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Primary Jurisdiction: The Need for Better Court/Agency Interaction

Michael Botein
New York Law School, michael.botein@nyls.edu

PRIMARY JURISDICTION: THE NEED FOR BETTER COURT/AGENCY INTERACTION

MICHAEL BOTEIN*

The division of responsibility between courts and agencies, generally considered under the rubric of "primary jurisdiction," is often seen as a powerful force in shaping the administrative process. But some agencies pay little attention to the doctrines involved and make little attempt to preserve their jurisdiction from judicial intervention.[1] The interest of commentators in the doctrines therefore appears somewhat anomalous.[2]

Nevertheless, scholarly study has produced an excellent body of writing on the law of primary jurisdiction.[3] Precisely because this material already exists, a further analysis of the often chaotic case law seems neither fruitful nor appropriate. Instead, after a very brief overview of the doctrines, this piece will consist of a preliminary study of how the courts and agencies actually interact, together with methods by which this interaction can be made more efficient.

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* B.A., 1966, Wesleyan University; J.D., 1969, Cornell University; LL.M., 1972, Columbia University; Associate Professor, Rutgers Law School, Newark.

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1. *See* text surrounding notes 126-45 *infra.*

2. This interest may spring from any one of several causes. First, the commentators' concern may simply reflect an increasing public awareness of and interest in the functioning of administrative agencies. Thus, a number of "public interest" groups have begun to study in detail the functioning of administrative agencies. *See, e.g.*, R. FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970) (Ralph Nader's study group on The Interstate Commerce Commission and Transportation) [hereinafter cited as FELLMETH]. At the same time, the Executive branch has become increasingly concerned about the efficient functioning of the federal agencies. *See* PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 3-7 (1971). Moreover, as the nation's economy has become increasingly regulated, Congress has exempted more and more industries from the operation of the antitrust laws, an area in which the doctrines have come to play a highly significant role. *See, e.g.*, Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 48-51 (1962) [hereinafter cited as Hale & Hale]. Finally, the federal courts face increasingly overloaded dockets. *See, e.g.*, Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229 (1972); Zeisel, *Court Delay Caused by the Bar?*, 54 A.B.A.J. 886 (1968). Accordingly, courts may be tempted to reduce congestion by funneling litigation into the administrative process.

3. For a sampling of the excellent scholarly literature in this area, see notes 4, 7, 14, 17 *infra.*

I. THE DOCTRINES AND THEIR DIFFICULTIES: A BRIEF OVERVIEW

The law of primary jurisdiction exists in a highly uncertain state today. Indeed, some observers[4] have suggested that there really is no coherent law at all. This situation could arise only in a country like the United States which had developed the administrative process into a fine and artificial art.[5] The development of the various related doctrines naturally tracks the development of the federal administrative agencies; as agencies grew in number and importance, their jurisdiction and potential conflicts with courts also increased. It is necessary to review the doctrines briefly, in order to clarify some of the problems facing courts and agencies.

"Primary jurisdiction" actually includes at least four major doctrines: primary exclusive jurisdiction, true primary jurisdiction, statutory exemptions, and agency immunizations.[6] Under primary exclusive jurisdiction, a court loses all power over a case, except the very limited ability to review any ensuing agency action. On the other hand, true primary jurisdiction gives an agency the initial opportunity to consider a legal issue or to find facts, but reserves for the court the ultimate power to render a judgment.[7]

A statutory exemption is simply a congressional act which bars specific causes of action against particular industries, most commonly under the antitrust laws.[8] An agency immunization has virtually the same effect of removing potential liability, but is not self-executing and must be secured from an agency.[9] Statutory exemptions and agency immunizations thus are quite similar in terms of both policy and impact. As will be seen, statutory exemptions and agency immunizations in fact share a number of common features and often overlap.[10]

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4. *See* Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038-41 (1964) [hereinafter cited as Jaffe]; Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812, 818-23 (1967) [hereinafter cited as Kestenbaum].

5. A former prominent official in the Antitrust Division of the Justice Department thus recently commented—perhaps tongue-in-cheek—that the regulatory agency "is a unique American contribution to the history of public institutions." Baker, *Competition and Regulation*: Charles River Bridge *Recrossed*, 60 CORNELL L. REV. 159, 161 (1975).

6. To a certain extent, this analysis tracks that of McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 ABA ANTITRUST SECTION 57, 61 (1958) [hereinafter cited as McGovern].

7. *See* text accompanying notes 51-58 *infra*.

8. *See* text accompanying notes 24-31 *infra*.

9. *See* text accompanying notes 37-50 *infra*.

10. *See* text accompanying notes 25-63 *infra*. This analysis does not include, of course, the problem of federal preemption of state court action or the converse question of the extent to which state legislation can immunize conduct from the antitrust laws under *Parker v. Brown*, 317 U.S. 341 (1943). The latter issue is extremely important, since it functions very much like an express federal statutory exemption or administrative

A. *Primary Exclusive Jurisdiction*

The original statement of "primary jurisdiction"—really primary exclusive jurisdiction—came in the context of protecting ICC tariffs from scattergun collateral attacks in state courts. Primary exclusive jurisdiction thus developed for purposes far different than its most common application today as a defense in antitrust actions.[11]

The putative parent of the doctrine is *Texas & Pacific Railway v. Abilene Cotton Oil Co.*[12] In fact, the Court there held only that an aggrieved shipper could not challenge in state court the validity of a railroad's tariff filing with the Interstate Commerce Commission, but instead had to commence a proceeding before the Commission. The Court reasoned that individual recoveries would permit de facto rebates to some shippers, encourage collusive lawsuits to give rebates, and thus create a lack of "uniformity" in rates.[13]

Abilene has received numerous criticisms, which need not be repeated here.[14] Perhaps most important today, however, is that the doctrine was created to control private law contractual disputes, but now functions mainly in the context of public law antitrust cases. Moreover, the

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immunization. Its dimensions, however, take it beyond the scope of this piece. For an excellent discussion of the problems in this area, see Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

11. As noted above, primary exclusive jurisdiction is closely related to true primary jurisdiction. The following analysis separates the two concepts, however, in order to put them in an appropriate historical context.

12. 204 U.S. 426 (1907). The *Abilene* debate had been foreshadowed in one of the Court's first decisions under the Sherman Act. In *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), a case usually cited for its adoption of "per se" standards for price-fixing arrangements, the Court concluded after a lengthy discussion that the mere existence of the Interstate Commerce Commisssion did not immunize from the antitrust laws railroads which filed tariffs with it. *Id.* at 314-27. Interestingly enough, the four dissenting justices argued that merely filing a tariff with the Commission immunized all actions under it from the antitrust laws. *Id.* at 343, 363-69. (White, Field, Gray & Shiras, JJ., dissenting).

13. *See* 204 U.S. at 440-46. In a companion case, the Court held that failure to post rate schedules, in violation of the Act, did not vitiate the *Abilene* principle. Texas & Pac. Ry. v. Cisco Oil Mill, 204 U.S. 449 (1907).

14. The Court reached its decision not because the issues required it, but rather because it unilaterally decided to do so. The Court thus ignored several major procedural objections, 204 U.S. at 434-35, and pushed on to decide a point which had been neither briefed nor argued. *See* von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929, 932-33 (1954) [hereinafter cited as von Mehren]. Moreover, the Court's great emphasis on "uniformity" may have been misplaced, for the possibility of many inconsistent results probably was quite remote. *Cf.* Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L.J. 315, 322-25 (1956) [hereinafter cited as Convisser]. Similarly, collusive lawsuits would have been a rather expensive and complicated way for railroads to give de facto rebates to favored customers. Some commentators thus have characterized *Abilene* as a blatant exercise in judicial legislation. *See, e.g.*, Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495, 497 (1953) [hereinafter cited as Schwartz, *Primary Jurisdiction*].

Court's fears of inconsistent results in *Abilene* may have made sense in 1907 but are less valid today. The modern class action, despite recently imposed limitations,[15] provides uniform treatment for similarly situated parties. A properly supervised class action thus would give as much uniformity as would the ICC, and also preserve judicial jurisdiction.[16]

The Court soon expanded the ICC's primary exclusive jurisdiction beyond tariffs.[17] And the Court later held *Abilene* required primary exclusive ICC jurisdiction over motor carriers as well as rail carriers.[18] Moreover, as the Court expanded the scope of the ICC's primary exclusive jurisdiction, it also created several exceptions to it—some of which have continuing vitality today. First, the Court did not find primary exclusive jurisdiction where an action challenged conduct which the ICC could not regulate.[19] The Court also allowed actions against

15. The strict notice requirements on class actions imposed by *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), would not seem to be difficult to meet in a case such as *Abilene*. The potential litigants in *Abilene* were few in number and readily identifiable by company records. *Eisen* requirements might not be met in suits involving potentially large, unidentified groups of litigants, as in suits involving the FCC and SEC. The more difficult hurdle naturally would be establishing that each class member had suffered at least $10,000 damages required under *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

16. Furthermore, the nature of the railroad industry has changed fundamentally since 1907. Because of competition from motor trucks and the effect of World War II, the railroad industry has lost its natural monopoly status and therefore may need less intensive regulation. *Cf.* Phillips, *Railroad Mergers: Competition, Monopoly, and Antitrust*, 19 WASH. & LEE L. REV. 1, 15-17 (1962). The Court conveniently overlooked this consideration when it applied *Abilene* to suits against motor carriers. *See generally*, T.I.M.E. Inc. v. United States, 359 U.S. 464, 468-80 (1959). Congress thus probably could have abolished the ICC and allowed competition as well as class actions to control railroad charges.

17. In *Baltimore & Ohio Railroad v. United States* ex rel. *Pitcairn Coal Co.*, 215 U.S. 431 (1910), the Court held that the ICC had exclusive jurisdiction over a railroad's allocation of cars to coal companies, even though the carrier had not filed its regulations with the Commission in the first place. *See also* Jaffe, *Primary Jurisdiction Reconsidered; The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 582-83 (1954). This position seems questionable at best. If a carrier's practice is not before the ICC by way of a tariff filing, the Commission can act only by way of an affirmative investigation—a practice of which it is not terribly fond. *See* FELLMETH, *supra* note 2, at 11-13. To a certain extent, the *Pitcairn* Court may have been influenced by the fact that the ICC in fact had undertaken an investigation. *See* 215 U.S. at 494-95. Nevertheless, the possibility that an agency may act should not give it exclusive jurisdiction automatically.

18. *See* T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959). Four justices dissented on the ground that the ICC did not have as appropriate remedies for motor shippers as for rail shippers. *Id.* at 481-84 (Black, Douglas, Warren, and Clark, JJ., dissenting). *But see* Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 88-89 (1962) (Court seemed to indicate that the ICC has only primary as opposed to exclusive jurisdiction over motor carriers).

