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The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review

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I. Introduction

Within constitutional limits, Congress may create administrative agencies with adjudicatory power.[1] Congress may also define the jurisdiction of Article III courts.[2] As a result, Congress has the greatest control over the balance of power between courts and agencies. It can provide exclusive jurisdiction over a matter to one tribunal, or provide concurrent jurisdiction to both. Neither courts nor agencies can disregard these statutory boundaries.[3] In reality, however, the balance of power is more complicated. Courts and agencies may willingly relinquish adjudicatory power that is rightfully theirs in favor of the other.[4]

When a court wishes to defer to the adjudicatory authority of an agency, there are a number of legal means available, including finality, ripeness, and exhaustion. A related but less popular means of deference is the primary jurisdiction doctrine. Because it is applied infrequently, the shape of this doctrine is not fully defined. The circuit courts employ differing conceptions of primary jurisdiction,[5] utilize different factors in their analysis,[6] and apply different standards of review.[7]

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1. *See* Crowell v. Benson, 285 U.S. 22, 51 (1932) (holding that Congress may delegate fact finding authority to agencies rather than courts); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985) ("[T]he Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts."); CFTC v. Schor, 478 U.S. 833, 854 (1986) (holding that vesting the petitioner with jurisdiction over a narrow set of common-law claims does not threaten the separation of powers).

2. *See* U.S. CONST. art. III, § 1 (granting Congress the power to "ordain and establish" inferior courts); Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."); Ex parte McCardle, 74 U.S. 506, 513 (1868) (noting that the appellate jurisdiction of the Supreme Court is subject to the exceptions and regulations of Congress).

3. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

4. *See* JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 49.01 (2006) (noting that courts have discretion to apply the exhaustion doctrine and refer the case to the agency and noting that agencies may waive their jurisdiction to invoke the power of the courts to enforce administrative rulings or orders).

5. *See infra* Part II.B (comparing the Tenth Circuit's description of the doctrine with that of the Seventh Circuit).

6. *See infra* notes 99–102 and accompanying text (discussing the factors used by the various circuit courts).

7. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 750 (10th

Standard of review disputes, unfortunately, are particularly difficult to resolve. Without a statutory mandate, or a clear history of appellate practice, there is little to turn to for guidance.[8] Judges are often of little help, expressing the standard of review in a few words before addressing the merits. For the attorney contemplating an appeal, however, knowing the applicable standard is crucial.[9] First, the standard of review affects the decision whether to appeal because the likelihood of success is a function of "the nature of the error claimed and the standard under which it is reviewed."[10] Second, the review standard focuses and organizes arguments, and it provides "a shared language of appellate scope."[11]

The standard of review for primary jurisdiction in particular presents a valuable opportunity for litigants. A few circuits have yet to address the problem,[12] while others have explicitly left the issue to be decided another day.[13] In these circuits there is law to be made, and litigants may persuade the court to adopt a standard advantageous to their position.

This Note addresses the issue of the proper standard of appellate review for primary jurisdiction decisions and concludes that they should be reviewed only for an abuse of discretion.[14] In reaching this conclusion, Part II begins with a summary of the primary jurisdiction doctrine, including the development and application of the doctrine, as well as a breakdown of the current circuit split. Part III examines the two applicable review standards, namely, de novo and abuse of discretion. Part IV then analyzes the application of the doctrine and determines that primary jurisdiction decisions are best characterized as discretionary, as opposed to factual or legal. Lastly, Part V discusses analogous doctrines, which reinforce the validity of the abuse of discretion standard.

Cir. 2005) (acknowledging the circuit split over the standard of review applied to primary jurisdiction decisions).

8. *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988) (finding that, without statutory guidance or historical practices, deriving the correct standard of review is "uncommonly difficult").

9. *See* FED. R. APP. P. 28(a)(9)(B) (mandating that the appellant's brief include for each issue "a concise statement of the applicable standard of review").

10. JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 206.01 (3d ed. 2006).

11. STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.02 (3d ed. 1999).

12. *See infra* Part II.C (pointing out that the standard of review is unclear in the First, Sixth, and Seventh Circuits).

13. *See infra* Part II.C.1 (noting that the Eighth and Ninth Circuits have postponed addressing this issue).

14. *See infra* Part VI (concluding that review for an abuse of discretion fits the doctrine best).

II. The Primary Jurisdiction Doctrine

In appropriate circumstances, the primary jurisdiction doctrine provides trial courts a useful tool for advancing certain policy objectives by deferring to the decisionmaking power of administrative tribunals.[15] Specifically, it aims to promote better informed legal decisions by proper utilization of administrative expertise, and it seeks to maintain uniform treatment of a regulatory scheme by leaving critical decisions to the appropriate agency.[16] When these objectives will be furthered by its application, the doctrine allows a court to refer issues to an agency that, because of a congressional delegation of power, has special knowledge and discretion over the subject matter.[17]

The doctrine arises from a series of Supreme Court cases addressing the Interstate Commerce Commission (ICC) and its regulation of common carriers.[18] In these cases, the Court invoked the primary jurisdiction of the ICC in order to give effect to the congressional intent of the Commerce Act.[19] The application of the doctrine was tantamount to a finding of exclusive original jurisdiction in the agency.[20] As such, the doctrine probably would have been more aptly entitled the *exclusive* primary jurisdiction doctrine. Over the course of the twentieth century, however, the doctrine shifted from its original conception.[21] The primary jurisdiction analysis transformed from an entirely jurisdictional inquiry to a predominantly prudential one. By taking on a permissive quality, the doctrine now encompasses contextual

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15. *See* PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW: CASES AND COMMENTS 1244 (10th ed. 2003) ("[T]he doctrine of primary jurisdiction is more accurately described as a set of policy considerations, applied in [a] fact-specific manner, than as a collection of formulaic rules.").

16. *See* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 672 (2003) (Breyer, J., concurring) (noting the benefits of primary jurisdiction).

17. *See* Far E. Conference v. United States, 342 U.S. 570, 574 (1952) ("[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress . . . should not be passed over.").

18. *See* Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 430 (1907) (addressing an oil company's claim that it was charged an unreasonable rate for interstate shipping).

19. *See id.* at 440–41 (reviewing the Commerce Act to determine whether judicial review of shipping rates was consistent with the congressional intent of the act); Great N. Ry. Co. v. Merchs. Elevator Co., 259 U.S. 285, 290 (1922) (deciding whether an administrative rule may be interpreted by courts without interfering with the Commerce Act).

20. *See Abilene Cotton Oil Co.*, 204 U.S. at 448 (holding that a shipper must initially seek redress with the ICC for being charged an unreasonable rate).

21. *See infra* Part II.A (tracing the development of the primary jurisdiction doctrine).

considerations, such as the burden imposed on the parties, which make discretionary review more appropriate.[22]

A. Origins and Development

Primary jurisdiction finds its inception in the Supreme Court's decision in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*[23] Abilene brought suit in state court alleging that it was charged an unreasonable rate to ship goods from Louisiana to Texas.[24] Texas & Pacific Railway responded that the court did not have jurisdiction to hear the claim, and that, even if jurisdiction was properly vested in the court, it could not grant relief because the ICC had already accepted the rate as reasonable.[25] To resolve the controversy, the Court had to determine the effect of the Commerce Act, and its establishment of the ICC, on the jurisdiction and remedial powers of the courts—an issue of first impression.[26] The Court held that the ICC alone was empowered to hear in the first instance a claim based on the reasonableness of a carrier's rates.[27] The Court reasoned that the core objective of the Act—and one of the primary functions of the ICC—was to ensure uniformity and to prevent discrimination in the rates charged by carriers.[28] This purpose would be frustrated if courts and juries were allowed to pass judgment on established rates.[29] Without uniformity, the Court posited, the Act would become a nullity.[30]

In *Abilene Cotton*, the Court relied on a statutory requirement of uniformity to determine the jurisdiction of the courts in relation to the agency.[31] Consequently, maintaining uniformity in a regulatory scheme

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22. *See* CORA M. THOMPSON, CYCLOPEDIA OF FEDERAL PROCEDURE § 89.05 (3d ed. 1999) (stating that primary jurisdiction is a flexible doctrine to be applied at the discretion of the district court).

23. *See* Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (holding that claims based upon the reasonableness of a carrier's rates are within the primary jurisdiction of the ICC); *see* Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1042 (1964) (describing *Abilene Cotton* as the "germinal decision" in this area).

24. *Abilene Cotton Oil Co.*, 204 U.S. at 430.

25. *Id.* at 431.

26. *Id.* at 437.

27. *Id.* at 448.

28. *Id.* at 441.

29. Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907).

30. *Id.* at 441.

