*, at 141-42.

151. One hesitates to suggest a recent political parallel for this position in which one of the Republican candidate's campaign assertions was that since he shared no responsibility for the war in Viet Nam, he was in a position to re-evaluate the merits of continued American involvement and make appropriate changes; whereas, it was said, the party in power was already committed to a continuation of the conflict. Query the length of time which will commit the present administration and narrow the options available to it.

152. *See* Sterling, *supra* note 114, at 572; *Antitrust*, *supra* note 7, at 235.

rather the protection of investors, 'to insure fair dealing in securities . . . and fair administration' "[153] of the stock exchanges.

The goal of securities regulation, as stated in the Securities Exchange Act, is to provide for regulation and control of such [exchange] transactions and of practices and matters related thereto . . . ."[154] The public interest in the regulation and control of stock exchanges is significantly different from government intervention in other areas of the national economy. Elsewhere, regulation promotes efficiency by the limitation of competition where economies of scale and natural monopoly conditions make competition uneconomical.

> The stock exchange, however, has the opportunity of being a more competitive market than most because it displays the characteristics—at least outwardly—of a competitive market: (1) Its "products" are homogeneous within its classification because every stock of an issuer in a particular class is identical with every other stock of that class; (2) There are large numbers of sellers and buyers because ownership of American corporations tends to be widely dispersed; (3) There exists a wide network of firms specializing in the buying and selling of securities both as agents and for their own accounts; and (4) In the case of "listed" shares at least, selling prices recently experienced by buyers and sellers are widely varied.[155]

Efficient stock exchange operation is dependent upon the convergence of as many demand and supply factors as possible.

> The more of these market factors that are present the better the chance the marketplace has of properly evaluating the worth that society places on the endeavors of a particular enterprise. Anything which would inhibit this free flow of 'goods' or funds is detrimental to the workings of the market . . .[156]

Consequently, effective stock exchange regulation has as its end the encouragement of competition within the confines of the auction market and the elimination of factors which would tend to dilute the competitive process.

Since it is certain that the minimum commission rate structure is at least to some extent responsible for a lessening of volume on the floor of the NYSE and is a contributing factor in the fragmentation of the securities industry by diverting funds to regional exchanges, the over-the-counter markets, and to the so-called third and even fourth markets for listed stocks, the rate structure is to that extent an anticompetitive influence.[157] In addition, it is generally recognized that the

153. Sterling, *supra* note 114, at 572. *See* Turner, *supra* note 35, at 1237.
154. 15 U.S.C. § 78(b) *quoted in* Crossland & Sehr, *supra* note 74, at 516.
155. Crossland & Sehr, *supra* note 74, at 517 (footnotes omitted).
156. *Id.*
157. FORTUNE, April, 1969, at 81-82, 167; Crossland & Sehr, *supra* note 74, at 533-48;

minimum commission rate structure has motivated those with the power to do so to develop "intricate means of circumventing the letter of the law by arrangements among brokers to achieve the ends of reduced rates;" most conspicuously the recently limited "give-up" system.[158] For these reasons, it would appear on the surface that the commission rate structure is precisely the kind of exchange practice which Congress intended for the SEC to regulate and control. However, this conclusion need not necessarily follow, and in fact, may be both undesirable and detrimental for the maintenance of an efficient stock exchange operation. Previous to the Securities Exchange Act, Congress had enacted regulatory legislation—the Sherman Act—which is perhaps better suited for the control of commission rate abuse than is the SEC. "There is no antithesis between antitrust policy, intelligently conceived, and the achievement of efficient performance under conditions of natural monopoly; efficiency is (or should be) the paramount goal of antitrust."[159] The economics of the securities industry are such that any regulation of commissions other than a competitive system or an arbitrary commission schedule (or a combination of the two[160]) may be impossible for practical reasons which are beyond the control of the SEC.[161] The number of firms to be regulated,[162] as well as the "complexity of the factors that go into devising a rate which represents a fair return—costs of each kind of service, the possible market impact of a rate, appropriate profit level and base—raise considerable doubt whether the SEC is competent to handle ratesetting problems."[163] The fact that the SEC is not alone in this disability is illustrated by the conclusion reached after a recent economic analysis of the effectiveness of regulation in natural monopoly:

> [T]his study has convinced me that in fact public utility regulation is probably not a useful exertion of governmental powers; that its benefits cannot be shown to outweigh its costs; and that even in markets where efficiency dictates monopoly, we might do better to allow natural economic forces to determine business conduct and performance subject only to the constraints of antitrust policy.[164]

Application, *supra* note 56, at 159-60; *Antitrust*, *supra* note 7, at 213, 237; Mundheim, Forward to *Symposium on the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROB. 647, 650 (1964).

158. *Application*, *supra* note 56, at 160-61; *Antitrust*, *supra* note 7, at 235; "elaborate evasionary practices;" Special Study pt. II, at 309; "complex system of arrangements . . . not seem[ing] to be a desirable answer to a pricing problem in any industry;" Memorandum of the Dep't of Justice 71-88; Crossland & Sehr, *supra* note 74, at 551-52.

159. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 617-18 (1969), *citing* C. KAYSEN & D. TURNER, ANTITRUST POLICY 45 (1959). *See also* Turner, *supra* note 35, at 1237.

160. Memorandum of the Dep't of Justice 187.

161. *Antitrust*, *supra* note 7, at 234-35.

162. There are 1,366 member firms on the NYSE alone.

163. *Antitrust*, *supra* note 7, at 235.

164. Posner, *supra* note 159, at 549.

His analysis of the harmful effects of regulation led Professor Posner to recommend "resolute refusal to extend regulation to new industries" as well as the "relaxation of [present] regulatory controls as a matter of administrative discretion."[165]

If the foregoing assessment of the difficulties of rate regulation in the securities industry is accurate, the policies of the Securities Exchange Act can best be furthered by the absence of regulation and exchange rules in the commission area and the institution of a competitive rate structure instead. Perhaps, the only "reasonable rates of commission" can be freely competitive rates. Preclusive SEC jurisdiction would be unnecessary to insure the effective operation of a competitive rate structure; the antitrust laws enforced in the courts by both the Justice Department and private parties have traditionally accomplished this end.

The case law in the preclusive jurisdiction context has been described as being in a state of chaos.

> Some regulated industries are subject to antitrust legislation; others are not. Some courts hold business subject to interventionist enactments to be free from rules prohibiting restraints of trade; others do not. New cases are decided without reference to old precedents and the courts in general have been unable to explain coherently the conclusions they have reached.[166]

The most important characteristic of a reasoned decision would be a "detailed analysis of the regulatory statutes and administrative action thereunder."[167] Earlier, it was concluded that the purposes of the Securities Exchange Act would be better achieved if competitive commission rates replaced the present minimum rate structure and that preclusive SEC jurisdiction was unnecessary to realize that objective. The case law does not alter this conclusion.

The issue which remains to be discussed concerns itself with the vitality of an antitrust cause of action after the enactment of a regulatory scheme. In *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*,[168] a case often noted as the first primary jurisdiction decision,[169] (but really concerned with the problem of supersession of antitrust law by regulatory law)[170] the Court held that judicial remedies were destroyed by the enactment of a regulatory scheme when a shipper alleged that rates were unreasonable. The Court decided that only the relevant agency, the Interstate Commerce Commission, could determine whether rates were reasonable, because if courts and juries could revise

165. *Id:* at 640. *Cf.* Turner, *supra* note 35, at 1232, 1243-44.
166. Hale & Hale, *Competition or Control I: The Chaos in the Cases*, 106 U. PA. L. REV. 641, 681 (1958).
167. *Id.* at 682.
168. 204 U.S. 426 (1907).
169. *E.g.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 125 (1965).
170. *E.g.*, *Types*, *supra* note 13, at 62.

a rate schedule there would be no uniformity, and this "would render the enforcement of the act impossible."[171] Since these issues are regularly decided by administrative agencies and generally thought to be beyond the competence of the courts,[172] a number of cases have dismissed antitrust actions grounded on particular rate practices because the agency had exclusive jurisdiction to make the appropriate determinations.[173]