19. The Court was somewhat unclear as to whether this exception covered conduct which the Commission did not regulate or only conduct which the Commission could not regulate. In *United States v. Pacific & Arctic Railway & Navigation Co.*, 228 U.S. 87, 103-05 (1913), the Court allowed the Justice Department to bring an antitrust suit based on a conspiracy which ultimately resulted in the fixing of prices in tariffs filed with the

conduct violative of the ICC's regulations, as opposed to attacks on the validity of the regulations.[20] Furthermore, the Court at one time recognized an exception for some pure "common law" rights.[21] Finally, the Court vacillated in applying primary exclusive jurisdiction to cases which involved judicial "construction" of tariffs[22] or statutes.[23]

There is clearly a need for doctrines to adjust tensions between courts and agencies, but the doctrine of primary exclusive jurisdiction is riddled with exceptions and about as forgiving to litigants as Attila the Hun. Although there appear to be no immediate solutions, it is at least possible to approach the problem more analytically, as suggested in Section II.

ICC. The Court seemed to reason that government could attack conduct which led to the tariff, as opposed to the tariff itself. *See also* Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). But in *Midland Valley Railroad v. Barkley*, 276 U.S. 482 (1928), the Court held that the ICC's failure to act in a given area where it clearly had jurisdiction precluded private lawsuits. This apparent distinction between inability and disinclination to regulate seems a bit anomalous, since both produce the same result. Moreover, allowing court action where an agency fails to act need not prejudice the agency. A court presumably will defer to an agency's exercise of a previously dormant power.

20. *See, e.g.*, Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 131-32 (1915); Pennsylvania R.R. v. International Coal Mining Co., 239 U.S. 184, 196-97 (1913). Although perfectly reasonable under *Abilene*'s notion of "uniformity," this approach clearly was inconsistent with the later theory of "expertise," since it deprived the ICC of a chance to apply its supposedly specialized skills to the meaning of its own regulations. *See* text accompanying notes 66-69 *infra*.

The lower federal courts later—and perfectly logically—extended this principle to violations of agency authorizations. *See, e.g.*, World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007, 1011 (1st Cir. 1965); CAB v. Modern Air Transport, Inc., 179 F.2d 622, 624-25 (2d Cir. 1950). This type of holding appears related to the notion that exclusive jurisdiction does not exist where the agency itself is the plaintiff in a suit.

21. Pennsylvania R.R. v. Sonman Shaft Co., 242 U.S. 120, 125-26 (1916); Eastern Ry. of N.M. v. Littlefield, 237 U.S. 140, 144-45 (1915).

22. At first, the Court consistently seemed to reject this type of exception, on the theory that an apparently simple question of tariff construction actually might involve complex issues of economics and technology. Loomis v. Lehigh Valley R.R., 240 U.S. 43 (1916); Texas & Pac. Ry. v. American Tie & Timber Co., 234 U.S. 138 (1914). But just a few years after these cases, the Court decided that the meaning of a tariff raised an issue which was "solely one of construction. . . ." Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 294 (1922). When the Court later cut down on the scope of the exception in *United States v. Western Pacific Railroad*, 352 U.S. 59 (1956), the ICC on remand applied precisely the same general type of standards in construing the tariff as a court would have. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 130 (1965).

23. In *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233, 238-39 (1971), the Court held that the question of whether a union member had received a fair hearing under the Labor Management Reporting and Disclosure Act was within judicial competence and that the NLRB had no superior competence.

There seems to be more support for this position than the position on tariffs. *See* note 22 *supra*. While an agency may have some expertise in construing regulations promulgated by it or tariffs approved by it, the judiciary has the final authority to give an authoritative construction to a statute. For an unusual variation on this theme, see *Zuber v. Allen*, 396 U.S. 168, 192-94 (1969).

B. *Statutory Exemptions and Agency Immunizations*

The most difficult issues in this area arise in the context of antitrust suits, for the theories behind regulation and antitrust are naturally antithetical: regulation emphasizes governmental control of business; antitrust relies on the market place. Although the basic regulatory and antitrust schemes evolved at roughly the same time toward the end of the nineteenth century,[24] the Court has recognized very properly that they represent "two regimes."[25] Professor Handler thus has noted that the "two basic questions" in this area are "what particular mix of competition and regulation is best calculated to serve the public interest in connection with any given business activity . . ." and "how this determination should be made in any given instance."[26] Section II addresses itself primarily to this second question. Since administrative agencies often apply anticompetitive standards, statutory exemptions and agency immunizations may result in approval of anticompetitive conduct;[27] every such decision is thus at least potentially anticompetitive.[28]

Some observers believe that competition essentially is dead in this country and that the nation thus simply should accept increased regulation of industry.[29] Other observers have more faith in the future of competition, however, and thus oppose the potentially anticompetitive effects of exclusive agency jurisdiction.[30] Indeed, the commentators have appeared diametrically opposed as to whether regulation or competition is to be preferred.[31]

The easiest cases naturally are those in which the status of an agency's immunization power, and an industry's statutory exemption, are clear. When a court finds that an agency could not conceivably immunize a

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24. King, *The "Arguably Lawful" Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries*, 40 TENN. L. REV. 617, 617 & n.1 (1973) [hereinafter cited as King].

25. Pan American World Airways, Inc. v. United States, 371 U.S. 296, 310 (1963).

26. Handler, *Regulation Versus Competition*, 44 U. CIN. L. REV. 191, 194 (1975) [hereinafter cited as Handler]. Professor Handler would leave the task of answering the second question to the Congress—a perhaps overly optimistic solution.

27. In *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), for example, the Court held that the CAB had immunized conduct otherwise violative of the antitrust laws by approving it.

28. For a discussion of the outcome-determinative nature of such assertions of exclusive jurisdiction, see Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 464-75 (1954) [hereinafter cited as Schwartz, *Legal Restriction*].

29. *Cf.*, *e.g.*, Stokes, *A Few Irreverent Comments About Antitrust, Agency Jurisdiction, and Primary Jurisdiction*, 33 GEO. WASH. L. REV. 529, 537-39 (1964).

30. *See, e.g.*, Jacobs, *Introductory Comments*, 20 FED. B.J. 4, 4-5 (1960); Schwartz, *Legal Restriction*, *supra* note 28, at 471-75.

31. *Cf.* Hale & Hale, *supra* note 2, at 51-52; Schwartz, *Legal Restriction*, *supra* note 28 at 437-38.

violation of the antitrust laws, the court need not consider whether the agency must pass on the conduct.[32] Conversely, many industries operate under express statutory exemptions from the antitrust laws.[33] The existence of an exemption thus creates a legal situation very similar to primary exclusive jurisdiction; the jurisdiction of the courts is effectively destroyed and all control of the industry is vested in an agency.[34]

The situation becomes infinitely more complicated, however, either where the scope of an exemption is unclear or where an implied exemption may exist. Congress is often deliberately or carelessly vague in its language.[35] Accordingly, the statutes behind possible exemptions are usually quite cryptic.[36]

In this area of comparatively free decision, the courts have established virtually no standards at all. To be sure, even *Abilene* started from a presumption against implied repeals[37]—a notion to which the Court consistently has given only lip service.[38] Beyond this obviously general statement, however, the Court has developed few or no real standards in the course of making decisions regarding implied repeals. To be sure, it occasionally has suggested that immunization power should turn on whether an agency's regulatory scheme is sufficiently "pervasive." But the Court has vacillated in using even this general test, applying or ignoring it as it has wished to retain or relinquish judicial jurisdiction.[39]

32. *See* Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 464-71 (1960); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 204-06 (1945). In both cases the Court held that although the defendants might claim a limited form of antitrust immunity to legitimize the creation of their otherwise illegal cartels, Congress had meant to immunize acts with illegal purposes.

33. Walden, *Antitrust in the Positive State*, 41 TEXAS L. REV. 741, 767-88 (1963), devotes more than twenty pages to listing the staggering number of special exemptions which private interest groups have obtained from Congress. As his laundry list effectively demonstrates, there is no particularly consistent or coherent pattern to the granting of exemptions.

34. Note, *Antitrust Immunity in the Communications Industries*, 44 VA. L. REV. 1131, 1132 (1958), views statutory exemptions and agency immunization power as different from and "supplemented by" the doctrine of primary jurisdiction. As noted before, regulation and competition usually exist as alternatives. *See* text accompanying notes 24-31 *supra*. Accordingly, some form of administrative structure almost invariably goes along with the grant of an express exemption. *See, e.g.*, United States v. Borden Co., 308 U.S. 188, 199-200 (1939).

35. Congress generally obfuscates administrative enabling statutes, simply because it may have absolutely no idea of how to handle a problem and thus wishes to dump it—as well as any resulting political flak—into the lap of a comfortably removed administrative agency. For an excellent example of how Congress ended in total futility when attempting to allocate radio frequencies around the country, see W. JONES, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION 4 (1962).

36. *Cf.* Comment, *Antitrust and the Regulated Industries: The* Panagra *Decision and Its Ramifications*, 38 N.Y.U.L. REV. 593, 595-98 (1963).

37. *See* Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 436-37 (1907).

38. *Cf., e.g.*, United States v. Borden Co., 308 U.S. 188, 198 (1939).

39. In *United States v. Radio Corp. of America*, 358 U.S. 334, 348-51 (1959), the Court held that the Federal Communications Commission's activities in licensing televi-

The cases[40] indicate that the Court tends to look to an agency's effectiveness in protecting some public interest other than competition. Although the Court has deliberately eschewed dealing in these terms explicitly,[41] its use of this standard has been apparent.[42] This obviously

sion broadcasters did not constitute a "pervasive regulatory scheme," on the grounds that the Commission controlled only limited aspects of licensees' operation and left them considerable discretion in the conduct of day-to-day activities. *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-52 (1963).

40. For example, in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Court held that an Exchange ruling against member firms having direct telephone lines with nonmember firms was not immunized from the antitrust laws. The Court went through the usual litany of emphasizing the role of the Securities and Exchange Commission in policing stock exchanges. But it held that the Exchange had failed to give valid reasons for its failure to hold a hearing. *See id.* at 361-63. The Court appeared to be concerned more with due process than with immunization, as not only the dissent, *see id.* at 367-69 (Stewart & Harlan, JJ., dissenting), but also other observers pointed out. *Cf.* Intercontinental Indus., Inc. v. American Stock Exch., 452 F.2d 935, 941-43 (5th Cir. 1971) (issue of whether plaintiff had received fair hearing before delisting of its stock dealt with in pure procedural due process terms).