31. *See id.* at 446 (noting that interpreting the Commerce Act to provide concurrent, original jurisdiction would cause the Act to destroy itself).

became a persuasive reason for referring a claim to an agency in the first instance, and thus a tenet of the primary jurisdiction doctrine. Fifteen years later, in another case dealing with the ICC, the Supreme Court placed an important limit on the deference given to agencies in the name of uniformity. In *Great Northern Railway Co. v. Merchants Elevator Co.*,[32] the Court distinguished precedent following *Abilene Cotton* and maintained the jurisdiction of the lower court to hear the claim.[33]

Merchants Elevator brought suit to contest a reconsignment charge imposed when it shipped sixteen railway cars of corn from Iowa and Nebraska, through Willmar, Minnesota—where the reconsignment occurred—to the corn's final destination in Anoka, Minnesota.[34] Merchants Elevator argued that the charge should not be applied because the shipment fell within a regulatory exception.[35] Whether the exception applied, however, did not reach the Supreme Court. Rather, the question on appeal was whether the lower court had jurisdiction to hear the claim before the ICC had been given the opportunity to consider it.[36] While reaffirming that uniformity was "the paramount purpose of the Commerce Act," the Court concluded that uniformity could be maintained without first referring the issue to the ICC.[37]

The Court declared that the issue presented to the trial court by *Merchants Elevator* was one of tariff construction—purely a question of law.[38] Uniformity was not threatened because any interpretation given to the tariff by lower courts could ultimately be reviewed by the Supreme Court.[39] While holding that the lower court had jurisdiction to interpret the tariff, the Court emphasized that the language of the tariff was employed in its usual, ordinary meaning.[40] The Court explicitly stated that cases may arise in which deference to agency expertise would be necessary because of conflicting evidence, intricate facts, or words imbued with peculiar meaning.[41] Although only dicta, the reference to cases

32. *See* Great N. Ry. Co. v. Merchs. Elevator Co., 259 U.S. 285 (1922) (holding that a question of statutory interpretation, without more, does not invoke the primary jurisdiction of the ICC).

33. *See id.* at 289 (pointing out that at trial Great Northern relied on cases such as Tex. & Pac. Ry. Co. v. Am. Tie & Timber Co., 234 U.S. 138 (1914), and that the issue on appeal was whether the trial court had jurisdiction in light of those precedents).

34. *Id.* at 288.

35. *Id.* at 289.

36. *Great N. Ry. Co.*, 259 U.S. at 290.

37. *Id.*

38. *Id.* at 290.

39. *Id.* at 290–91.

40. *Id.* at 294.

41. *Great N. Ry. Co.*, 259 U.S. at 291.

requiring agency expertise laid the groundwork for what came to be another tenet of primary jurisdiction. Future cases heeded the Court's caveat and proper utilization of agency expertise became a persuasive rationale for deferring to the jurisdiction of the agency.[42]

Over the next thirty years, lower courts utilized *Abilene Cotton* and *Merchants Elevator* to develop the principle at the heart of the primary jurisdiction doctrine. The principle, as announced in *Far East Conference v. United States*,[43] is "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."[44] The underlying dispute involved the Far East Conference, an association of steamship carriers, operating under an agreement that provided two fee schedules: one schedule for shippers who agreed to contract exclusively with Conference members; and a second, higher schedule for shippers who refused to bind themselves to the Conference.[45] The United States brought suit alleging violations of antitrust laws.[46] The Conference, and the Federal Maritime Board as intervener, argued that the claim should be dismissed and reviewed initially by the Board.[47] The Court agreed, finding that utilization of administrative expertise was necessary.[48] Specifically, it concluded that the question of whether the Conference's agreement contravened the Shipping Act involved facts peculiar to the international shipping industry and a need for technical knowledge that courts generally do not possess.[49]

After *Far East Conference*, applying the primary jurisdiction doctrine is no longer equivalent to a finding of exclusive agency jurisdiction, which is a

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42. *See* Far E. Conference v. United States, 342 U.S. 570, 573–74 (1952) (quoting controlling precedent that referred the issue to the agency because it involved factual considerations unfamiliar to a judge).

43. *See* Far E. Conference v. United States, 342 U.S. 570 (1952) (holding that the lower court lacked the requisite expertise to determine whether an agreement involving carriers engaged in foreign trade complied with the Shipping Act).

44. *Id.* at 574.

45. *Id.* at 571–72.

46. *Id.* at 570.

47. *Id.* at 572; *see also id.* at 578 (Douglas, J., dissenting) (explaining that rate schedules approved by the Board and deemed compliant with the Shipping Act were exempt from the Sherman Act).

48. *Far E. Conference*, 342 U.S. at 573–74 (relying on United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932), because that case also involved the Sherman Act, the Shipping Act, and a similar dual-rate system).

49. *Id.* at 573.

marked departure from *Abilene Cotton*. This change manifests itself in the opinion in two ways. First, the Court recognized that preliminary resort to an agency may be necessary even when the legal consequences of the administrative ruling have to be judicially determined.[50] In other words, application of the doctrine may be appropriate even though the agency action will not completely resolve the case. Second, the Court provided lower courts the option either to stay proceedings while the agency action is pending, or to dismiss the proceedings entirely.[51] In this regard, *Far East Conference* presumes that the claim is originally cognizable by both the court and agency. Otherwise, dismissal would have been mandatory and the lower court would not have been able to stay the proceedings and retain jurisdiction.

Four years later, the Court decided *United States v. Western Pacific Railroad Co.*,[52] perhaps the most frequently cited opinion discussing the primary jurisdiction doctrine. In *Western Pacific*, the issue on appeal was whether the Court of Claims had properly applied the doctrine.[53] Three rail companies sued the United States for failure to pay the full amount charged for the shipment of bomb casings filled with napalm gel.[54] Having deemed the casings to be "incendiary bomb[s]," the carriers charged the first-class rate.[55] Because napalm is not self-igniting, and the fuses were not included in the shipments, the Government paid the lower fifth-class rate applicable to gasoline drums.[56] The Government argued that the higher rate was inapplicable because the casings were not "incendiary bombs."[57] Or, alternatively, if the higher rate applied, it would be unreasonable and the issue ought to be referred to the ICC.[58] The Court held that the issues of interpretation and reasonableness were matters for the Commission's initial review,[59] because the setting of rates involved various cost-allocation factors unfamiliar to the courts,[60] and because this was not purely a question of law as in *Merchants Elevator*.[61]

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50. *Id.* at 574.

51. *Id.* at 576–77.

52. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59 (1956) (holding that the lower court erred by failing to refer to the ICC the determination of the applicable shipping rate and the evaluation of the reasonableness of that rate).

53. *Id.* at 62.

54. *Id.* at 60.

55. *Id.*

56. *Id.* at 60–61.

57. *See W. Pac. R.R. Co.*, 352 U.S. at 61 (noting the Government argued that without bursters or fuses the casings lacked the "essential characteristics" of incendiary bombs).

58. *Id.* at 61–62.

59. *Id.* at 70.

60. *See id.* at 68 (finding that without such knowledge the courts would be engaging in "judicial guesswork").

61. *See id.* at 69 (explaining that the interpretation and reasonableness of the tariff were

In so holding, the Court set forth the basic primary-jurisdiction analysis. It first declared that "[n]o fixed formula exists for applying the doctrine of primary jurisdiction."[62] It went on to say, however, that "[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."[63] Referring to *Abilene Cotton* and *Far East Conference*, the Court defined the purposes of the doctrine as the uniformity achieved when the agency initially reviews certain administrative questions and the proper utilization of the special knowledge and expertise of agencies.[64] Continuing its departure from *Abilene Cotton*, the Court in *Western Pacific* made the doctrine more sensitive to the particular litigation at hand. If no fixed formula exists, then applying the doctrine cannot simply be a matter of statutory interpretation, as it was in *Abilene Cotton* and *Merchants Elevator*. It must involve some contextual analysis.

The Court added a third, albeit less prominent, consideration to the primary jurisdiction analysis in *Ricci v. Chicago Mercantile Exchange*[65]—whether the adjudication of the issue by the agency will materially aid the court.[66] Similar to *Western Pacific*, the question on appeal was whether the circuit below had properly stayed the proceedings in order to invoke the primary jurisdiction doctrine.[67] The issue arose out of Ricci's complaint that the Chicago Mercantile Exchange revoked his membership without notice or a hearing in contravention of the Exchange's rules and the Commodity Exchange Act (CEA).[68] Ricci further alleged that the Exchange's actions were part of a conspiracy to restrain his business in violation of the Sherman Act.[69]

The Court held that the Commodity Exchange Commission should first decide whether the revocation violated the Exchange's rules or the CEA.[70] The Court reasoned that such prior administrative action would assist the judiciary

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"so intertwined that the same factors [were] determinative on both issues").

62. United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

63. *Id.*

64. *Id.*

65. *See* Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973) (holding that the court of appeals properly ordered a stay of the proceedings pending the Commodity Exchange Commission's determination of whether the Chicago Mercantile Exchange violated the Commodity Exchange Act when it revoked Ricci's membership).

66. *See id.* at 302 (listing the three related premises on which the judgment rested).

67. *Id.* at 290.

68. *Id.* at 290–91.

69. *Id*; *see* Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)) (prohibiting the formation of monopolies and any contract or conspiracy to restrain trade).

70. *Ricci*, 409 U.S. at 302.

regardless of the outcome.[71] On the one hand, if the Commission found that the Exchange violated either its rules or the CEA, then any need for judicial consideration of the antitrust issues would disappear.[72] On the other hand, if the Commission found the revocation to be valid, then the lower court would be better positioned to make an informed and precise determination whether the CEA provided antitrust immunity for the alleged conduct.[73] The Court emphasized that it was not deciding whether the Commission had authority to hear the antitrust issue, but that it was simply utilizing a specialized agency to determine the facts and interpret the relevant agency rules.[74]

The application of primary jurisdiction in *Ricci* represents the culmination of the doctrine's development. Most notably, *Ricci* makes clear that primary jurisdiction is not actually jurisdictional. Unlike earlier cases, the *Ricci* Court explicitly refused to make a final jurisdictional determination. The Court stated: "We need not finally decide the jurisdictional issue for present purposes, but there is sufficient statutory support for administrative authority in this area that the agency should at least be requested to institute proceedings."[75] Under this conception, although it does not appear that the agency need have jurisdiction at all, primary jurisdiction is most appropriately applied in cases where the court and agency share original jurisdiction. As a result, the doctrine has become apposite in more circumstances, and its use turns more on whether its application is wise than whether it is legally required.