Even thorough regulation, however, does not necessarily imply freedom from antitrust enforcement. Railroads, for example, are subject to pervasive I.C.C. supervision, including control over entry, rates, service, financing, pooling of earnings, division of traffic, mergers, and consolidations.[174] Nevertheless, and in striking contrast to the cases noted above, a long line of Supreme Court decisions has applied the Sherman Act to the railroad industry.[175] The securities industry, less completely controlled by a scheme of regulation which relies heavily upon self-regulation, would appear to be subject to antitrust policy in addition to general SEC regulation, particularly in the context of the commission rate structure which would ordinarily constitute price fixing, which is per se illegal.[176]

In *United States v. Philadelphia National Bank*,[177] the Supreme Court held that a bank merger, previously approved by the Comptroller of the Currency, violated the Clayton Act. The Court rejected the contention that "the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, immunizes approved mergers from challenge under the federal antitrust laws."[178]

> Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; . . . and there is no specific provision for judicial review of his decision. . . . Moreover, bank regulation is in most respects less complete than public utility regulation, to which interstate

171. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 441 (1907). *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 125 (1965).

172. Trienens, *supra* note 23, at 44.

173. *E.g.*, Far East Conference v. United States, 342 U.S. 570 (1952); United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474 (1932); Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922).

174. Hale & Hale, *supra* note 166, at 643-44.

175. *Id.* at 645 & n.27; United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1877). Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).

176. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-22, 224 n.59 (1940). *But see* Appalachian Coals, Inc. v. United States, 246 U.S. 231 (1918). *Silver*, however, took Sherman Act violations out of the per se category in the securities industry. Kaplan v. Lehman Bros., 250 F. Supp. 562 (N.D. Ill. 1966).

177. 374 U.S. 321 (1963). *See also* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

178. 374 U.S. 321, 350 (1963). The Court noted at 374 U.S. 351 n.26: "This contention was abandoned on appeal. We consider it, nevertheless, because it touches the proper relations of the judicial and administrative spheres."

> rail and air carriers, among others, are subject. Rate regulation in the banking industry is limited and largely indirect, . . . ; banks are under no duty not to discriminate in their services; . . . banks may do business . . . where they please. The fact that the banking agencies maintain a close surveillance of the industry . . . does not make federal banking regulation all-pervasive . . .[179]

Application of the relevant factors as expressed in *Philadelphia National Bank* "leads to the conclusion that the preclusive jurisdiction doctrine will not bar an antitrust attack on the NYSE's commission rules."[180] This conclusion is based upon several reasons. First, as noted above,[181] while the SEC sometimes considers anticompetitive effects, it is neither "required" to do so nor is it required "to give this factor any particular weight."[182] Second, provision for judicial review of an SEC "order" is made in section 25 of the Securities Exchange Act, but under section 19(b) the SEC can act by "rules or regulations or by order." Thus, there may be a gap in the judicial review of SEC action.[183] Third, rate regulation in the securities industry is "limited and largely indirect."[184] Fourth, NYSE member firms are under a positive duty to "discriminate in their services." A fifth reason is that:

> [B]rokers are [not] required to maintain unprofitable facilities in the public interest or to provide services for all customers or all types of transactions. Indeed, they are not required by law to serve anyone. We have seen in recent months how brokerage firms refuse certain types of unprofitable orders and close down unprofitable branch offices.[185]

Securities regulation, then, is "almost identical" to the bank regulation described in *Philadelphia National Bank*; to the extent it differs, ap plication of the criteria quoted above presents a stronger case for rejection of the preclusive jurisdiction rule."[186]

B. *Primary Jurisdiction*

Primary Jurisdiction is a judicial doctrine "designed to avoid duplication and conflict between different governmental entities dealing with the same subject matter."[187] A cogent definition of the doctrine is stated in *United States v. Western Pacific R.R.*:[188]

179. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 at 351-52 (1963).

180. *Antitrust*, *supra* note 7, at 216.

181. *See* text accompanying note 148 *supra*.

182. *Antitrust*, *supra* note 7, at 216.

183. *Id.*, noting the "The Commission recently took the position that its determination would be subject to judicial review . . . ."