It thus came as less than a surprise when just ten years later the Court appeared to turn ninety degrees. In *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), the Court held that the Commodity Exchange Commission had a form of true primary—as opposed to primary exclusive—jurisdiction to review the Mercantile Exchange's transfer of a membership without hearing, noting that:

> This judgment [to stay the action] rests on three related premises: (1) that it will be essential for the antitrust court to determine whether the Commodity Exchange Act or any of its provisions are "incompatible with the maintenance of an antitrust action". . . ; (2) that some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question. *Id.* at 302.

The Court distinguished *Silver* on the grounds that the statute arguably immunized the Mercantile Exchange's conduct and that the CEC had a stronger duty than the SEC to supervise membership in exchanges. *See id.* at 303-06.

The *Ricci* decision may very well make sense because of the difference between the SEC and the CEC. The Court may have recognized that the latter commission supervised the exchanges' activities more closely. *But cf.* Note, 33 OHIO STATE L.J. 209, 216-17 (1972). Nevertheless, the Court's suggestion that the statute might immunize the activities of commodities exchanges seems inconsistent with its treatment of the case as one involving true primary jurisdiction, and thus appropriate for a stay rather than a dismissal. *See* 409 U.S. at 302.

The Court turned another ninety degrees away from *Silver* in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), where it held that the Exchange's now defunct rate-setting was immune from the antitrust laws. The Court ostensibly based its holding just on the fact that the SEC had clear, direct, and effective statutory authority over the Exchange's rate practices. Indeed, the Court went to great lengths at the end of its opinion to state that it was not considering the existence of "pervasive" jurisdiction, but only whether the SEC had the requisite statutory power. *See id.* at 688-89. Justice Douglas, however, concurred solely on the grounds that the SEC had done an effective job of regulation. *Id.* at 691-96.

The Court as a whole was nevertheless highly concerned with the history of the Exchange's rate practices and the rigor of the SEC's regulation. *See id.* at 668-82. The Court thus spent the major part of its opinion exploring the history of Exchange practices and SEC regulation.

41. *See, e.g., id.* at 689-90.

42. *See* note 40 *supra*. The Court apparently found effective regulation lacking in *Silver*, arguable in *Ricci*, and present in *Gordon*.

creates a certain amount of ad hoc and unpredictable decisionmaking. As Section II suggests, however, this may be not only inevitable, but also desirable.

The Court thus has not produced any clear and consistent standards for finding immunization power. To be sure, a number of commentators seem little more convinced about their own tests than the Court's.[43] Indeed, perhaps the most honest recommendation is simply that the Court recognize that every immunization issue requires an almost ad hoc approach.[44]

Even when an agency definitely does have power to immunize conduct, it often is unclear whether an agency has taken enough action to invoke its immunization power for a particular firm. The Court thus has held that an agency's approval of contracts between regulated industries invoked immunization—despite the agency's plea that the Court apply the antitrust laws.[45] The Court thus was in the position of forcing more oversight of anticompetitive conduct down an agency's throat.

Finally, it is unclear whether an agency may immunize retroactively conduct which has not been brought to its attention by means of tariff or other filings. Indeed, the Court has wavered on the issue and made apparently contradictory statements.[46] On the one hand, a requirement of prior approval may make sense; after all, failure to file shows a disrespect for law and the agency conceivably might disapprove the filing.[47] On the other hand, a filing requirement may be formalistic,

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43. McGovern proposes that courts look to whether there is a need for special administrative expertise and uniformity. He limits this obviously rather general recommendation with the comment—hopefully tongue-in-cheek—that his test is "nothing more finite than a pragmatic, working test as a criterion for the application of the doctrine." McGovern, *supra* note 7, at 67. On the other hand, Convisser suggests that the courts look solely to whether judicial intervention would interfere with agency operations—also a general standard. *See* Convisser, *supra* note 14, at 336-37. Perhaps most interesting of all, Hale & Hale develop a "mushroom principle," under which an agency would have exclusive jurisdiction over everything which it potentially might need to regulate in the future. Hale & Hale, *supra* note 2, at 57-58.

44. *See* Fox, *The Antitrust Laws and Regulated Industries: A Reappraisal of the Role of the Primary Jurisdiction Doctrine*, 2 MEMPHIS STATE L. REV. 296, 297 (1972).

45. *See* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973). The CAB had made its request by way of an amicus brief. *Id.* at 409 (Burger & Blackmun, JJ., dissenting). The reasons for the CAB's disavowal of this very substantial chunk of power were less than clear. The Board apparently feared that a holding like the majority's, however, would force it to use excessive care, which it felt it could not exercise with its present staff. Interview with member of Office of General Counsel, Civil Aeronautics Board, in Washington, D.C., February 24, 1975 [hereinafter cited as CAB Interview].

46. *Compare* Carnation Co. v. Pacific Westbound Conf., 282 U.S. 213, 215 (1966) *with* Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 69 (1970).

47. *See* Fulda, *A Critique of the Doctrine of Primary Jurisdiction*, 13 ABA ANTITRUST SECTION 68, 72-73 (1958).

since an agency immunization may terminate antitrust liability.[48]

A decision in favor of immunization power thus has a powerful impact upon the parties to a law suit. Immunization effectively may destroy a plaintiff's cause of action. If it has the requisite power, the agency often will immunize the conduct. Commentators have recognized the outcome-determinative effect of agency immunization for a long time,[49] and even the Court has appeared to note this.[50]

C. *True Primary Jurisdiction and Referrals*

Despite the doctrines of primary exclusive jurisdiction, statutory exemptions, and agency immunizations, this country's judicial system always has allowed a certain amount of concurrent jurisdiction between courts and agencies.[51] Indeed, the United States legal system not only permits but also encourages concurrent jurisdiction in some situations, as between the NLRB and the federal courts.[52] True "primary jurisdiction" thus exists only where there is concurrent jurisdiction. In this situation, the question is which tribunal will proceed first, rather than which tribunal will proceed.[53] To be sure, primary jurisdiction has some impact upon the outcome of a case; after all, if an agency uses its "expertise" to find facts, review under the substantial evidence rule will restrict a court's role greatly.[54] A court may well be able to refer a case in such a way, however, as to preserve unlimited review powers.[55]

The seminal as well as most illustrative case of true primary jurisdiction is *General American Tank Car Corp. v. El Dorado Terminal Co.*[56] The shipper there brought a simple action for breach of contract, claiming that under the contract the carrier owed it all rebates received from railroads for shipping the plaintiff's products. The defendant argued that it could not pass along such rebates under the Interstate Commerce Act. The Court quickly went to the merits and held that the plaintiff was entitled under the contract to the rebates. However, it

48. *See* King, *supra* note 24, at 631.

49. Convisser, *supra* note 14, at 330-31; *see* Kestenbaum, *supra* note 4, at 814. Moreover, just giving the agency the power to find the facts in a case under a theory of primary jurisdiction gives the agency a good deal of power, since on judicial review—as opposed to a de novo trial—a court is much more restricted in its ability to make findings of fact. *See also* von Mehren, *supra* note 14, at 960-65.

50. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353-54 (1963).

51. *See* Jaffe, *supra* note 4, at 1053-54.

52. *See* Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 547-48 (1963).

53. *See* Comment, *New Twists on Old Wrinkles: Primary Jurisdiction and Regulatory Accommodation with the Antitrust Laws*, 15 B.C. IND. & COMM. L. REV. 80, 93-94 (1971).

54. *See* von Mehren, *supra* note 14, at 946-47.

55. *See* text accompanying note 124 *infra*.

56. 308 U.S. 422 (1940).

decided to stay the proceeding and retain jurisdiction in order to give the ICC a chance to decide whether the rebates were legal in the first place.[57] The *El Dorado* holding thus creates a situation very different from primary exclusive jurisdiction. In an exclusive jurisdiction situation, the court's only role is to subject the agency decision to very limited substantive review, while in the true primary jurisdiction situation the court retains jurisdiction over the case and uses the agency decision as just one component in its own decision. The plaintiff thus retains its right to a judicial remedy, subject only to a possibly binding decision from the relevant agency.[58]

Primary jurisdiction does have its own problems. It is not clear how closely an issue must be related to administrative expertise before a court should order a referral.[59] A fair reading of *El Dorado* indicates that the administrative issue need not be closely related to the lawsuit, however, since the ICC rulings there were relevant only to the legality of a part of a purely private contract.[60] Similarly, there is no statutory or administrative procedure for making a referral in an *El Dorado* situation.[61] Accordingly, a more definite procedure for making these referrals certainly would be useful.[62]

The *El Dorado* form of true primary jurisdiction promotes an easy relationship between courts, agencies, and litigants. Instead of producing the harsh result of outright dismissal, it merely stays the action until the agency has been heard.

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57. *See id.* at 431-33. The Court thus did not divest the jurisdiction of the district court, but only required that the court wait for the ICC determination before making any final decision.

58. Schwartz, *Primary Jurisdiction, supra* note 14, at 500-03, criticizes the practice of splitting up issues between court and agency, arguing instead that the court should decide the whole case. Although this might well be beneficial in terms of securing a speedier decision, the *El Dorado* formulation gives the court the benefit of a supposedly expert opinion and should not consume an undue amount of time unless the agency deliberately drags its feet.

59. *See* McGovern, *supra* note 7, at 66.

60. Indeed, to the extent that referral is based upon a desire to receive an agency's supposed "expertise," a close relation may not be necessary at all. *See, e.g.*, Quigley v. Exxon Co., 34 AD. L.2d 891 (M.D. Pa., May 10, 1974).

61. *See* Ailes, *Some Procedural Problems of Primary Jurisdiction*, 13 ABA ANTITRUST SECTION 82, 84-85 (1958).

62. *See id.* at 89-91. Ailes sets forth a model order of referral, specifying the issues on which the agency should pass. Issuance of such an order is no guarantee of agency action, however, since agencies have been known simply to turn up their noses at courts. *See* McQuade Tours, Inc., 50 C.A.B. 910 (1969). Nevertheless, this type of behavior appears to be quite rare, to say the least. As one agency attorney quite realistically pointed out, an agency does not like to offend a judge "particularly if a lot of our own litigation is pending there." Interview with member of Office of General Counsel, Securities & Exchange Commission, in Washington, D.C., December 4, 1974 [hereinafter cited as SEC].

II. An Analytical Framework for Judicial Decisionmaking

As the preceding discussion indicates, the jargon of "primary jurisdiction" actually lumps together many separate doctrines. In order to develop any useful conceptual model of judicial versus agency jurisdiction, it therefore is essential to separate the radically different decisionmaking situations which fall under the "primary jurisdiction" rubric. As noted in Section I, the four most common situations are statutory exemption, immunization by agency order, primary exclusive jurisdiction, and true primary jurisdiction. The latter two situations obviously have the most in common as well as the greatest resemblance to traditional notions of primary jurisdiction; but there is considerable interplay among all four theories.