Reiter v. Cooper[76] is the most recent Supreme Court case addressing the primary jurisdiction doctrine in a substantial manner.[77] Although *Reiter* does

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71. *See id.* at 307–08 (noting the benefits of each of the possible administrative rulings).

72. *See id.* at 306 (stating that if the Commission rules in favor of Ricci, "the immunity issue will dissolve").

73. *See id.* (stating that the agency could "prepare the way" for the court).

74. *Id.* at 307.

75. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304 (1973).

76. *See* Reiter v. Cooper, 507 U.S. 258 (1993) (holding that, when a carrier sues to collect its fees and the shipper argues in response that the rates are unreasonable, whether a court may proceed directly to judgment or must wait for the ICC to rule on the reasonableness depends on the equities of the case). In *Reiter*, Cooper was the bankruptcy trustee for Carolina Motor Express (CME), a certified carrier regulated by the ICC. *Id.* at 261–62. Reiter and California Consolidated Enterprises (CCE) had negotiated with CME for shipping rates below those filed with the ICC. *Id.* When CME went bankrupt, Cooper initiated proceedings to collect the difference between the rates paid and the rates filed. *Id.* at 262. Reiter and CCE then asserted two counterclaims: (1) that charging more than the agreed-upon rate was an "unreasonable practice" under the Interstate Commerce Act; and (2) that the rates as filed were unreasonably high. *Id.* at 261. In response to these counterclaims, Cooper argued that they were within the primary jurisdiction of the ICC. *Id.* at 268. The Court held, however, that the counterclaims did not have to be referred to the ICC before the lower court could enter judgment on Cooper's original claim for undercharges. *Id.* at 269.

77. *See* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 673–74 (2003) (discussing

not alter the primary jurisdiction analysis, it provides a helpful explanation of the procedure underlying the doctrine. The Court explained that once an issue is found to be within the special competence of an agency, the primary jurisdiction doctrine allows a "referral" of that issue to the agency.[78] The Court clarified that the issue remains within the power of the court to adjudicate and that a referral does not deprive the court of its jurisdiction.[79] In addition, the Court reaffirmed the notion from *Far East Conference* that once primary jurisdiction is invoked, the lower court has discretion to dismiss the action pending an administrative ruling.[80] Or, if such dismissal would be unfair to one of the parties, the court may retain its jurisdiction.[81] For a more detailed analysis of the contemporary application of the doctrine, one must turn to the circuit courts.

B. Current Application

The opinion of the Tenth Circuit in *Southern Utah Wilderness Alliance v. Bureau of Land Management*[82] provides a useful illustration of a recent application of the doctrine, as well as an acknowledgement of the split in the circuits over the appropriate standard of review.[83] Southern Utah Wilderness Alliance (SUWA), an environmental protection group, brought suit against three county governments in southern Utah to halt construction on various roads located on federal lands managed by the Bureau of Land Management (BLM).[84] SUWA also brought suit against the BLM alleging that it had violated its duties by allowing the construction to commence.[85] The BLM filed cross-claims against the counties for trespass and degradation of federal property.[86] In response, the counties argued that the

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primary jurisdiction only in the concurring opinion of Justice Breyer); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 381 n.8 (1999) (referencing primary jurisdiction once in a footnote); Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 366–67 (1994) (citing the doctrine briefly but failing to invoke it as the parties did not brief or argue the issue).

78. *Reiter*, 507 U.S. at 268–69 (describing the referral process).

79. *Id.* at 268.

80. *Id.* at 268–69.

81. *Id.*

82. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735 (10th Cir. 2005) (holding that the BLM did not have primary jurisdiction to determine whether county governments had valid rights-of-way to conduct construction activities on federal land).

83. *See id.* at 750 (pointing out that, like the Fourth and D.C. Circuits, it reviews primary jurisdiction decisions for an abuse of discretion while other circuits review such decisions de novo).

84. *Id.* at 742.

85. *Id.*

86. *Id.* at 742–43.

construction activities were lawful because of sixteen rights-of-way granted by Congress in the Mining Act of 1866.[87] The district court concluded that the BLM should determine initially whether the counties did in fact have valid rights-of-way, and whether the construction activities fell within the scope of those rights-of-way.[88] As such, the district court stayed the proceedings and referred the issue to the BLM, which then conducted an informal adjudication.[89] At the conclusion of the adjudication, the BLM determined that the counties were entitled to only one right-of-way and that they had exceeded the scope of that right-of-way.[90] SUWA then returned to the district court to enforce the BLM's conclusions, which the court affirmed as supported by substantial evidence.[91] One of the threshold issues the Tenth Circuit confronted on appeal was whether the district court erred by treating the result of the adjudication as final agency action under the Administrative Procedure Act (APA).[92] In order to resolve this issue, however, the court first had to address the question of whether the claim should have been referred to the BLM in the first place.[93]

Before tackling these issues, the Tenth Circuit provided a thorough discussion of the primary jurisdiction doctrine.[94] It first stated that primary jurisdiction is a prudential doctrine arising in cases where Congress has placed an issue within the "special competence" of an agency.[95] The doctrine serves two purposes, promoting both regulatory uniformity and resort to agency expertise,[96] and it allows a court to stay judicial proceedings pending appropriate administrative action.[97] Such a description is generally in accord with how other circuits have defined primary jurisdiction;[98] however, the circuits have diverged on additional considerations. Some circuits have taken

87. *S. Utah Wilderness Alliance*, 425 F.3d at 740, 743 (citing the Mining Act of 1866, *codified* at 43 U.S.C. § 932, *repealed by* the Federal Land Policy and Management Act of 1976).

88. *Id.* at 743.

89. *Id.*

90. *Id.*

91. *Id.* at 743–44.

92. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 750 (10th Cir. 2005) (noting that if the referral to the BLM was in fact a primary jurisdiction referral, then the district court was limited to reviewing for substantial evidence).

93. *Id.* at 751.

94. *Id.* at 750–51.

95. *Id.* at 750 (quoting United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)).

96. *Id.* at 751 (citing *Abilene Cotton* and *Far East Conference*).

97. *S. Utah Wilderness Alliance*, 425 F.3d at 750–51.

98. *See, e.g.*, United States v. Haun, 124 F.3d 745, 750 (6th Cir. 1997) (describing briefly the primary jurisdiction doctrine).

into account some or all of the following in addition to the twin aims of the doctrine: the benefit to the court of an agency determination;[99] the burden on the parties of withholding judicial relief;[100] the need to maintain the proper working relationship between courts and agencies;[101] and the desire to avoid potential interference with an agency's performance of its statutory responsibilities.[102]

After generally describing the primary jurisdiction doctrine, the Tenth Circuit stated that "[a]ll of this assumes that Congress has, by statute, given authority over the issue to an administrative agency."[103] The court then reviewed the relevant legislative enactments and the historical practices under those acts, concluding that Congress had not intended the BLM to have authority to make determinations on the rights-of-way at issue.[104] Thus, the BLM did not have primary jurisdiction over SUWA's claim, and the district court had abused its discretion by deferring to the agency.[105] Because the BLM failed to meet this threshold requirement, the Tenth Circuit did not have to address other primary jurisdiction considerations.[106] On remand, the district court was to complete a plenary review of the claims, and the administrative record created by the BLM was to be admitted as evidence, not as a binding administrative decision.[107]

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99. *See, e.g.*, Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co., 358 F.3d 82, 91 (1st Cir. 2004) (considering "whether . . . agency determination would materially aid the court").

100. *See, e.g.*, Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988) (stating that a court may defer only if the benefits of agency review exceed the costs imposed on the parties); Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co., 46 F.3d 220, 223, 225 (2nd Cir. 1995) (considering "the fair administration of justice" as a factor).

101. *See, e.g.*, In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1162 (3d Cir. 1993) (stating that primary jurisdiction structures proceedings "so as to engender an orderly and sensible coordination of the work of agencies and courts"); Gen. Elec. Co. v. Nedlloyd, 817 F.2d 1022, 1026 (2d Cir. 1987) ("[T]he principal reason why such a doctrine exists is to encourage a court and agency to act in coordination with one other.").

102. *See, e.g.*, Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1376–77 (10th Cir. 1989) (finding that if primary jurisdiction applies, "the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation").

103. S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 751 (10th Cir. 2005).

104. *See id.* at 757 (noting that the long history of administrative practice under the statute reinforced the court's decision).

105. *Id.*

106. *See id.* at 751 (stating that without sufficient administrative authority over the issue, there is no need to assess uniformity and expertise).

107. *See id.* at 757 (noting that the BLM is always allowed to consider the validity of rights-of-way for its own purposes via a process called "administrative determinations").