184. *Antitrust*, *supra* note 7, at 216."

185. Memorandum of the Dep't of Justice 40-41.

186. *Antitrust*, *supra* note 7, at 216.

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

188. 352 U.S. 59, 63-64 (1956).

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

The distinguishing characteristic of primary jurisdiction relates to the court's original jurisdiction to entertain the controversy.[189] It is for this reason that the "problems engendered by exemption from the antitrust laws on the one hand and the grant of exclusive agency jurisdiction on the other cannot be solved, or even intelligently discussed, within the matrix of what is now called primary jurisdiction."[190]

The doctrine of primary jurisdiction is thus quite limited in both its scope and application. We start with the proposition that the antitrust court has properly obtained jurisdiction of the case before it under the antitrust laws. ("Primary jurisdiction" plays no role in determining antitrust jurisdiction. The doctrine is operative, if at all, only when there is concurrent jurisdiction in court and agency. Confusion on this issue, as noted previously,[191] has resulted in the mingling of primary jurisdiction concepts with antitrust exemption, exclusive agency jurisdiction, and exhaustion of administrative remedies; situations in which a case is not properly before the court at all. Dismissal, appropriate when the court does not have jurisdiction, is inappropriate in the primary jurisdiction context where the court by definition does have jurisdiction.)

The legal process ordinarily assumes judicial decision when the jurisdiction of the court is properly invoked. In rare instances, however, it may be necessary for a court to refer certain of the issues before it to an administrative agency for decision or fact-finding before the court itself renders its judgment. The doctrine of primary jurisdiction has been developed by the courts to aid in the determination of when such agency reference is necessary and appropriate. In this context, the question presented for discussion in this section is whether an antitrust court, faced with the problem of the legality under the antitrust laws of the stock exchange minimum commission rate rules, should refer any of the issues before it to the SEC for decision by that agency. Properly applied, the primary jurisdiction doctrine will enable the court "to evaluate whether the critical issues posed in the antitrust

189. Mitchell, *supra* note 187, at 29.
190. Stokes, *supra* note 81, at 551.
191. *See* text accompanying notes 136-40 *supra*.

case actually fall within the policymaking competence of the regulatory agency."[192]

The development of the primary jurisdiction doctrine has isolated two reasons for its application: uniformity and expertise. The earlier cases stressed the need to funnel through the agencies questions where the statutory policy was interpreted as requiring uniformity of administration, rates, or construction of tariffs.[193] The judicial forum was seen as inappropriate in such instances since inherent in the process of numerous suits is a diversity of results reached by different courts and juries. A single administrative agency, repeatedly presented with similar issues, was thought more likely to achieve consistency and thus better able to further the legislative goal of uniformity.

The second rationale was developed by Mr. Justice Brandeis in *Great No. Ry. v. Merchants Elevator Co.*:[194]

> [T]he enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.

While these criteria accurately describe the reasons for the primary jurisdiction doctrine, "they are much too sweeping to be helpful in defining its application,"[195] particularly in the realm of regulated industry where the need for a concise definition is crucial. "Taken literally, they would suggest that every case of any description arising in a regulated industry should be referred to the appropriate regulatory agency."[196] Professor Jaffe suggested that the doctrine be used "only when a court finds itself faced with relevant considerations which it genuinely feels it is not in a position to evaluate . . . . Surely it should not be necessary in every individual application of a rate to undertake an elaborate court hearing."[197] The criteria for the application of the doctrine have been recognized as properly grounded in Congressional intent: "whether one or more of the critical issues before the Court are the kind of issues that fall within the agency's regulatory competence and in the uniform solution of which the agency has a legitimate

192. *Types*, *supra* note 13, at 67.

193. *Id.* at 63; Convisser, *supra* note 140, at 324; Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922); Texas & Pac. Ry. Co. v. Am. Tie Co., 234 U.S. 138 (1944); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 125 (1965).

194. 259 U.S. 285, 291 (1922).

195. *Types*, *supra* note 13, at 63.

196. *Id.*; Convisser, *supra* note 140, at 329.

197. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 130 (1965).

concern under the statutory scheme of control provided by Congress for the industry."[198]

Issues involving the reasonableness of rates and industry practices have traditionally been among the types of questions subject to the primary jurisdiction doctrine.[199] The reason for this is twofold: first, in many cases, Congressional intent that rates be uniform is clear; second, rate regulation involves a detailed analysis of complex accounting, cost-finding, rate comparison factors in the light of regulatory policy—an analysis generally thought beyond the competence of courts but seen as issues regularly decided by administrative agencies.[200] But even in this area, reference to the agency is not automatic: "In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."[201]

It is submitted that in an antitrust action challenging the fixed minimum commission rate structure as a violation of the Sherman Act there would be no occasion to apply the primary jurisdiction doctrine. First, the uniformity rationale would be inapplicable. The suit would challenge the structure of the rate system itself rather than the reasonableness of a particular rate.[202] On the other hand, structural uniformity would be preserved if the *court* concluded that a competitive rate system must be used. In addition, the present minimum structure does not guarantee uniformity because (a) a firm is free to charge commissions at any level above the minimum[203] and (b) the "give-up" system has essentially been a competitive institution in which the broker retains but a fraction of his "minimum commission." Thus, the present lack of uniformity under the minimum rate structure militates against the use of the uniformity criterion to refer the issue to the SEC.

SEC expertise, as a factor in determining primary jurisdiction in the agency, deserves attention. The SEC is familiar with the intricate problems and economics of the securities industry, and it is in the best position to measure the impact of a competitive rate structure on the industry. Realistically, SEC expertise can enlighten the court without formal reference to that agency. The Commission has been conducting a thorough investigation of the commission structure for over fifteen

198. *Types*, *supra* note 13, at 67; Convisser, *supra* note 140, at 336: "[S]ince it is Congress that creates the administrative jurisdiction out of which the problem of conflicting jurisdictions originates, it is in congressional intent that the problem's solution should be found."

199. *E.g.*, Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963); United States v. Western Pac. Ry. Co., 352 U.S. 59 (1956); Far East Conference v. United States, 342 U.S. 570 (1952); Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). *See* Trienens, *supra* note 23, at 43-52.

200. Trienens, *supra* note 23, at 44. *See also* Turner, *supra* note 35, at 1235.

201. United States v. Western Pac. Ry. Co., 352 U.S. 59, 64 (1956).

202. *Cf.* Convisser, *supra* note 140, at 325.

203. Almost all transactions take place at the minimum commission level, however.

months; however, its determination can be made available to the court only by way of *amicus* presentation. Once the SEC has in fact reached a decision it would serve no purpose for the court to stay its hand pending reference of the same issues already decided by the agency. "The court will have the benefit of the agency's investigation and analysis of the facts . . . ."[204] The additional insights possibly accruing from referral under the primary jurisdiction doctrine would have to be balanced against the inconvenience and expense ancillary to its application, and it is likely that the latter would outweigh the former.

IV. CONCLUSION

Court consideration of stock exchange practices has been rare. The Supreme Court has yet to rule on the legality of the minimum commission rate structure, an exchange institution since 1792. The increasing activity of institutional investors has served to highlight and emphasize the inadequacy of adherence to minimum rates as a practical matter. The tangle of evasionary devices, developed as alternatives, has initiated SEC investigation and the possibility of a restructuring of exchange commission rates. The likelihood of subsequent litigation makes it appropriate to examine the jurisdictional aspects of court accommodation of the antitrust laws to the securities industry.

The focal point of this article has been the extent to which a court should be able to hear and decide the merits of the minimum commission controversy. The conclusion favors full judicial consideration of the merits.

Congressional exemption of the minimum commission rate structure from the antitrust laws cannot justifiably be inferred from the ambiguous Securities Exchange Act. The emphasis upon self-regulation, the residual role and limited power of the SEC, argues against both implied statutory exemption and preclusive SEC jurisdiction. The reasons for the application of the primary jurisdiction doctrine are not present in this instance. In sum, nothing shields the stock exchange minimum commission rates from judicial scrutiny.

204. Mitchell, *supra* note 187, at 37.