In each situation, two main considerations are relevant: first, the appropriateness of judicial versus agency action, and, second, the specific factual context of the situation. Tension often exists among the various factors which comprise the two main considerations. Furthermore, although judicial action may appear perfectly appropriate, a particular situation may present countervailing considerations, such as a very explicit statutory exemption, agency immunization of the conduct in issue, or specific jurisdictional requirements.

To be sure, improved judicial decisionmaking may not be the key to resolving fundamental tensions between regulation and competition, agencies and courts. Indeed, Professor Handler has broken from other commentators in suggesting that the answer lies with Congress through a thorough-going reevaluation and redefinition of present statutes.[63] But although this type of clear-cut and definitive answer is attractive, it does not appear to be forthcoming in light of Congress' past lack of success in expeditious and thoughtful action. Moreover, under even a new statutory scheme the courts would retain ultimate responsibility for filling in gaps and dealing with unforeseen situations.

A. *Appropriateness of Judicial Versus Agency Action*

The first consideration is the relationship between agency and judicial action. To be sure, this is a very general and perhaps speciously overbroad concept. Indeed, too many commentators fall into the trap of attempting to construct a unified field theory for all court-agency relations. But the doctrines discussed in Section I are general by nature, and a broad discussion of the judicial role is therefore valid, so long as it also considers more specific issues.

There are many possible justifications for judicial deference to administrative agencies. Some rationales may be questionable, however, and

63. *See* Handler, *supra* note 26, at 204-06.

all vary in weight from situation to situation.

Perhaps the major bar to accurate analysis is simply that "primary jurisdiction" developed in 1907 for one purpose, but now serves totally different ones. Although the *Abilene* Court ostensibly was attempting to protect the rights of shippers as a class, it probably was more concerned with insulating the then young ICC from other courts' encroachment. After all, the ICC as well as the administrative process was comparatively new and unpopular with some political groups.[64] Indeed, by contemporary standards the early ICC was an extraordinarily aggressive agency[65] and thus easily made enemies. But the ghosts of anti-agency bias have long since evaporated. To a very real extent, the courts thus use primary jurisdiction to protect agencies against non-existent dangers.

The most common and perhaps most questionable justification for judicial deference is that agencies develop special "expertise" which generalist judges presumably never can duplicate.[66] To be sure, a case should go to the forum which can deal with it most competently. But the much vaunted theory of agency expertise has become increasingly questionable for several reasons. Agency members come and go too quickly to develop much specialized knowledge.[67] Too many permanent and high level staffers may have only limited competence, simply because the private sector attracts the best and brightest.[68] Moreover, an agency's alleged "expertise" often consists of outdated gut reactions, rather than up-to-date empirical studies.[69] Finally, and most significantly, the courts have become increasingly restive with post-New Deal restrictions on judicial review. Some federal judges—particularly in the District of Columbia Circuit—have lived with agencies long enough to know and, occasionally, even articulate their deficiencies.[70] Judges know when an agency has been "captured" by the industry or industries

64. *See* Schwartz, *Legal Restriction*, *supra* note 28, at 471.

65. For an illustration, see Judge Friendly's contrast of early versus current ICC attitudes. H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 27-35 (1962). *See also* Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L. REV. 577 (1954), who maintains that the courts now are attempting to "repent their sins" from pre-New Deal days.

66. The theory of administrative expertise did not enter the law, of course, until well after *Abilene* and other early cases initially had developed the concept of primary exclusive jurisdiction. *See* Jaffe, *supra* note 4, at 1041-43.

67. *See* Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931, 957 (1960).

68. *See* Schwartz, *Legal Restriction*, *supra* note 28, at 473-74.

69. *Cf.* FELLMETH, *supra* note 2, at 13-15. Indeed, all too often an agency's only hard information will consist of studies compiled by the very firms which the agency is charged with regulating, as a perusal of almost any major rulemaking docket will indicate quickly.

70. *See, e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966). After all, judges in and around the District of Columbia have the opportunity for frequent and substantial social and professional contact with high level agency personnel.

which it has been charged to regulate[71] and thus accord less deference to these agencies. Indeed, some courts may have embarked upon a mission to rescue "captured" agencies by imposing the courts' conceptions of the public interest on them. If the courts are willing to restructure a prison's day-to-day activities,[72] they presumably should find little difficulty in reviewing an agency's more visible actions.

Expertise thus has become an increasingly weak reed upon which to rest agency jurisdiction, especially as to captured agencies. To be sure, agencies usually are the best qualified forums to pass on the conduct of firms which they police. But expertise should not keep any talismanic quality. Instead, a court should use the procedures discussed in Section III[73] to discover whether an agency has real competence in a particular case.

A second rationale for agency jurisdiction, and *Abilene*'s ostensible basis, is that court adjudication of individual disputes prevents "uniformity" in the treatment of a whole class. But *Abilene* probably was unfounded in its fear that individual and possible collusive actions would give some shippers de facto preferences over others, since only some shippers would recover. To be sure, national uniformity in policy—as opposed to individual case results—may be valuable to facilitate commercial and other transactions. As will be noted later,[74] however, this consideration is quite different from the theory of uniformity underlying agency jurisdiction.

Another possible justification for judicial deference is that agencies deliver speedier justice than courts. After all, one of the traditional reasons for creating agencies has been to expedite proceedings.[75] To be sure, some federal agencies perform the vital function of processing millions of comparatively small matters very efficiently. But any major adjudication is likely to proceed as torturously before an agency as before a court. An agency must decide whether to order a hearing in the first place[76]—a process which by itself can take three or four years.[77]

71. *Cf. id.* at 1003-04, 1008.

72. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 743-44 (1969), turns this argument around in maintaining that courts can intervene in prison administration because of their past success in dealing with federal agencies.

73. *See* text surrounding notes 146-62 *infra*.

74. *See* text accompanying notes 91-99 *infra*.

75. *See, e.g.*, I K. DAVIS, ADMINISTRATIVE LAW TREATISE 39 (1958). In more recent years, however, Professor Davis appears to have become somewhat alarmed at the very speediness of some high volume agencies' low visibility decisionmaking. *See* K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY 27-28 (1969).

76. For example, 47 U.S.C. § 312(c) (1970) requires a complainant to persuade the Federal Communications Commission to issue a show cause order before even beginning a proceeding—a procedure common to most other agency statutes with cease and desist order provisions. *See, e.g.*, 15 U.S.C. 45(b) (1970). Thus an aggrieved party in effect must win a motion for summary judgment in order to get a hearing—precisely the converse of traditional judicial procedure.

77. For example, the FCC currently is more than three years behind in deciding

Thus, an additional decisional process is interposed before a case even goes to hearing. In addition, if a hearing is designated, an agency may not conduct it more expeditiously than a court. Despite recent attempts to upgrade their status,[78] most administrative law judges still are not as qualified as most federal district court judges. Moreover, evidentiary and procedural rules are often the same in an agency as in a federal district court,[79] thus creating the same potential delay as in a court. Thus administrative justice is not necessarily speedy. Indeed, the generation-long, Dickensian nature of some jurisdictional litigation often is partially the result of delay at the administrative as well as judicial level.[80] A general theory of administrative speed or efficiency therefore is not a sound basis on which a court should defer. Instead, a court should look to an agency's demonstrated competence in handling particular types of issues or cases.

A fourth rationale might be that judicial action creates a conflict with another branch of the federal government, whether Congress, the Executive, or the "headless fourth branch."[81] If this conflict existed, it would be far more dangerous than the analogous struggle between law and equity.[82] After all, disputes within one branch are presumably less disruptive than those between branches.

But although judicial action may create some conflict with agencies, it does not rise to the quasi-constitutional level of a "political question." Judicial action simply does not create the dangers with which the political question doctrine is concerned. Agency jurisdiction comes from Congress, not from any direct constitutional source, and courts generally have "judicially discoverable and manageable standards" for resolving the questions at issue. Very few cases involve "an initial policy determination" which the courts cannot make. Moreover, judicial action does not express any "lack of respect due coordinate branches," usually does not interfere with any "political decision," and practically never creates conflicting views from different branches.[83] If a court

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whether to grant hearings to parties filing petitions to deny the license renewals of radio or television stations. See, for example, the table in ACCESS, Feb. 9, 1976, at 20-21. This is rather anomalous in light of the fact that licenses have a duration of only three years.

78. For example, in 1972 the Civil Service Commission changed the name of federal presiding officers from "hearing examiner" to "administrative law judge" in most cases.

79. *See, e.g.*, 47 C.F.R. §§ 1.201 *et seq.* (1975).

80. *See, e.g.*, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 390-94 (1973) (Burger & Blackmun, JJ., dissenting). *See also* Comment, 38 N.Y.U.L. REV. 593, 602 (1963).

81. 2 COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, GENERAL MANAGEMENT OF EXECUTIVE BRANCH, INDEPENDENT REGULATORY AGENCIES 4 (1949).

82. *See* Schwartz, *Primary Jurisdiction, supra* note 14, at 507.

83. These criteria are among those listed in *Baker v. Carr*, 369 U.S. 186, 217 (1962), and still appear to be as definite an exposition of the political question doctrine as is likely to exist.

ignores an agency's regulatory scheme, it creates a conflict directly with the agency and only indirectly with the ultimate source of power, Congress or the Executive. The real danger of conflict thus arises only when a court flouts an agency policy which has been mandated affirmatively by either a congressional act or an executive order. Since many agency enabling statutes are no more specific than "the public interest,"[84] this type of conflict seems quite rare.

Moreover, experience in the enforcement of the antitrust laws reflects a long tradition of using diverse parties as well as forums to effectuate national policy. Here the Justice Department, the FTC, or private parties may be complainants, and the forum may be a federal district court or the FTC. The existence of three potential plaintiffs and two potential forums has not created many confusing or inconsistent results. Rather, this diversity appears to promote more effective enforcement of the laws. Different parties and forums have different concerns, for example, a private party and the Department. Only in very rare instances must courts thus be concerned that their actions will create a serious conflict with another branch.

A fifth possible justification for judicial deference is to reduce the federal courts' already overloaded docket. Courts may invoke agency jurisdiction for reasons similar to those behind requiring exhaustion of administrative remedies.[85] This approach seems not only shortsighted, but also unproductive. The real source of overcrowded dockets today is diversity jurisdiction.[86] Transferring cases from courts to agencies thus can have only a very minimal impact on the judicial docket—especially where potential judicial review of administrative action exists. Finally, administrative cases raise inherently federal questions; accordingly, they should receive more favorable treatment than diversity cases.