The Seventh Circuit in *Arsberry v. Illinois*[108] took a different approach and found that there are actually two incarnations of the primary jurisdiction doctrine.[109] The court called the first incarnation the central and original form: "[I]t applies only when, in a suit involving a regulated firm but not brought under the regulatory statute itself, an issue arises that is within the exclusive original jurisdiction of the regulatory agency."[110] Under this form of the doctrine, a court must stop the proceedings and refer the issue to the agency.[111] Such a view of primary jurisdiction is in accord with the Supreme Court's opinions in *Abilene Cotton* and *Merchants Elevator*. The *Abilene Cotton* Court found that if congressional intent was to place the issue in the hands of the administrative body alone, referral was required.[112]

The second form of primary jurisdiction only muddles the doctrine, according to the Seventh Circuit, because it has nothing to do with actual jurisdiction.[113] This latter form arises when the court and agency have concurrent jurisdiction over the issue, or the agency has no jurisdiction at all.[114] It allows the court to refer the issue to an agency in order to promote the reasons underlying the primary jurisdiction doctrine, particularly utilization of agency expertise.[115] The Seventh Circuit posits that this second form is akin to the *Burford* abstention doctrine, "or cases in which

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108. *See* Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001) (holding that the lower court erred by invoking the primary jurisdiction of the Federal Communications Commission (FCC) to dismiss a claim that alleged collusive agreements between telephone companies and the state penitentiary system). In *Arsberry*, prison inmates and their loved-ones brought suit against the State for violations of state and federal law, including the Sherman Act. *Id.* at 561. The plaintiffs challenged the practice whereby each prison contracted with one phone company to provide exclusive telephone service to the inmates in exchange for fifty percent of the revenue. *Id.* The plaintiffs alleged that the rates charged were exorbitant and unreflective of the actual costs of providing the service and that the payments to the prisons amounted to "kickbacks." *Id.* at 561–62. The district court dismissed the suit, reasoning that the filed-rate doctrine (a rule forbidding a regulated entity to charge a rate other than the one filed with the agency) and the primary jurisdiction doctrine applied. *Id.* On appeal, the Seventh Circuit held, among other things, that the primary jurisdiction doctrine did not deprive the lower court of jurisdiction to hear the complaint. *Id.* at 563. First, the plaintiffs were not seeking a rate change. *Id.* Second, the FCC had no authority to approve a collusive agreement among the telephone companies. *Id.* at 564. And third, the court had no reason to believe that the FCC knew anything useful in evaluating the claim. *Id.*

109. *Id.* at 563.

110. *Id.*

111. *Id.*

112. *See* Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907) (concluding that a challenge to the reasonableness of rates must be filed with the ICC).

113. *See Arsberry*, 244 F.3d at 563 (stating that the second form "obscures the core of the doctrine").

114. *Id.* at 564.

115. *Id.* at 563.

the court has in effect appointed the agency to be a special master."[116] This view of the doctrine closely parallels the Supreme Court's application of primary jurisdiction in *Ricci*, in which the Court referred an issue to the Exchange Commission in order to utilize the Commission's expertise, not because the issue was within the Commission's exclusive power to decide.[117]

The Seventh Circuit's view of the doctrine is not unpersuasive, but its position is not widely shared among the circuits.[118] Primary jurisdiction is a court-created concept and is therefore subject to modification.[119] The Supreme Court has not obscured the doctrine, so much as refined it. Thus, this Note will treat primary jurisdiction as the Court has described it most recently,[120] and how the majority of circuits apply it: as a single doctrine suitable to a number of contexts,[121] and jurisdictional only insofar as jurisdiction is always a threshold inquiry, that is, whether the court has the power to hear the claim.[122]

C. The Circuit Split

As recently noted by the Tenth Circuit, the circuits are currently divided on the standard of review appropriate for reviewing a primary jurisdiction decision. The Third,[123] Fourth,[124] Fifth,[125] Tenth,[126] and D.C.

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116. *Id.* at 563–64.

117. *See* Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304, 307 (1973) (referring the issue to obtain the Commission's view on whether its membership rules had been violated, while declining to define the scope of the Commission's jurisdiction).

118. *Cf.* ASAP Paging, Inc. v. CenturyTel of San Marcos Inc., 137 Fed. Appx. 694, 697 (5th Cir. 2005) (unpublished opinion) (noting that primary jurisdiction is not applicable to the case at bar under either form described in *Arsberry*). *ASAP Paging* is one of the few cases outside of the Seventh Circuit applying *Arsberry*'s two forms of primary jurisdiction.

119. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it is a principle of policy . . . .").

120. *See supra* Part II.A (discussing *Ricci* and *Reiter*).

121. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) ("No fixed formula exists for applying the doctrine of primary jurisdiction.").

122. *See infra* Part IV.A (describing the analytical steps in applying primary jurisdiction).

123. *See* In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1162 (3d Cir. 1993) (declaring that a decision not to submit an issue to an agency will be reviewed only for an abuse of discretion).

124. *See* Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir. 1996) (stating that decisions regarding primary jurisdiction are reviewed for an abuse of discretion).

125. *See* Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988) (declaring primary jurisdiction to be a "flexible doctrine to be applied at the discretion of the district court").

126. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 750 (10th

Circuits[127] review for an abuse of discretion. In contrast, the Second,[128] Eighth,[129] and Ninth Circuits[130] review such decisions de novo. The remaining circuits—the First,[131] Sixth,[132] Seventh,[133] and Eleventh Circuits[134]—are unclear as to the standard they apply.

1. The De Novo Circuits

Turning first to the circuits that have explicitly applied the de novo standard, it appears that none has adequately justified its choice. Of the three, the Second Circuit is apparently the most committed to de novo review. That circuit corrected the language of an earlier opinion by declaring that "[a]lthough sometimes framed in terms of whether the district court abused its discretion . . . the standard of review is essentially *de novo*."[135] The Second

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Cir. 2005) ("This Court . . . reviews decisions regarding primary jurisdiction under an abuse of discretion standard.").

127. *See* Nat'l Tel. Coop. Ass'n v. Exxon Mobil Corp., 244 F.3d 153, 156 (D.C. Cir. 2001) (reviewing for an abuse of discretion).

128. *See* Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co., 46 F.3d 220, 222 (2d Cir. 1995) ("Although sometimes framed in terms of whether the district court abused its discretion . . . the standard of review is essentially *de novo*.").

129. *See* United States v. Henderson, 416 F.3d 686, 691 (8th Cir. 2005) ("This court appears to review primary jurisdiction de novo.").

130. *See* United States v. Culliton, 328 F.3d 1074, 1081 (9th Cir. 2003) ("Because we can affirm . . . under de novo review, we find it unnecessary to speculate further on the proper standard in these types of cases.").

131. *See* Ass'n of Int'l Auto. Mfrs., Inc. v. Mass. Dept. of Envtl. Prot., 196 F.3d 302, 303 (1st Cir. 1999) ("[T]he District Court had erred in failing to refer a number of questions to the EPA under the doctrine of primary jurisdiction."); U.S. Pub. Interest Research Group v. Atl. Salmon of Maine, LLC, 339 F.3d 23, 34 (1st Cir. 2003) ("Accordingly, a refusal in this case to make a primary jurisdiction reference prior to the state's issuance of the permit was neither a mistake of law nor an abuse of discretion.").

132. *See* United States v. Haun, 124 F.3d 745, 747 (6th Cir. 1997) (reviewing the order of dismissal de novo as a question of statutory interpretation without adopting a standard for primary jurisdiction).

133. *See* Johnson v. Artim Transp. Sys., Inc., 826 F.2d 538, 548 (7th Cir. 1987) (noting that cases may arise in which it would be "plain error" for the district court to refuse to apply the doctrine); Marseilles Hydro Power, LLC v. Marseilles Land and Water Co., 299 F.3d 643, 652 (7th Cir. 2002) ("The question whether to stay the suit is something for the district court to decide in the first instance.").

134. *See* Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1264–66 (11th Cir. 2000) (deciding that preemption was the dispositive issue and reviewing that issue under the de novo standard, while also equating primary jurisdiction with *Burford* abstention, which, the court notes, is generally reviewed for an abuse of discretion).

135. Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co., 46 F.3d 220, 222 (2d Cir. 1995)

Circuit, unfortunately, provided no further explanation or citation in support of its conclusion.[136]

The remaining de novo circuits specifically avoided addressing the standard of review issue. The Eighth Circuit in *Access Telecommunications v. Southwestern Bell Telephone Co.*[137] reviewed the district court's determination de novo at the request of the parties, who assumed that to be the law of the circuit.[138] And the Ninth Circuit, in *United States v. Culliton*,[139] stated that it could affirm the district court's decision under a de novo standard and that it took no position on what the appropriate standard should be.[140] Both the Eighth and Ninth Circuits declined to confront the issue and reasoned that it was better left to a case in which the parties actually contested it.[141]

2. *The Abuse of Discretion Circuits*

As for the abuse of discretion circuits, the amount of discussion in support of the standard of review is minimal, but more informative than the de novo

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(citations omitted).

136. *Id.*

137. *See* Access Telecomms. v. Sw. Bell Tel. Co., 137 F.3d 605 (8th Cir. 1998) (holding that a dispute over the categorization of telephonic services, and the reasonableness of that categorization, was within the primary jurisdiction of the FCC). Access Telecommunications (AT), a long distance reseller, brought suit against Southwestern Bell (SWBT) alleging that it had been overcharged for telephonic services. *Id.* at 607. In response, SWBT moved to dismiss arguing that the issues were within the primary jurisdiction of the FCC. *Id.* Although noting that AT could have filed its claim with either court or agency, the district court agreed with SWBT and dismissed the complaint. *Id.* On appeal, AT argued that there was a distinction between challenging the reasonableness of a rate—to which primary jurisdiction would apply—and challenging a violation of a rate—what AT alleged in its complaint. *Id.* at 608. The Eighth Circuit disagreed with this distinction, finding that the issue actually involved the classification of the services AT had purchased and whether that classification was reasonable. *Id.* at 608–09. This issue, the court held, was within the statutory authority of the FCC. *Id.* at 609. The court upheld the district court's decision. *Id.*

138. *Id.* at 608.