Still another rationale for agency jurisdiction might be that agencies are presumably more democratic than courts because they report directly to elected officials in the Congress or the Executive. Although agencies probably are more responsive than courts to the public's will, the distinction is one of degree rather than kind. After all, the Executive has the initiative in nominating all federal judges, and the Congress has the final power in confirming them. Pragmatically, both courts and agencies are insulated to varying degrees from direct popular pressure, since neither is subject to direct elections—an obviously desirable situation in adjudicatory matters. Nevertheless, the greater isolation of the courts militates toward expanding, rather than contracting, their role in adjudicatory matters.[87]

84. *E.g.*, 47 U.S.C. §§ 307(a), 309(a) (1970).

85. *See* Public Util. Comm'n v. United States, 355 U.S. 534, 539 (1958).

86. For a proposal simply to abolish diversity jurisdiction, see H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 139 (1973).

87. Indeed, this separation of adjudicatory and policymaking functions is precisely

A seventh and final justification for agency jurisdiction goes to remedial power in two ways: first, that agencies are more competent than courts in fashioning relief for broad classes, and second, that the legal system cannot tolerate different results from different forums. The question of agency competence in remedial matters rests upon basically the same assumptions as the "expertise" rationale discussed above.[88] These considerations are just as questionable in this context. Moreover, the courts have developed increasingly flexible powers since *Abilene*.[89] As the Supreme Court itself has noted,[90] the availability of Supreme Court review prevents wildly varying lower federal court standards. As with the expertise justification, a court therefore should not defer unless an agency shows that it is peculiarly qualified to administer relief in a particular case.

The second part of this justification—the danger of inconsistent results by courts and agencies—is also subject to question. The amount of inconsistency might be extremely small and easily tolerated,[91] and in at least some instances the legal system already does accept different results by courts and agencies.[92] To be sure, conflict between agency and court decisions should be minimized. In some situations, however, a court may act without danger of real conflict even though an agency has acted or may act.

A court should be free to award damages where an agency can give only prospective relief.[93] A court should also be free to impose liability for conduct which an agency has not immunized or has not immunized retrospectively.[94] In both cases, court action is necessary to insure a complete and adequate remedy for the plaintiff. Although a court's award of damages would conflict in principle with an agency's grant of

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what former CAB Chairman Hector, as well as many other commentators, urged. *See* Hector, *Problems of the CAB and the Independent Regulatory Commission*, 69 YALE L.J. 931, 953-57 (1969).

88. *See* text accompanying notes 66-73 *supra*.

89. Note the example of class actions, as discussed at notes 15, 16 and accompanying text, *supra*.

90. Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 290-91 (1922).

91. Convisser, *supra* note 14, at 325, argues that there is no inherent reason why inconsistent court and agency judgments could not peacefully co-exist, and that the actual chance of inconsistency is comparatively small.

92. *See* Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 549-50 (1963). As Sovern aptly points out, the NLRB and the federal courts often decide similar issues as to employees' rights.

93. In *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199, 213-18 (D.N.J. 1951), the court held that it could award treble damages in an antitrust suit, since the CAB could not act retrospectively.

94. In *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 220-22 (1966), the Court held that although a case had to be referred to the Federal Maritime Commission for an initial decision, a grant of immunity would not be retroactive and that the district court should retain jurisdiction to adjudicate any antitrust violations occurring before the Board's immunization.

immunity, a firm cannot reasonably expect immunity until it has secured all necessary formal authorization.[95] Finally, a court should maintain jurisdiction where agency action is speculative for any reason—for example, where the agency may decide not to act,[96] the agency may lack an appropriate procedure,[97] or the agency is involved in general rulemaking on the subject.[98] Indeed, courts should separate out administrative questions and retain jurisdiction over judicial issues as well as ultimate relief.[99] A court thus should require an agency to show specific areas of potential conflict among remedies.

In utilizing these seven possible considerations, a court must use a procedurally fair means to develop necessary data. As will be discussed later,[100] a court should request an agency to give detailed and specific reasons as to why it should have jurisdiction. A court also should insure that all interested parties know of any agency recommendation and receive a full opportunity to comment on it.

These general considerations as to judicial deference are complex and often divergent. It simply is impossible to create any simple checklist to guide courts, agencies, or parties. Nevertheless, courts should retreat from their sometimes blind adherence to general precepts like "expertise" and "uniformity." Rather, courts should make a detailed and independent inquiry into each factor's applicability.

B. *Specific Situations in Which Judicial Action may not be Appropriate*

As noted at the beginning of this Section, a court's decision to defer should be based not only on the general considerations of court/agency relations, but also on the specific situation before the court. Although it is impossible to create pigeonholes, it nevertheless is useful to distinguish some of the most common—and commonly confused—situations. The

95. For a discussion of whether a firm actually must have secured approval from an agency in order to be immunized, see text accompanying notes 46-48 *supra*.

96. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Court thus noted that any conflict between an injunction to interconnect gas lines and a possible future FPC order would be decided "as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it." *Id.* at 377. See also World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007, 1011 (1st Cir. 1965).

97. *See* Rosado v. Wyman, 397 U.S. 397, 405-06 (1970); Local 139, Amalgamated Meat Cutter & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 687 (1965).

98. *E.g.*, Nader v. Allegheny Airlines, Inc., 512 F.2d 527, 544-46 (D.C. Cir. 1975), *rev'd* 44 U.S.L.W. 4803 (1976). The court of appeals there emphasized the fact, however, that plaintiff's general interests already were well represented in the rulemaking proceeding. Presumably if a party did not have such effective representation, a court would be less willing to defer.

99. This is generally the case with true primary jurisdiction. See text surrounding note 122 *infra*.

100. See text accompanying note 159 *infra*.

following analysis thus categorizes situations on the basis of the type of jurisdictional issue involved.

1. Judicial Interpretation of Statutory Exemptions

The most common and convenient method of removing judicial jurisdiction is simply a statute barring actions against an industry or group of industries. This situation arises most frequently in the context of the antitrust laws, since treble damages or divestiture have the greatest potential impact upon the industries which federal agencies regulate. To be sure, statutory exemptions exist for causes of action other than antitrust violations. But precisely because of the antitrust laws' potential impact,[101] most exemptions focus on the antitrust laws.[102]

Because of the powerful policy forces at work, any analysis of statutory exemptions must employ broad standards. First, the clarity of an exemption's language is obviously important. Although courts always have been ingenious at twisting statutory language to make sense, statutes can nevertheless compel irrational results if clearly expressed. Certainly, the Court has given lip-service to a presumption against implied repeals ever since *Abilene*.[103] But at the same time, under the "pervasive regulation" theory,[104] it has been willing to imply repeals quite readily. Although a court should honor the clear intent of a coordinate branch, it need not display absolute fealty. Where a statutory provision is at all ambiguous, a court should construe it against the drafter.[105]

Assuming that statutory language leaves room for judicial construction, as it practically always does, a second consideration should be the potentially detrimental impact of the challenged conduct. In considering this question, however, a court should look not to the general activity of the firm or industry in question, but rather to the particular conduct at issue. As the Court itself has recognized,[106] a statute sometimes immunizes an organization's existence but not all its activities. In examining the potential harm of challenged conduct, a court should attempt to pinpoint the precise danger to consumers, other firms, and overall social interests, such as the introduction or promotion of new technology. A court should be particularly sensitive to any possibility that conduct will reduce the number of firms in a field, in light of the

101. *See* United States v. Borden Co., 308 U.S. 188, 199-200 (1939).
102. Walden, *Antitrust in the Positive State*, 41 TEXAS L. REV. 741, 767-88 (1963).
103. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907).
104. See text accompanying notes 37-39 *supra*.
105. *See generally* Schwartz, *Legal Restriction*, *supra* note 28, at 437.
106. In *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466-70 (1960), the Court held that although the Capper-Volstead Act, 7 U.S.C. § 291 (1972), allowed agricultural producers to form otherwise illegal trade associations, it did not authorize them to engage in other illegal activities.

national commitment to preservation of atomistic industries.[107] Moreover, a court should examine not just the potential dangers, but also the past activities of a firm or industry. Although conduct may seem comparatively innocuous, a page of history may show that it has been used improperly in the past.

On the other hand, a third consideration in a court's assessment of the applicability of a statutory exemption is whether the allegedly illegal conduct is essential to some supervening public interest. Manufacturers may need to be free to exchange price information about anti-pollution equipment, for example, in order to expedite adoption of more effective devices;[108] or mergers of competing railroads may be essential in order to guarantee efficient service.[109] Although the antitrust laws are organic in nature, a more recently expressed public policy can override them. And in attempting to establish a particular conduct's potential benefits as well as detriments, a court should not just make predictions. Once again, it should examine any available data on past experience with the industry and the conduct. If a firm or industry has abused its exempt status in the past, a court should be hesitant to extend an exemption.

Another consideration is whether any agency has jurisdiction over the firm or industry in question. Congress often creates a new regulatory agency or vests new jurisdiction in an existing agency at the same time that it grants a statutory exemption. And although an agency's standards probably will differ from those of the antitrust laws, an agency nevertheless offers some protection to the public interest. The mere existence of an agency, however, does not militate in favor of an exemption. A court should examine an agency's power and willingness to enforce its version of the public interest. Although this inquiry requires examination of an agency's policies and attitudes, some courts have done so.[110] A court thus should deal not with generalities, but rather with the experience of the agency.

2. Immunization of Conduct Through Agency Approval

Because agency immunizations are similar to statutory exemptions,[111] most of the considerations relevant to the latter also apply to the former.

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107. The leading case for this proposition, of course, is *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). But since *Brown* the Court has expanded the scope of this policy even further, by preventing conglomerate mergers or mergers of even vaguely potential competitors. *See* FTC v. Proctor & Gamble Co., 386 U.S. 563 (1967).

108. *See* R. POSNER, ANTITRUST 319-20 (1974).

109. *See* Phillips, *Railroad Mergers: Competition, Monopoly, and Antitrust*, 19 WASH. & LEE L. REV. 1, 14 *et seq.* (1962).

110. *See, e.g.*, United States Alkali Export Ass'n v. United States, 325 U.S. 196, 205-07 (1945); McCleneghan v. Union Stock Yards Co., 298 F.2d 659, 669-70 (8th Cir. 1962).

111. *See* text accompanying notes 8-10 *supra*.

A court therefore must parse the language of an agency's enabling statute in order to determine whether the agency has immunization power in the first place. There is clearly little benefit in allowing an agency to order immunization if the agency lacks the necessary power in the first place. And in deciding whether an agency has immunization power, a court also should consider the other factors relevant to statutory exemptions—*i.e.*, impact of the conduct, social need for the conduct, and competence of the agency to police the public interest. A court should weigh overall benefit and detriment just as in the statutory exemption situation. In both cases, freedom from liability is the result of a theoretically reasoned and open legislative process. To be sure, agencies may devote more study to their decisions and may be subject to less pressure. These differences are not only impossible to document, however, but also are probably de minimis. On the other hand, many judges are quite aware when an agency has been "captured,"[112] and in such cases a court obviously may scrutinize an immunization rather closely.

Even if an agency has the authority to immunize the challenged conduct, a firm should be expected to make a reasonable attempt to secure the agency's formal approval. Both courts and commentators are divided over this question. Some maintain that a firm must have received approval, while others feel that an agency should be free to grant retroactive immunity.[113] Although each position has merit, there is a middle ground: holding firms to a "reasonable corporation" standard. A court thus should require a firm to have secured formal agency action where a firm knew or should have known that it needed to apply for approval. A court thus might excuse a small firm which has limited legal resources and operates in an unclear area of the law, while it might impose a far stricter standard on a large corporation with house counsel.

As with statutory exemptions, agency immunizations raise a number of highly complex questions. No definitive guide exists for courts, agencies, or parties. Nevertheless, a court can add to the rationality of the decisionmaking process by scrutinizing the reason for an agency's or firm's action.

3. Primary Exclusive Jurisdiction

Under primary exclusive jurisdiction, a court has no power to try a case and an agency has the only authority to make an initial decision. The courts thus can intervene only on judicial review—an obviously limited role. Moreover, primary exclusive jurisdiction allows an agency to apply its own statutory standards, which may differ radically from

112. *See* text accompanying notes 71, 72 *supra.*
113. *See* text accompanying notes 46-48 *supra.*

common law or other statutory law. This is particularly true in antitrust cases, since an agency's last concern usually is to enforce competition among the firms which it regulates. To the extent that administrative and judicial legal standards differ, primary exclusive jurisdiction deprives a plaintiff of rights just as effectively as a statutory exemption or an agency immunization.[114] The only difference—and one of cold comfort to potential plaintiffs—is that the agency theoretically must consider initiating a proceeding. All too often, however, the agency's remedy is either functionally inadequate or merely prospective.

Thus, a court should first consider the impact of an agency's legal standards on the parties. As noted before,[115] a party effectively may lose all rights by being shunted into an agency. Since this amounts to a de facto negation of major statutory rights, it should not be taken lightly.[116] Therefore, a court should request an agency to show the precise legal standards applicable to a case. A court should not seek an advisory opinion on the merits of a case. But it may request an agency to set forth the applicable precedents or regulations before deciding to refer a case or issue.

Similarly, a court should consider the effect of an agency's capacity to give an effective remedy. Even if an agency applies the same legal test as a court, its inability to give an adequate remedy may effectively negate a party's rights. A court thus should inquire into the amount, type, and practicality of agency relief. A court should not send a plaintiff seeking damages to an agency which cannot award them.[117] Similarly, a party should not be forced into an agency which can award only prospective equitable relief where other relief is sought.[118] And finally, a court should examine the feasibility of potential agency relief. Although an agency theoretically may have sufficient power, as a practical matter it may be unable to act.[119] And even if an agency has appropriate remedial powers, it simply may invoke its discretion not to use them. Again, therefore, a court should scrutinize an agency's willingness as well as capability to enforce its mandate.

A third and countervailing consideration, however, is the possible social value of the challenged conduct. As in the case of statutory

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114. *See* text accompanying note 34 *supra.*

115. *See* note 28 and text surrounding notes 49, 50 *supra.*

116. Schwartz implies that primary exclusive jurisdiction is appropriate only where the agency would apply the same law as the court. *Cf.* Schwartz, *Primary Jurisdiction, supra* note 14, at 499.

117. *Cf.* Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 162 (1922).

118. *See* Schwartz, *Primary Jurisdiction, supra* note 14, at 509.

119. *See* Pan American World Airways, Inc. v. United States, 371 U.S. 296, 327-30 (1963) (Brennan & Warren, JJ., dissenting). The dissent criticized the Court for ignoring the CAB's pleas that it simply could not enforce divestiture adequately through cease and desist orders.

exemptions,[120] some supervening public interest may justify agency immunization. If this type of social value can justify negation of legal rights, presumably it also can justify limitation of such rights by forcing a party into an agency.

Finally, a court should consider the scope of judicial review on a possible appeal from agency action. A broad scope of review makes primary exclusive jurisdiction far more tolerable. It allows a reviewing court partially to correct the pro-industry biases of a "captured" agency, even though the reviewing court cannot award relief as completely as a trial court. A trial court obviously cannot be sure that another court will apply incisive review. But as courts become increasingly aware of how an agency actually operates,[121] they can at least make an educated guess as to a reviewing court's attitude.

4. Primary Jurisdiction

Under true primary jurisdiction, the court retains jurisdiction to render the ultimate decision as well as relief, refers one or more issues to the agency, and then takes the agency's action for what it deems it is worth.[122] Although true primary jurisdiction has existed for decades, a vital feature still is unclear—namely, the extent of a court's freedom to ignore an agency's decision. A court theoretically should be able to treat an agency decision merely as an advisory opinion, since the agency's role in many ways resembles that of a referee. Nevertheless, the Supreme Court appears to require the same substantial evidence rule as on judicial review.[123] Since the Court presumably has reasons similar to those behind the substantial evidence rule, such as not interfering with another body's factfinding, a court might be able to preserve broad review powers by requesting the agency merely to render a legal opinion, not to make findings of fact. This approach might convert the review into one of law, in which a court has great latitude.[124]

The first and most vital consideration in a primary jurisdiction situation is the relevance to the case of the issue which the court is considering whether to refer. The less relevant an issue, the less is the need for referral. Although the courts have developed virtually no standards for determining when an issue requires referral, a court should nevertheless examine an issue's relation to the disposition of the case. What seems at first glance to be a major question may on analysis turn out to be

120. *See* text accompanying notes 108, 109 *supra.*

121. *See* note 110 and accompanying text *supra.*

122. *See* text accompanying notes 51-58 *supra.*

123. *Cf.* General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 432-33 (1940). *See also* Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F.2d 334, 341 (1st Cir. 1970).

124. *See* Red Ball Motor Freight, Inc. v. Shannon, 377 U.S. 311 (1964).

comparatively minor or separable. And since referral delays litigation, a court should not entertain any broad presumption in its favor. Rather, a court must make this determination, on the basis of its own expertise. Since courts are experts in analysis of causes of action, only a court should determine the relevance of a particular issue. Accordingly, an agency has virtually no role to play in this decision.

A court also should weigh the need for expertise in deciding an issue, regardless of the issue's alleged relevance or irrelevance. Where an issue is within a court's traditional competence—*e.g.*, construing statutory language or settling controverted factual issues—a court should feel comparatively free to retain jurisdiction. And courts obviously have special competence in deciding issues of fundamental rights, such as the adequacy of a hearing.[125]

Furthermore, a court should consider its ability to review the agency action after a referral. A court should consider structuring a referral so that the court can review any agency decision as a question of law. To the extent that a court is able to assure itself a broad scope of future review, it can feel somewhat freer in referring an issue.

Finally, a court must be sure that an agency will render its opinion speedily and fairly. Since a referral delays litigation, a court should require an agency to assure speedy action. Similarly, a court should require an agency to demonstrate that its decisionmaking process provides adequate procedural safeguards.

True primary jurisdiction thus can be a highly effective mechanism for coordinating the skills of courts and agencies. If properly structured, a referral can draw on agency expertise and yet not impair judicial jurisdiction. Precisely for these reasons, courts should have an operational bias in favor of true primary—as opposed to primary exclusive—jurisdiction. Unless both statutory and policy considerations mandate a finding of primary exclusive jurisdiction, a court should resolve any ambiguity in favor of true primary jurisdiction.

Jurisdictional issues thus are sufficiently complex to defy the creation of a laundry list of relevant factors. Nevertheless, it is possible to separate out some issues and considerations. To be sure, the above factors are general in nature and will not yield facile decisionmaking. Nevertheless, by considering the general nature of court-agency relations and the specific nature of such situations, the relevant considerations at least may become more visible and structured.

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125. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341, 361-65 (1963); Intercontinental Indus., Inc. v. American Stock Exch., 452 F.2d 935, 941-43 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972).

III. CURRENT ADMINISTRATIVE PRACTICE AND POSSIBLE REFORM

As noted at the beginning, many commentators have done excellent analyses of the cases on "primary jurisdiction," but few have explored the pragmatic implications for agencies. Accordingly, an examination of actual agency practices appears in order—even through the quasi-empirical means of interviews with prominent agency legal staff members.[126]

At any given time, any federal agency probably is involved in comparatively few jurisdictional issues. Indeed, the Nuclear Regulatory Commission reported that it had never encountered a jurisdictional issue. Most complainants apparently attack NRC licensees by filing a complaint with the Commission and appealing any adverse agency action.[127] Other agencies indicated that they handled perhaps one or two jurisdictional questions per year.[128] Accordingly, these doctrines apparently operate on a very individualized and ad hoc basis. A court will deal with any one agency very infrequently, thus preventing development of judicial expertise. As noted in Section II, a court therefore must take care to elicit the details of an agency's regulatory program.

Agencies get notice of potential jurisdictional issues in different ways. While some have internal procedures for discovering potentially relevant cases,[129] others, such as the FCC,[130] learn only from their licensees. The

126. See Appendix for a description of the study.

127. Interview with members of Office of General Counsel, Nuclear Regulatory Commission, in Washingon, D.C., March 4, 1975. This estimate includes cases involving the former Atomic Energy Commission, since the staff members interviewed simply had been transferred from one agency to another.

The staff members were somewhat puzzled themselves as to the absence of these jurisdictional issues, although they frankly said that they never had thought about the question before. Upon reflection, they decided that the reason for the lack of these issues probably was that private parties had few if any direct causes of action against operators of reactors and other nuclear devices. Indeed, all such state remedies may be preempted under *Northern State Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1973). And they expressed absolutely no interest in assuming exclusive jurisdiction, even on the somewhat questionable assumption that the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.* (Supp. 1976), created such jurisdiction. They felt that antitrust issues should be litigated before the federal courts.

128. Interview with members of Office of General Counsel, Federal Communications Commission, in Washington, D.C., October 21, 1974 [hereinafter cited as FCC Interview]; interview with member of Office of General Counsel, Federal Maritime Commission, July 18, 1975, in Washington, D.C. [hereinafter cited as FMC Interview]. Interestingly enough, the ICC encounters dozens of jurisdictional issues every year, but has little trouble in processing them—perhaps precisely because it has lived with the problem since *Abilene* in 1907. Interview with member of Office of General Counsel, Interstate Commerce Commission, July 1, 1975, in Washington, D.C. [hereinafter cited as ICC Interview]. See text accompanying notes 12-23 *supra*.