139. *See* United States v. Culliton, 328 F.3d 1074 (9th Cir. 2003) (holding that the primary jurisdiction doctrine did not bar the lower court from determining whether the defendant defrauded the Federal Aviation Administration (FAA)). In *Culliton*, the Ninth Circuit addressed the scope of the FAA's primary jurisdiction over medical certifications. *Id.* at 1076. The issue arose from Culliton's jury conviction for making false statements on a medical form. *Id.* Culliton appealed arguing that the FAA had sole authority to prosecute false statements and that the court below erroneously entertained the criminal prosecution. *Id.* at 1082. Because the court found no statutory or regulatory support for this proposition, the Ninth Circuit held that the district court properly proceeded with the case. *Id.*

140. *Id.* at 1081.

141. *Id.*; *Access Telecomms.*, 137 F.3d at 608.

circuits. The Tenth Circuit presents the clearest reasoning. It analogizes primary jurisdiction to the *Burford* abstention doctrine in support of the abuse of discretion standard.[142] *Burford* abstention arises when a federal court refrains from hearing a case and defers to the jurisdiction of a state court or agency due to a complex state regulatory scheme.[143] The objectives and application of the *Burford* abstention doctrine are quite similar to primary jurisdiction.[144] As such, it will be considered in more detail in Part V.B.

The remaining circuits are less clear in their rationale. While explaining the primary jurisdiction doctrine, the Third Circuit quotes the Supreme Court in stating that the doctrine requires "judicial *abstention* in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency."[145] The Third Circuit did not explicitly link this language to the appropriate standard of review, but the court's more recent opinions help make the connection.[146] The most probable inference is that the Third Circuit considers primary jurisdiction a type of abstention doctrine. The Fourth and D.C. Circuits, which also review for an abuse of discretion, cite to the Third Circuit without explanation.[147]

If the inferences are accurate, then the Third, Fourth, and D.C. Circuits are relying on the standard of review for abstention doctrines to provide the appropriate standard for primary jurisdiction. One problem with this approach is that the Supreme Court has not declared a single standard of review for all abstention orders,[148] and there are multiple forms of abstention.[149]

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142. *See* Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1377 (10th Cir. 1989) (citing Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943)).

143. *See* BLACK'S LAW DICTIONARY 8–9 (8th ed. 2004) (describing in general terms when *Burford* abstention is applicable).

144. *See infra* Part V.B (comparing primary jurisdiction to *Burford* abstention).

145. Cheyney State Coll. Faculty v. Hufstedler, 703 F.2d 732, 736 (3d Cir. 1983) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353 (1963)) (emphasis added).

146. *See* In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1162 (3d Cir. 1993) (citing to the portion of *Cheyney State College* in which *Philadelphia National Bank* is quoted, while stating that the district court's decision will be reversed only for an abuse of discretion); Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc., 856 F.2d 546, 549 (3d Cir. 1988) (same).

147. *See* Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir. 1996) (citing In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1162 (3d Cir. 1993)); United States v. Bessemer & Lake Erie R.R. Co., 717 F.2d 593, 599 (D.C. Cir. 1983) (citing Cheyney State Coll. Faculty v. Hufstedler, 703 F.2d 732, 736 (3d Cir. 1983)).

148. MOORE, *supra* note 10, § 22.08[2].

149. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–18 (1996) (collecting the recognized abstention cases).

Nevertheless, most circuits do in fact review all abstention decisions for an abuse of discretion.[150]

III. Examining the Review Standards

A. De Novo Review: Plenary Appellate Power

As a general matter, circuit courts have plenary authority over the final decisions of district courts.[151] This power of review promotes both doctrinal coherence and decisional accuracy because, in most cases, the fast pace of litigation forces trial judges to make determinations without "extended reflection [or] extensive information."[152] Appellate courts, in contrast, receive briefs from each of the parties who refine the issues and present detailed research and analysis.[153] The multi-judge panels of appellate courts can then engage in "reflective dialogue" and assert their "collective judgment."[154] One of the reviewing judges may be able to contribute a "fresh insight" not thought of by the trial court or counsel.[155] Or, perhaps more importantly, appellate review may prevent decisions influenced by subconscious prejudices.[156] In light of the advantages of the appellate forum, it is fitting that circuit courts are able to review the record de novo and reach an independent conclusion.[157] In cases that depart from the de novo standard, there is usually some kind of

150. *Cf.* MOORE, *supra* note 10, § 22.08[2] (finding that the Sixth, Eighth, and D.C. Circuits do not review all abstention decisions for an abuse of discretion).

151. *See* 28 U.S.C. § 291 (2000) (stating that the United States Courts of Appeals have jurisdiction over all final decisions of the District Courts). *But see* Commercial Standards Ins. Co. v. Bryce St. Apts., Ltd., 703 F.2d 904, 908 (5th Cir. 1983) ("We take this occasion to repeat: we do not sit to hear cases de novo.").

152. Salve Regina Coll. v. Russell, 499 U.S. 225, 231–32 (1991) (quoting Dan Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 923 (1989)).

153. *See id.* at 232 ("As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge.").

154. *Id.*

155. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 757 (1982).

156. *See id.* at 757–58 (referring not to the "rare cases of venality or of prejudice in its most pejorative sense, but rather [to] the subconscious mind-set from which few judges are immune").

157. *See* CHILDRESS, *supra* note 11, § 2.14 (stating that de novo review is a convenient shorthand way of saying "*independent conclusion on the record*" with "*no particular deference*" to the trial court).

justification for giving deference to the trial court.[158] For certain issues, such as the trial court's superior factfinding ability, this deference is codified.[159]

B. Abuse of Discretion Review: Degrees of Deference

When an issue is committed to the discretion of the trial court, the decision of the judge is largely insulated from review.[160] This standard provides the trial judge some leeway to be "wrong" without being reversed because the decision will be affirmed even if the appellate court would have reached a different conclusion.[161] There are several reasons why such discretion is given to lower courts. First, it promotes judicial efficiency and finality.[162] If every decision of the trial court was susceptible to easy reversal, the dockets of the appellate courts would be overwhelmed,[163] and wealthy parties might be tempted to abuse the system in order to wear down their opponents and prolong the process.[164]

Second, the question presented may not be well suited to a general rule.[165] Many issues which arise during litigation are novel, multifarious, fleeting, or they "otherwise resist generalization."[166] Therefore, "[w]hen the problem arises in a context so new and unsettled that the rule-makers do not yet know what

158. *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988) (pointing out that often the appropriate standard of review for a given issue is defined by statute or by a long history of appellate practice).

159. *See* FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

160. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 638 (1971) (stating that trial court discretion "is essentially a *review-limiting* concept").

161. *Id.* at 648–49; *see* Martha S. Davis, *Standards of Review: Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 49 (2000) ("In review of discretion, the focus of the reviewing court is supposed to be on the process used to reach the decision and not on the decision itself.").

162. *See* Rosenberg, *supra* note 160, at 660–61 (mentioning as an additional reason for trial court discretion the morale of trial judges, i.e., that searching review of every decision might be oppressive and undermine a judge's sense of dignity); Friendly, *supra* note 155, at 762 (noting that discretion extends just beyond the scope of the harmless error doctrine to prevent useless appeals where a different result is unlikely on retrial).

163. Rosenberg, *supra* note 160, at 660.

164. *Id.* at 662.

165. *Id.*

166. *Id.*

factors should shape the result, the case may be a good one to leave to lower court discretion."[167]

The third and most persuasive reason for conferring discretion on lower courts is that they are better positioned to make the determination.[168] This rationale is based in large part on the premise that the written trial record is an inherently inadequate reflection of the actual proceedings. Because the appellate judges were not there, they may be unaware of significant matters.[169] This rationale is also based on the idea of conserving appellate energies. Even when appellate judges could acquire complete knowledge of the case from the record, such knowledge may come at considerable and unjustifiable expense.[170]

The abuse of discretion standard is flexible and within its ambit there are varying degrees of deference.[171] As one commentator pointed out, "it cannot be seriously claimed that the same abuse of discretion standard is used when a judge refuses to award attorney fees to a prevailing civil rights plaintiff as when she grants a one-day continuance."[172] Sometimes appellate treatment can vary on a single issue; for example, a ruling on a motion for a new trial may be given greater weight depending on whether the motion was granted or denied.[173] The varying degrees of deference cause the abuse of discretion standard to be highly context sensitive.[174] As a general rule, the more reasons for trial court discretion are present the more likely appellate courts will accord greater deference.[175] Consequently, the best way to apply the standard to a given

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167. *Id.*

168. Rosenberg, *supra* note 160, at 662; *see* Friendly, *supra* note 155, at 783 (concluding that decisions which depend on direct contact with the litigation "merit[ ] a high degree of insulation from appellate revision").

169. Rosenberg, *supra* note 160, at 663–64.

170. *See* Pierce v. Underwood, 487 U.S. 552, 560 (1988) (pointing out that obtaining a degree of knowledge comparable to the trial judge would require review of the entire record, a task to which appellate courts are unaccustomed).

171. *See* CHILDRESS, *supra* note 11, § 4.01(C) (declaring that there is no single abuse-of-discretion standard); Friendly, *supra* note 155, at 763 (noting the conflicting definitions of the phrase "abuse of discretion").

172. CHILDRESS, *supra* note 11, § 4.01(C).

173. Davis, *supra* note 161, at 81.

174. *See* CHILDRESS, *supra* note 11, § 4.01(C) ("[D]iscretion is reviewed for whether it was abused *under the relevant considerations*."); Standards of Review Primer: Federal Civil Appeals, 229 F.R.D. 267, 294 (2005) (noting that the abuse of discretion test "has little meaning if pulled from its precise procedural setting and application").