129. SEC Interview, *supra* note 62.

130. FCC Interview, *supra* note 128; FMC Interview, *supra* note 128. Neither commission undertakes an affirmative effort to uncover cases in which it potentially has exclusive, primary, or preemptive jurisdiction. In fact, very often the first and only

SEC provides a particularly interesting illustration of internal agency monitoring. The Office of General Counsel searches appropriate trade and legal literature for potentially relevant litigation;[131] and since the Division of Corporate Finance naturally reviews all proxy, registration, and annual statements, it refers to the General Counsel's office any potentially relevant litigation.[132] The practices of the FCC and SEC thus differ radically. To a certain extent, this results from the SEC's greater access to information. At the same time, the two agencies simply differ as to their concern with intervening in relevant private litigation.[133]

Agencies also differ as to the factors which they consider in deciding whether to file in a case and assert jurisdiction. Some agencies apparently look to the comparatively abstract policy question of a case's potential impact upon their regulatory programs.[134] Other agencies appear more concerned with the effect of asserting jurisdiction upon their continuing relationships with courts.[135]

Perhaps more important, procedures for dealing with private litigants also vary from agency to agency. Some agencies will discuss filing an amicus brief with one party and never notify the opposing party.[136] Other agencies either notify both sides that they are considering a

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notice of such a case will come in the form of a request for referral or advice from a state or federal court.

131. SEC Interview, *supra* note 62.

132. Interview with member of Division of Corporate Finance, Securities and Exchange Commission, in Washington, D.C., December 4, 1974. When the Division uncovers a potentially interesting case, it either may send a memorandum or simply "hand-carry the file" to the General Counsel's Office. The Division does not have any definite guidelines as to what cases may be relevant, but has an apparently effective "general understanding in the office." *Id.*

133. Although there is a natural temptation to look for different levels of competence at different agencies, the difference in concern more likely is the result of the impact of private litigation. A lawsuit against a single television station has little effect on the FCC's more than 7,500 broadcast licensees. A lawsuit against the New York Stock Exchange, however, can affect the nation's entire financial status.

134. The SEC apparently looks to whether a case presents a new and important issue and whether the court definitely will decide the issue one way or another. It prefers to avoid "cases with substantial unresolved factual controversies" and to enter as an amicus at the court of appeals level. SEC Interview, *supra* note 62. The NLRB is "highly sensitized to the proposition that there are daily labor proceedings independent of NLRB jurisdiction" and thus at least will appear in any case with a potential conflict. Interview with members of Office of General Counsel, National Labor Relations Board, in Washington, D.C., March 4, 1975 [hereinafter cited as NLRB Interview]. One problem with this approach, a staff member noted, is that in federal district court enforcement of collective bargaining contracts the General Counsel's Office may be "notified two minutes before the hearing" and thus have to make a very speedy appearance without prior presentation to the Board.

135. CAB Interview, *supra* note 45. On the other hand, the Commission apparently feels free simply to refuse to file any kind of brief at all, where it feels that the issue is solely one of law. FCC Interview, *supra* note 128.

136. FCC Interview, *supra* note 128; CAB Interview, *supra* note 45.

filing,[137] or simply refuse to talk to either party after learning about the litigation.[138] In all agencies, however, there appears to be little or no contact between private parties and agency members.[139]

The agencies also differ substantially in the extent to which the staffs consult agency members about asserting jurisdiction. In some agencies, the staff adopts a position and files a brief without ever consulting the agency members. Indeed, the agency members may learn of the filing only when they receive copies of the brief afterward.[140] Other agencies have informal discussions between staff and members before taking any position.[141] Still other agencies make both formal and informal presentations to agency members, depending upon the nature and urgency of the case.[142]

Even though it has approved the filing of a brief, an agency often must get clearance from the Department of Justice or the Solicitor General in order to file in some courts. Several agencies reported snarls

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137. NLRB Interview, *supra* note 134. Several staff members indicated that they were "very scrupulous . . . to get the view of the other side before acting." Very often, however, they are able to do so simply by means of a telephone call—a simple procedure which usually satisfies both the agency and the private party.

The ICC has the rather interesting technique of forcing a meeting of all parties, if its staff decides that a discussion of the merits would be worthwhile. ICC Interview, *supra* note 128.

138. SEC Interview, *supra* note 62. Staff members will not talk with private parties "beyond the preliminary stage" of investigating the litigation at issue.

139. *Id.* Both staff and members of the agency attempt to discourage such contacts. This attitude apparently is unknown at the FCC. FCC Interview, *supra* note 128.

140. FCC Interview, *supra* note 128. The General Counsel's Office consults with the bureau which has primary responsibility for a day-to-day regulation of the industry in question. If the General Counsel's Office and a bureau disagree, they then take their differences to the Commission for ultimate resolution. And the staff always informs the Commission after a court actually has made a referral. The FPC follows a similar procedure. Interview with members of Office of General Counsel, Federal Power Commission, in Washington, D.C., July 15, 1975 [hereinafter cited as FPC Interview].

141. SEC Interview, *supra* note 62. The staff will circulate a memorandum outlining the proposed agency position to Commission members before drafting a final brief. Sometimes the Commission will discuss the issue and sometimes the individual Commissioners simply give their informal approval. The FMC follow a similar pattern. FMC Interview, *supra* note 128.

142. NLRB Interview, *supra* note 134. If the staff of the General Counsel's Office finds that "time is tight," they will "rush the matter down to the oral agenda of the Board." If there is not even time for this, the staff will appear in court and assert the agency's interest in the case, "but not suggest any affirmative position." When the Board is not sitting as an entity, the staff will attempt to get authorization from three individual members—a majority of the Board. As one staff member commented, it is "curiously easy to find three Board members if you really want to." And where time allows, the staff will circulate a proposed statement to the full Board and have formal discussion if the Board wants it. One staff member noted that the General Counsel's Office had considerable discretion for two reasons: first, with more than 300 briefs a year "the volume of litigation makes it impossible for the Board to review each carefully"; and second, the Office has grown to "enjoy the confidence of the Board in very great measure." *Id.*

at this point in the process when either the Justice Department or the Solicitor General disagrees with the agency position.[143]

Aside from the mechanics of filing, it is interesting to note the type of arguments which agencies make. Some agencies include fairly detailed discussions of the pragmatic and policy problems which would result if a court did not grant the agency jurisdiction.[144] This appears highly useful, since this type of information otherwise may not be available to a court. On the other hand, some agencies argue general theories of jurisdiction.[145] This approach appears to be largely an exercise in futility, since the litigants presumably brief these issues and a court certainly makes its own legal analysis. Accordingly, the former style of brief probably is more useful.

As the above review indicates, the agencies have different procedures for considering and asserting jurisdictional issues. While this diversity reinforces the conclusion that jurisdictional decisions must be highly ad hoc, it also suggests the possibility of procedural reform at the administrative level.

As the above review also indicates, there are problems in the agencies' treatment of jurisdictional issues. To be sure, the most useful change would be judicial clarification of the doctrines. In light of the doctrines' very confused nature, however, this seems unlikely.

On the other hand, there is room for minor but hopefully useful reforms in the agencies' procedures for dealing with jurisdictional issues. These changes might enable agencies to interact more effectively with courts, and improve the flow of information between agencies and courts, thus producing more reasoned judicial decisions.

First, there should be some system for informing agencies that a jurisdictional issue has been raised. Agencies thus should use discretionary means to inform courts of their interest in certain jurisdictional issues.[146] Agencies could use methods as diverse as direct mail,

143. *Id.* In some cases, the Solicitor General simply will reject the NLRB's position and either refuse to file a brief or file a brief with the NLRB's position "in a footnote." And where there is substantial disagreement among several federal agencies, the Solicitor General may file a brief and allow the NLRB to file a separate brief on its own. *See also* FMC Interview, *supra* note 128. The SEC tries to work with the Justice Department from the initial decision to file and has experienced some difficulty with the Solicitor General. SEC Interview, *supra* note 62. The FCC appears to have had a similar experience. FCC Interview, *supra* note 128.

144. *See, e.g.*, Brief for CAB as Amicus Curiae at 22-28, Nader v. Allegheny Airlines, 412 F.2d 527 (D.C. Cir. 1975), rev'd 44 U.S.L.W. 4803 (1976); Brief for SEC as Amicus Curiae at 6-20, Thill v. New York Stock. Exch., 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

145. *See, e.g.*, Motion to Intervene for NLRB at 6-9, International Bhd. of Teamsters v. Ace Enterprises, Inc., 332 F. Supp. 36 (S.D. Cal. 1971); Brief for NLRB as Amicus Curiae at 11-13, Amalgamated Ass'n of Street, Elec. R.R. & Motor Coach Employees v. Lockridge, 404 U.S. 874 (1970).

146. This suggestion ties in closely with the possibility of agency policy statements on jurisdictional issues. See discussion at text accompanying notes 160-62 *infra*.

publication in the *Federal Register*, statements in legal publications, or cooperation with bar and judiciary groups. This approach is consistent with the established view that courts should elicit agency views where potentially relevant.[147] It is impossible to describe this type of system in very precise terms, simply because the definition of a relevant jurisdictional issue is so vague. Indeed, two agencies favored this kind of approach,[148] while two opposed it,[149] thus indicating at least some agency support.

A second reform would be the creation of a uniform referral system in primary exclusive or primary jurisdiction cases. As previously noted,[150] there currently is a complete absence of standards in this area as to both the form and content of the referral order. Indeed, there often is considerable dispute about referring an issue to an agency or simply dismissing a case outright and allowing the plaintiff to commence proceedings before an agency. Dismissal seems inappropriate in a true primary jurisdiction situation.[151] But in cases of primary exclusive jurisdiction, at least some agency staffers prefer an outright dismissal on the interesting ground that it prevents any mistakes in a possible referral order.[152] Although none of the agencies seemed to have terribly strong feelings on this point, some staff members did complain about receiving incoherent or irrelevant referrals.[153]

Further, agencies should create internal clearinghouses to monitor possibly relevant litigation. It obviously is impossible to specify any one system for all agencies, since agencies differ not only as to structure and resources but also as to availability of information.[154] Nevertheless, agencies should designate staff members to review existing information and require the industries within their authority to submit more information. None of the agencies felt that this type of system was particularly essential, and one agency actively opposed the idea.[155]

The fourth, probably most important, and clearly most controversial, reform is that agencies ban ex parte contacts and allow all affected

147. *See* Rosado v. Wyman, 397 U.S. 397, 406-07 (1970). *See also* Kestenbaum, *supra* note 4, at 819-20.