175. *See* CHILDRESS, *supra* note 11, § 4.01(C) (stating the strength of the factors that determine the applicability of abuse of discretion, such as judicial economy or use of evidentiary facts, also weigh heavily as to the strength and scope of review within that standard).

decision is to evaluate why the decision is committed to trial court discretion in the first instance.[176]

IV. Defining the Question: Factual, Legal, Mixed, or Discretionary

As a means of determining the standard of review, most decisions of a trial court judge are placed into one of three categories: (1) questions of law, reviewed de novo; (2) questions of fact, reviewed for clear error; and (3) matters of discretion, reviewed for an abuse of discretion.[177] The mixed question of law and fact belongs in the hazy meridian between the first and second categories.[178] With regard to primary jurisdiction, the circuits are split between de novo and abuse of discretion review: No circuit has contended that clear error is the appropriate standard. It therefore seems safe to assume that the doctrine does not present a question purely of fact.[179] Discussion thus centers on the first and third categories, and the enigmatic mixed question.

In *Pullman-Standard v. Swint*,[180] the Court stated that mixed questions are ones in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or

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176. *See* Appellate Review of Trial Court Discretion, 79 F.R.D. 173, 185 (1978) (arguing that trial court discretion is unruly and that "[t]o tame the concept requires no less than to force ourselves to say *why* it is accorded or withheld").

177. Pierce v. Underwood, 487 U.S. 552, 558 (1988); *see also* Davis, *supra* note 161, at 50 (explaining that matters of discretion typically include trial supervision, conduct of the parties, and admission of evidence).

178. *See* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (noting the "vexing nature of the distinction between questions of fact and questions of law").

179. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990) (stating that the clearly erroneous and abuse of discretion standards are indistinguishable when an appellate court reviews factual findings). Thus, even if primary jurisdiction presented purely a question of fact, the debate would still boil down to a choice between some deference to the trial court and de novo review. The need for deference, however, would be much clearer.

180. *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982) (holding that whether the disparate impact of a seniority system evidenced an intent to discriminate is a question of fact subject to the clearly erroneous standard of review). In *Swint*, a group of black employees brought suit against Pullman-Standard, a manufacturer of railway freight cars, and United Steelworkers of America. *Id.* at 275. The plaintiffs alleged that the company's seniority system violated Title VII of the Civil Rights Act of 1964. *Id.* The district court found no intention to discriminate and held that the system complied with the act. *Id.* The Fifth Circuit, however, reversed. *Id.* The Supreme Court granted certiorari to address the question of whether the court of appeals was required to apply the clearly erroneous standard of review. *Id.* at 276. After reviewing four considerations useful to the determination of discriminatory intent, *id.* at 279–82, the Court held that such a finding was a pure question of fact. *Id.* at 287–88. The Court noted that the district court was not faulted with misunderstanding the definition of discriminatory intent, which would have amounted to legal error. *Id.* at 287.

to put it another way, whether the rule of law as applied to the established facts is or is not violated."[181] The Court found that its precedents support the notion that mixed questions are "independently reviewable,"[182] suggesting a de novo standard. More recently, however, the Court's approach to mixed questions has not been so straightforward. In *Pierce v. Underwood*,[183] the Court observed that determining how to approach a mixed question on appeal could be accomplished by deciding which judicial actor was "better positioned" to resolve the issue.[184] A few years later, the Court said that "the characterization of a mixed question of law and fact for one purpose does not govern its characterization for all purposes."[185] This has led some scholars to conclude that mixed questions require case-by-case analysis.[186] As a result, defining an individual question as "mixed" provides little help in determining the appropriate standard of review.

Because categorizing primary jurisdiction as a mixed question will not resolve the issue, it is helpful to turn to another category of decisionmaking, namely, matters of discretion. As noted above, the reasons for conferring

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181. *Id.* at 289 n.19.

182. *Id.*

183. *See* Pierce v. Underwood, 487 U.S. 552 (1988) (holding that the abuse of discretion standard applies to awards of attorneys' fees in cases brought pursuant to the Equal Access to Justice Act (EAJA)). Under the EAJA, the prevailing plaintiff in a civil suit against the Government is entitled to an award of attorneys' fees unless the court determines the Government's position was substantially justified. *Id.* at 556. This case arose from a settlement between Pierce, the Secretary of Housing and Urban Development, and numerous plaintiffs. *Id.* at 554–55. The District Court found that Pierce's predecessor had not been "substantially justified" in his decision not to implement a certain subsidy program. *Id.* at 555. The District Court therefore awarded attorneys' fees, and the Government appealed. *Id.* The first issue the Supreme Court addressed was the appropriate standard of review. *Id.* 557. This issue is particularly relevant to this Note because there was a split in the circuits: Some reviewed the decision for an abuse of discretion while others reviewed it de novo. *Id.* at 558. The Court held that abuse of discretion review should apply, *id.* at 562, and set forth various factors to consider when deciding whether to give discretion to the trial court. *Id.* at 559–62. There are a couple of factors which are not addressed in this Note because they are inapplicable to the primary jurisdiction doctrine. The first omitted factor is the language and structure of the governing statute. *Id.* at 559. The second omitted factor is the amount of liability typically produced by the decision. *Id.* at 563. This second factor is inapposite here because applying primary jurisdiction does not address the merits of a claim. Rather, it is a procedural doctrine, and it does not impose liability in the same way that an award of attorneys' fees does.

184. *Id.* at 559–60.

185. United States v. Gaudin, 515 U.S. 506, 522 (1995).

186. *See* CHILDRESS, *supra* note 11, § 2.18 (arguing that appellate courts should not claim "free review generally of mixed questions," but should narrow the inquiry "to the point at hand and ask[ ] whether that point requires the development and application of their law-making judgment").

greater deference on the trial court are the promotion of judicial efficiency, the inability to fashion a rule of decision, and the advantageous position of the trial judge.[187] The problem with the first justification, whether it is expressed in terms of judicial efficiency or finality, is that it provides little or no guidance as to which decisions it applies.[188] It fails to discriminate among issues that are unreviewable because the judicial system can always be streamlined by making the trial court, in effect, the court of last resort.[189] Thus, the notion of judicial efficiency is unhelpful and only the latter two reasons are worth considering here.

A. The Trial Court's Proximity to the Issues

Starting with the third justification, the question is whether the trial court is better positioned than the appellate court to make the primary jurisdiction decision. Initially, a court must determine the scope of its jurisdiction vis-à-vis the jurisdiction of the agency. If the court decides that the agency has exclusive, original jurisdiction over the matter, then the court is powerless to address it. *Abilene Cotton* exemplifies this analysis: Finding that uniformity was the key objective to the Commerce Act, the Court concluded that Congress had impliedly limited the jurisdiction of the lower courts with the creation of the ICC.[190] The inquiry was predominantly a matter of statutory interpretation, although the Court also looked to the nature of the claim and the unique demands of interstate regulation.[191]

Also at the outset, a court must determine whether Congress has placed sufficient authority over the issue into the hands of the agency. This too is predominantly a matter of statutory interpretation.[192] In *Southern Utah Wilderness Alliance*, after reviewing both statutes and historical administrative

187. *See supra* Part III.B (discussing Professor Rosenberg's analysis of when it is appropriate to confer discretion on a trial court).

188. *See* Rosenberg, *supra* note 160, at 662 (noting the inherent problem with judicial efficiency, finality, and trial-judge morale as reasons for providing trial-court discretion).

189. *Id.* at 660.

190. *See supra* Part II.A (discussing *Abilene Cotton*).

191. *See* Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440–41 (prohibiting courts from addressing claims predicated on the unreasonableness of shipping rates because, unless all courts reached identical conclusions, standards would vary among the jurisdictions and would frustrate the legislative goal of interstate uniformity).

192. S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 751 (10th Cir. 2005) ("All this assumes that Congress has, by statute, given authority over the issue to an administrative agency.").

practices, the Tenth Circuit held that the BLM did not have authority over the right-of-way issues, and therefore referral was inappropriate.[193] Looking at *Abilene Cotton* and *Southern Utah Wilderness Alliance* together, nothing in the analyses of the Supreme Court or Tenth Circuit suggests that the trial judges were more qualified to make the decisions or that the records hindered the quality of the appellate deliberations. Moreover, decisions that define the outer bounds of court and agency authority carry law-clarifying benefits—the benefits of appellate review the Court noted as important in *Pierce*.[194] Thus, the first step in the primary jurisdiction analysis fails to justify increased deference to trial judges due to their proximity to the issues. This is an uncontroversial conclusion considering that jurisdictional questions are invariably reviewed by appellate courts de novo.[195]

The second step in the primary jurisdiction analysis, in contrast, is more complicated. Here, the court must evaluate whether the purposes of the doctrine will be furthered by its application to the particular case.[196] The most important factors to consider are the core aims of the doctrine: maintaining regulatory uniformity and utilizing agency expertise. The circuits are divided as to what other factors are relevant.[197] Two factors, however, find support in Supreme Court precedents: the aid to the court of an administrative decision[198] and the burden on the parties caused by referral.[199] In terms of which decisionmaker is better positioned to weigh these factors, it appears that only the last one is sufficiently fact sensitive to justify increased deference to the trial judge. But, this last factor is so unique that it may, by itself, demand trial court discretion. The following paragraphs consider each factor in turn.

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193. *See supra* Part II.B (discussing *Southern Utah Wilderness Alliance*).

194. *See* Pierce v. Underwood, 487 U.S. 552, 561 (1988) (pointing out that with the particular kind of issue at bar, the appellate decision would not produce the "law-clarifying benefits" normally attendant review of questions of law).