148. SEC Interview, *supra* note 62; FCC Interview, *supra* note 128. The FCC staff particularly complained about the difficulty of getting relevant pleadings in a reasonable amount of time. They thought that better communications would ease this problem, since courts would understand agencies' needs better.

149. NLRB Interview, *supra* note 134; CAB Interview, *supra* note 45. Both sets of staff members thought such statements would be misunderstood.

150. *See* text accompanying notes 61, 62 *supra*.

151. *See* text accompanying note 58 *supra*.

152. ICC Interview, *supra* note 128.

153. ICC Interview, *supra* note 128; FMC Interview, *supra* note 128.

154. The very structure of the SEC insures that it receives comprehensive information about litigation activities probably relevant to it. *See* note 132 and accompanying text.

155. CAB Interview, *supra* note 45. One staff member simply felt that a clearinghouse was totally unnecessary because the agency already received sufficient notification from its regulated firms.

parties to submit written and possibly oral comments before an agency decides to assert jurisdiction. The plan would require an agency in its discretion to hold a minature oral argument before making a decision. This requirement seems only fair in light of the previously discussed outcome-determinative effect of exclusive or primary jurisdiction[156] and an agency's persuasive weight with a court. After all, if an agency asserts jurisdiction successfully, it has the same effect upon a plaintiff as an outright dismissal or at least a stay. Since no court would take such drastic action without a full hearing, an agency should apply a similar standard where its influence may bring about the same result. Given the fact that jurisdictional issues arise quite rarely,[157] this requirement would not impose an undue burden upon agencies. Nevertheless, agency personnel uniformly and bitterly opposed such a requirement. The typical reactions were that it would create a huge "hassle," add nothing to the decision process, involve pure questions of law, impinge upon the agency's litigation strategy, or generally create unnecessary work.[158] None of these reasons seems persuasive, however, in light of the comparative scarcity of jurisdictional issues. It does not seem unreasonable to ask that an agency spend several hours once or twice a year reading or listening to arguments which may affect a litigant's right to judicial relief sometimes running to millions of dollars.

Fifth, the agencies' amicus briefs should address themselves to pragmatic considerations, rather than just the general law of jurisdiction. As noted,[159] some agency briefs give courts absolutely nothing in terms of the agency's supposed expertise. If an agency indeed has sufficient expertise to justify jurisdiction, it at least should demonstrate this to a court in some detail.

Finally, agencies should promulgate general policy statements, outlining the areas in which they believe they have jurisdiction and the circumstances under which they would assert it. These policy statements would be analogous to the Justice Department's merger guidelines.[160] To be sure, these statements could hardly be any more precise than are the Justice Department's. Nevertheless, the statements at worst would let litigants know that an agency might raise a jurisdictional issue, and at best might give litigants a reasonably accurate forecast of an agency's position. The agencies did not appear to have any strong feeling on this subject at all. One agency felt that the statements would

156. *See* note 28 and text surrounding notes 49, 50 *supra.*

157. *See* text accompanying notes 126-28 *supra.*

158. One staff member rather pithily noted that "regulatory agencies are too goddamned slow as it is," and that a mini-hearing would take "three or six months to do." FMC Interview, *supra* note 128.

159. *See* note 145 and accompanying text *supra.*

160. DEPARTMENT OF JUSTICE, MERGER GUIDELINES, 1 CCH TRADE REG. REP. ¶ 4510 (1968).

be useless, because of their necessarily general nature.[161] Another agency thought the statements could be helpful, however, in at least a limited way.[162] Indeed, at least one agency already has taken action along these lines. In a *Statement Concerning Referrals of Private Litigation*,[163] the Commodity Futures Trading Commission attempted to outline in general terms the scope of its jurisdiction and the types of cases in which referral would be worthwhile. Moreover, the Commission invited courts to seek its assistance by way of amicus filings.

CONCLUSION

As noted at the outset, none of these proposals is exactly earthshaking. But the major problems lie in the substantive law, which is not likely to change in the short term. To the extent that jurisdictional determinations are somewhat ad hoc, however, better communications between agency and court will result in better judicial decisionmaking. The recommendations hopefully would improve these communications.

The law of "primary jurisdiction" has been and still is in a state of confusion. Precisely because of the partially ad hoc nature of jurisdictional determinations, judicial relief is not likely to materialize in the near future. Indeed, the Supreme Court's greatest contribution simply might be to acknowledge the highly individualized nature of its decisions. The proposed considerations discussed in Section II would lead the courts to undertake more searching inquiries as to the pragmatic bases for agency jurisdiction in each case, hopefully resulting in more reasoned, albeit more individualized, judicial decisionmaking.

The chaotic state of the law has placed the agencies in a difficult position, as shown by the diversity of methods by which they handle jurisdictional issues. Since each agency faces only a few jurisdictional problems at a time, however, no one agency has any particular incentive to search for better methods of dealing with them. The agencies thus have responded chaotically to a chaotic situation.

A combination of more rigorous judicial inquiry and more efficient agency participation would prove highly useful in deciding jurisdictional issues. To be sure, the proposals for courts in Section II and for agencies in Section III will not solve the underlying tensions between regulation and competition, agencies and courts. Nevertheless, they can go a long way toward easing an admittedly difficult situation.

161. FCC Interview, *supra* note 128. The staff member felt that policy statements could not cover the Commission's broad regulatory programs and could not take account of "unknown jurisdiction." To a certain extent, this feeling also may reflect the FCC's unhappy past experience with policy statements. *See, e.g.*, Botein, *Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation*, 6 GA. L. REV. 743, 751-53 (1972).

162. SEC Interview, *supra* note 62. The staff member expressed some fear, however, that overly specific policy statements would lead to inflexibility.

163. 41 Fed. Reg. 18471 (1976).

APPENDIX

METHODOLOGY OF AGENCY INTERVIEWS

From the beginning of the study, it seemed more profitable as well as more practicable to focus on the interaction between jurisdictional doctrines and administrative procedures. Accordingly, the author decided that at least a quasi-empirical study of agencies' internal processes was essential.

As the body of the article indicates, the study was inherently limited and unscientific. The author originally considered the possibility of distributing a questionnaire to all counsel in selected cases. The next step would have been to keypunch the responses, create an appropriate computer program, and attempt to discover conceptual trends among agency as well as private attorneys. This approach soon proved to be unfeasible, however, for two main reasons. First, the complexity of jurisdictional issues made the drafting of uniform questionnaires virtually impossible. Such a questionnaire would have been so general as to make the responses useless. On the other hand, tailoring questionnaires to specific jurisdictional issues or cases would have produced more detailed, but narrower, data.

Accordingly, the author decided to proceed by means of interviews with the decisionmaking personnel at each agency. In most cases, of course, these staff members were in each agency's office of general counsel. However, in some situations, as at the SEC and FCC, personnel in "line" operating units appeared to share responsibility and therefore also were interviewed.

Since the study obviously did not allow time to interview personnel at more than four hundred federal agencies, it was necessary to restrict the size of the sample. Accordingly, the author decided to use the independent regulatory agencies as the sample, for a variety of reasons. First, these agencies generally have been involved in more jurisdictional litigation than the executive agencies, simply because most independent bodies regulate industries where antitrust issues often arise. Second, these agencies' enabling statutes are at least vaguely similar, since most of the agencies were created at the same time and followed the model of the ICC. Finally, the number of independent agencies is small enough to make a thorough survey of them practicable.

The author initially approached each agency through its representative to the Administrative Conference of the United States. It usually was necessary to contact a number of busy agency officials in order to track down the appropriate personnel simply because of the comparative paucity of jurisdictional litigation. After making contact with the appropriate personnel, the author attempted to prepare for each interview

by reviewing all Supreme Court and all post World War II lower federal court cases involving an agency. This preparation usually was of little help. On the one hand, some staff members were so new that they could not shed any light on the agency's role in many cases. On the other hand, more senior personnel understandably tended to have somewhat foggy memories about the policy considerations behind generation-old litigation. This experience confirmed the previous decision that surveying counsel in particular cases would be useless.

Although each interview had a definite set of objectives in terms of securing information, the author did not present a formal set of questions. Instead, the author attempted to discuss each agency's general jurisdictional issues and ask specific questions as seemed appropriate. This unstructured approach ultimately was quite effective. It not only elicited fairly candid responses, but produced information about internal processes which the author previously had not realized might be relevant.

The author usually began an interview by asking agency personnel for their definition of "primary jurisdiction." This technique established the common definitional grounds necessary in light of the doctrine's previously discussed ambiguities. Indeed, almost every staff member had a different definition. This approach also created a fairly easy transition into a discussion of the staff members' dealings with the doctrine, often leading to the surprising conclusion that they actually cared very little.

This in turn led appropriately into a discussion of the agency's methods in dealing with jurisdictional issues in litigation. The author attempted to elicit very specific information, inquiring into staff members' interactions, relations between different offices and commissioners, procedures for presenting issues to agency members, methods of drafting amicus or other filings, and relations with the Solicitor General as well as the Justice Department. Discussion of specific internal procedures also gave the author an opportunity to present some seemingly useful reforms, such as special information-gathering units, issuance of policy statements, imposition of ex parte rules, and the like. Staff members appeared to react to the proposals casually and candidly, probably because no formal opinions were requested and anonymity was guaranteed.

After this formal discussion appeared to have produced maximum useful information, the author ended the interview by suggesting major reforms. Most importantly, at this point the author recommended that agencies hold miniature hearings before making any recommendation to courts. As noted in the article, this suggestion invariably provoked very negative reactions from agency employees. In fact, this suggestion

alone often provoked another round of highly productive general discussion.

The interviews varied in length from two to six hours, and follow-up telephone calls sometimes were necessary to clarify certain points or to contact previously unavailable staff members. On the whole, however, agency personnel were cooperative, helpful, and candid.

During the first few interviews the author attempted to interview between three and five staff members. This number later decreased radically; the author increasingly found not only that personnel tended to be repetitive and consistent, but also that some employees resented the suggestion that any other staff member could add further information. After the interviews at the first half-dozen agencies, the information became increasingly redundant. As indicated in the article, the agency responses tended to follow two or three separate but similar lines. Frankly, the author completed the interviews with all agencies only for the sake of having a full sample.

Although the results of the survey clearly did not rise to the level of any statistical significance, they nevertheless added a new and important dimension to the study. At the very least, they uncovered the agencies' general perceptions of and internal procedures for jurisdictional issues. Obviously enough, more interviews and formal questionnaires would add a new quantum of data. In light of the time and resources necessary to carry out these studies effectively, however, the benefit simply did not justify the cost.

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