195. *See* MOORE, *supra* note 10, § 206.08 (finding that the standard of review is de novo for jurisdictional issues).

196. *See* United States v. W. Pac. Ry. Co., 352 U.S. 59, 64 (1956) ("[T]he question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.").

197. *See supra* notes 99–102 and accompanying text (listing various factors used by the circuit courts).

198. *See* Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 302 (1973) (listing the three premises on which the Court rested its judgment).

199. *See* Reiter v. Cooper, 507 U.S. 258, 268–69 (1993) (stating that a district court may dismiss the proceedings only if the parties would not be unfairly disadvantaged); Rosado v. Wyman, 397 U.S. 397, 406 (1970) (finding primary jurisdiction inapplicable because the agency lacked the appropriate procedures to address the petitioner's claim).

1. Maintaining Regulatory Uniformity

If the need to maintain regulatory uniformity is a spectrum, then the original primary jurisdiction issue—the reasonableness of rates charged by interstate carriers—is at the most demanding end.[200] The more the issue at bar departs from that guidepost, the less this factor weighs in favor of a referral to the agency. Specifically, a judge must look for the possibility that various courts addressing the same regulatory issue will reach disparate results, and the degree such results will undermine the regulatory scheme. Because this determination typically depends on the plaintiff's cause of action,[201] the regulatory scheme implicated,[202] and the type of relief sought,[203] facts specific to the litigation are involved. But, the facts important to these considerations probably can be gleaned from the pleadings alone, thereby putting appellate courts on an equal footing with trial courts.

The Fifth Circuit in *Wagner & Brown v. ANR Pipeline Co.*[204] provided a helpful and concise example of this analysis.[205] The court first noted that numerous district courts had reached conflicting conclusions as to whether take-or-pay clauses in producer-distributor contracts violated the price ceilings of the federal Natural Gas Policy Act.[206] In addition, some district courts had

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200. *See supra* note 23–31 and accompanying text (discussing the Court's rationale in *Abilene Cotton*). It is the most demanding because it resulted in complete abrogation of the court's original jurisdiction.

201. *See* United States v. Henderson, 416 F.3d 686, 691 (2005) (finding that primary jurisdiction was inapplicable because the defendant was charged with lying to the Social Security Administration, which had nothing to do with eligibility for benefits or any other area of agency discretion).

202. *See* Taffet v. Southern Co., 930 F.2d 847, 854 (11th Cir. 1991) (reasoning that primary jurisdiction does not justify referral to a state agency).

203. *See* Arsberry v. Illinois, 244 F.3d 558, 563 (2001) (holding primary jurisdiction inapplicable because the plaintiffs did not seek a rate change; instead, they sought to nullify a contractual arrangement on equitable grounds).

204. *See* Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199 (5th Cir. 1988) (holding that a dispute that turned on whether payments under a "take-or-pay" clause were a component price of gas fell within the primary jurisdiction of the Federal Energy Regulatory Commission (FERC)). ANR was a natural gas distributor that had contracted with Wagner & Brown (W&B), a producer. *Id.* at 200. Under the terms of the contract, ANR agreed to a "take-or-pay" clause whereby ANR was obligated to purchase 75% of the gas that W&B produced. *Id.* W&B brought suit when ANR failed to take, or pay for, the required volume for several successive years. *Id.* at 200–01. The district court dismissed W&B's complaint, finding that controlling issues were within the primary jurisdiction of the FERC. *Id.* at 201. The Fifth Circuit affirmed the district court's order because it found that uniformity and expertise favored deferral. *Id.*

205. *See id.* at 202 (discussing the considerations of uniformity when applying the primary jurisdiction doctrine).

206. *Id.*

deferred to the primary jurisdiction of the Federal Energy Regulatory Commission (FERC), while others had not.[207] The court reasoned that, because the interstate market for gas is regulated under one act of Congress, the "patchwork solution" the courts could provide, even with appellate review, was insufficient.[208] The problem required a "uniform resolution."[209]

In addressing the primary jurisdiction consideration of uniformity, the Fifth Circuit required few case-specific facts. The determination neither turned on the identity of the litigants nor the credibility of the evidence. As a result, it appears the record on appeal was adequate and the appellate judges would not have benefited from direct observation of the litigation. This first factor, then, weighs against increased deference to the trial judge.

2. Utilizing Agency Expertise

Turning to the second core purpose of primary jurisdiction, a court must consider whether the issue is "within the conventional experience of judges."[210] With this factor, the Supreme Court has provided some guidance as to the nature of the inquiry. In *Merchants Elevator*, the Court stated that resort to "a body of experts" would be appropriate when the issue involves "voluminous and conflicting evidence," intricate facts, or words used with a "peculiar meaning."[211] Whether these are characteristics of the particular litigation seems, at first blush, a decision for the trial judge. It is undisputed that trial judges are accorded great deference with regard to the handling of evidence[212] and the marshalling of facts.[213] And whether words are imbued with something other than their conventional meaning is comparable to a finding of custom or intent, which is also considered a finding of fact.[214] By directly overseeing the

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207. *Id.*

208. *Id.*

209. *Wagner & Brown*, 837 F.2d at 202.

210. Far E. Conference v. United States, 342 U.S. 570, 574 (1952).

211. Great N. Ry. Co. v. Merchs. Elevator Co., 259 U.S. 285, 291 (1922).

212. *See* CHILDRESS, *supra* note 11, § 4.02(A) (stating that evidentiary matters are committed to the discretion of the trial court).

213. *See* FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . .").

214. *See* Pullman-Standard v. Swint, 456 U.S. 273, 287–88 (1982) (holding that whether an employer had an intent to discriminate on the basis of race was a pure question of fact, not a question of law, or even a mixed question of law and fact); *see also* CHILDRESS, *supra* note 11, § 2.23 (finding that "even contract interpretation is a question of fact under Rule 52 when extrinsic evidence, such as the parties' intent, is considered").

admission of evidence, one might argue, the trial judge is better able to determine whether the evidence is sufficiently conflicting, the facts sufficiently intricate, or the language sufficiently idiosyncratic to warrant referral to the agency.

But this argument may assume too much. Just because the trial judge is insulated from review on his findings of fact, e.g. that the evidence is conflicting, does not mean that he is insulated from review on his legal conclusions drawn from those findings, e.g. that the facts are sufficiently conflicting to justify referral. Under the guidance of *Merchants Elevator*, the expertise factor is best categorized as a mixed question of law and fact, that is, whether the established facts satisfy the appropriate legal standard.[215] As a result, the considerations set forth in *Merchants Elevator* may not point toward defining primary jurisdiction as a matter of discretion.[216]

The Court's language in *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*[217] cuts further against deferential review of the expertise factor. In that opinion, the Court discussed what it termed "almost [a] classic case for engaging the doctrine."[218] The Court found that:

> The District Court did not err in determining, for purposes of this litigation, that an Article III Court, acting on a single, isolated case-and-controversy record in a private suit in which neither the Commission nor the Government was a party, would lack the requisite capacity.[219]

First, the use of the word "err" may imply an error of law. The Court could have chosen language more indicative of trial court discretion.[220] Second, the

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215. *See supra* note 181 and accompanying text (defining mixed questions).

216. *See supra* note 182 and accompanying text (noting mixed questions have historically been reviewed de novo).

217. *See* Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970) (holding that a determination of the validity of an amendment to an agreement regulated by the Shipping Act was within the primary jurisdiction of the Federal Maritime Commission (FMC)). In *Port of Boston Marine*, the Court had to decide whether the FMC's adjudication of a dispute was binding on the parties. *Id.* at 63–64. The Terminal Association, under an agreement approved by the FMC, but without FMC approval, shifted a certain kind of storage fee from the consignees of the cargo to the vessel owners. *Id.* at 64. Some of the owners refused to pay, and the Terminal Association brought suit. *Id.* at 64–65. The district court invoked the primary jurisdiction of the FMC and stayed the proceedings to get a ruling on the validity of the change to the agreement. *Id.* at 65. The Court held that the referral was appropriate, *id.* at 69, and the administrative ruling in favor of the Terminal Association was binding. *Id.* at 72.

218. *Id.* at 68.

219. *Id.* at 69.

220. *See, e.g.*, Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir. 1996) (stating that "[t]he district court did not abuse its discretion" in determining that the EPA's

use of the phrase "an Article III Court" implies an evaluation of the capacity of judges in general. It seems that weighing the expertise factor is not a matter of what the particular judge overseeing the case knows, which would be reason to defer to his decision, but what the typical judge knows.

One possible counter argument is that a trial judge is better able to determine what other trial judges are familiar with, but this is unpersuasive for a number of reasons. As a general proposition, appellate judges are often former trial judges. Moreover, the Supreme Court did not refer specifically to trial court judges. It referred to Article III Courts. The Court's statement implies that all Article III Courts—trial and appellate—have the same limitations. If this inference is correct, then whether the litigation reaches beyond the knowledge of an Article III judge may be decided by an appellate court as easily as a trial court. *Port of Boston Marine*, in sum, points against increased deference to the trial court.

3. Benefiting the Court with Administrative Action

Like the aforementioned primary jurisdiction considerations, the third does not present a compelling case for trial court discretion. The Supreme Court first discusses the benefit to the court in *Ricci v. Chicago Mercantile Exchange*, and that case provides some insight into the analysis. In *Ricci*, once the Court found "sufficient statutory support for administrative authority" over the matter,[221] this consideration weighed heavily in the Court's decision.[222] The Court concluded that an agency ruling would make a meaningful contribution to the lawsuit for two main reasons: efficiency and accuracy.[223] First, the agency decision saves the district court from litigating any issues that the agency can fully resolve.[224] The administrative ruling might even moot the entire judicial inquiry.[225] Second, the agency can gather pertinent facts[226] and clarify the scope, meaning, and significance of the Exchange rules.[227] This, the

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special expertise was not needed).

221. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304 (1973).

222. *See id.* at 302 (discussing the three premises on which the decision rested).

223. *See id.* at 305–06 (noting the benefits of prior agency adjudication).

224. *Id.* at 306.

225. *Id.*

226. *Ricci*, 409 U.S. at 305 n.15.

227. *Id.* at 305.

Court declared, would "prepare the way . . . for a more informed and precise determination."[228]

In *Ricci*, both the majority and dissenting justices agreed that referral is appropriate if it is "likely to make a meaningful contribution to the resolution of [the] lawsuit."[229] The debate was not whether there was a benefit, but the sufficiency of the benefit conferred.[230] The justices were divided not on the legal standard, or even on the facts of the underlying case, but rather on the conclusion to be drawn from those facts. Consequently, this factor, like the expertise factor, presents a mixed question of law and fact—a type of question that has not traditionally been given deference on appeal.[231]

4. Weighing the Burdens

Of the four primary jurisdiction factors on which this Note focuses, the last one presents the best argument for trial court discretion because it is the most fact—and litigant—sensitive. The application of primary jurisdiction will always involve some amount of delay, and thus some degree of hardship.[232] As Justice Douglas emphasized in his dissenting opinion in *Ricci*, "[t]he road this litigant is now required to travel to obtain justice is . . . long and expensive and available only to those with long purses."[233] If the burden imposed is too prejudicial, the court is to retain jurisdiction and proceed with the claim.[234] Some circuits have struck a court-agency compromise to mitigate the burdens on the parties. The Fifth Circuit, for example, has stayed the proceedings for a finite period of time in which the agency was required to act.[235] If no administrative ruling was forthcoming after that time period expired, the district court was to reassert its jurisdiction.[236]

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228. *Id.* at 306.

229. *Id.* at 306 (quoting the dissenting opinion of Justice Marshall).

230. *Id.* at 306–07 (noting the differences of opinion between Justice Marshall and the majority of the Court).

231. *See supra* note 182 and accompanying text (discussing review of mixed questions).

232. *See* STRAUSS, *supra* note 15, at 1244 ("[I]nvocation of primary jurisdiction can result in considerable delay and extra litigation expense . . . .").

233. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 309 (1973) (Douglas, J., dissenting).

234. *See* Reiter v. Cooper, 507 U.S. 258, 269–70 (1993) (stating that the plaintiffs were not required to seek a determination from the ICC on the reasonableness of the rates before filing the civil action because the statute of limitations could run before the ICC acted).

235. *See* Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 206 (5th Cir. 1988) (staying the case for 180 days only).

236. *Id.*

Although a majority of the Court has not explicitly embraced the burden on the parties as a primary jurisdiction consideration, a number of courts of appeals have.[237] Moreover, sensitivity to the effects of judicial action is an inherent part of a judge's equitable authority,[238] and it plays a prominent role in a number of other discretionary decisions a trial judge must make in supervising litigation.[239] Consequently, the burden on the parties is a unique factor in that it has the potential to become the controlling consideration. On the one hand, a judge must weigh the burdens of referral, and on the other, he must evaluate all the benefits embodied in the primary jurisdiction doctrine. If the judge decides that the burdens outweigh the benefits, that is the end of the matter, and he is to proceed with the claim. Thus, the mere presence of this factor may demand trial court discretion regardless of whether the other factors call for it. In the very least, a decision *not* to apply the primary jurisdiction doctrine on the basis of this factor requires deference.

B. Fashioning a Rule of Decision

The second rationale for conferring discretion on the trial court presents the question of whether the primary jurisdiction doctrine is well suited to a rule of decision. In general, when an issue is so unsettled that an appellate court does not know how to approach the problem, the appellate court will leave its resolution to the discretion of the trial court.[240] Sometimes, the absence of a governing rule is a result of the novelty of the issue. If this is the case, appellate court deference allows trial courts to develop a pool of common

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237. *See, e.g.*, Am. Auto. Mfrs. Ass'n v. Massachusetts Dep't of Envt'l Prot., 163 F.3d 74, 81–82 (1st Cir. 1998) (noting that if the potential for delay is too great, the court may choose not to refer the matter to the agency); Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. and Tel. Co., 46 F.3d 220, 223, 225 (2d Cir. 1995) (considering the fair administration of justice as a factor); Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988) (stating that a court may defer only if the benefits of agency review exceed the costs imposed on the parties).

238. *See* Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (1997) ("[E]quity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules. . . . [It is] the power to adapt the relief to the circumstances of the particular case.").

239. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 706–07 (1997) (noting that, as part of its power to manage the case, the district court has broad discretion to stay proceedings as long as the delay is not oppressive or overly burdensome); Doran v. Salem Inn, Inc., 422 U.S. 922, 931–32 (1975) (holding that the district court did not abuse its discretion in finding irreparable injury in the absence of equitable relief, specifically, a preliminary injunction).

240. *See* Rosenberg, *supra* note 160, at 662–63 (explaining that when it is difficult to formulate a governing rule for the matter in issue, discretion should be conferred on the trial court).

experience from which appellate courts might later be able to draw a governing principle.[241] Alternatively, an issue may arise in such diverse situations that appellate courts are unable to establish a legal principle suitable to all cases.[242] Again, the appellate court will commit the issue to the discretion of the trial court.[243]

The primary jurisdiction doctrine's long history and developed guidelines make clear that it does not utterly resist generalization. The mere existence of factors, however, does not eliminate trial court discretion.[244] For example, the following issues are all committed to a trial court's "guided discretion": supplemental jurisdiction, award of attorneys' fees, forum non conveniens, choice of law, preliminary injunctions, and as discussed later, exhaustion of administrative remedies.[245] Some of these examples are discretionary because they are highly fact dependent, such as forum non conveniens.[246] For others, the discretion arises from the need to weigh numerous factors with regard to the particular litigation, as in the application of the exhaustion doctrine.[247]

Primary jurisdiction is more along the lines of the latter group. The doctrine is almost one hundred years old, but after all this time the doctrine remains a bit murky.[248] And the circuits continue to cite the Court's language:

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241. *See id.* at 663 (discussing the development of guidelines for decisions concerning Federal Rule of Civil Procedure 39(b)); *see also* Davis, *supra* note 161, at 56 ("Some issues originally thought by the appellate courts to be incapable of governance by general rules of decision are, after a time and a number of decisions on cases with similar facts, found to be addressable by such rules.").

242. *See* Friendly, *supra* note 155, at 754 (quoting Bouvier's Law Dictionary stating that discretion arises when no strict rule of law is applicable).

243. *See* Rosenberg, *supra* note 160, at 662 ("When the ruling under attack is one that does not seem to admit of control by a rule that can be formulated or criteria that can be indicated, prudence and necessity agree that it should be left in the control of the judge at the trial level.").

244. *See* Standards of Review Primer: Federal Civil Appeals, 229 F.R.D. 267, 294 (2005) ("Review for abuse often includes certain relevant factors—which ones count and whether they have been weighed right—and individual considerations meaningful only in application to the specific 'discretionary' context involved.").

245. *See id.* at 295–300 (discussing various decisions that utilize the judge's power to supervise and control the litigation that are generally reviewed for abuse of discretion); *see also infra* Part V.A (discussing the exhaustion doctrine).

246. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249–50 (1981) (noting that each case turns on its facts and that if the Court laid down a rigid rule governing the trial court's discretion the doctrine of forum non conveniens would lose the very flexibility that makes it so valuable).

247. *See* Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 343 (2d Cir. 2006) (implying that when exhaustion is not mandated by statute, there is judicial discretion to employ a broad array of exceptions); *see also infra* Part V.A (discussing the exhaustion doctrine).

248. *See supra* Part II.B (noting the differing conceptions of the doctrine currently held by the circuit courts).

"No fixed formula exists for applying the doctrine."[249] When confronted with a case not on all fours with controlling precedent, a court is therefore left to exercise its own judgment. More importantly, the court must weigh the burdens of referral on the particular litigants, which makes the doctrine less susceptible to a rule of general applicability.

Examining the two justifications for trial court discretion—the advantageous position of the trial judge and the feasibility of a rule of decision—does not provide an obvious answer to the standard of review problem. Taken as a whole, however, they appear to tip in favor of insulated review. First, direct contact with the litigation makes the trial judge better able to weigh the burdens of referral, and as noted above, this is a heavy consideration in the analysis. Second, the wide array of contexts in which the doctrine may be raised makes it resilient to a workable rule for all cases. It is important to emphasize that defining the primary jurisdiction question as a matter of discretion, and thus applying the abuse of discretion standard, does not mean that the trial court's decision is untouchable. Defining the question this way simply means that the reasons for trial court deference are sufficiently present to depart from de novo review, and that a trial judge's decision should be weighted accordingly.[250]

V. Reasoning by Analogy

A. The Exhaustion Doctrine

Primary jurisdiction is "conceptually analogous" to the doctrine of exhaustion of administrative remedies.[251] The Second Circuit has declared primary jurisdiction to be simply a "version" of the exhaustion requirement.[252] This statement is not ill-founded. The doctrines share not only similar objectives but also similar application. Both are used to determine the timing of federal-court decisionmaking, and both allocate decisionmaking power

249. United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

250. *See supra* notes 173–76 and accompanying text (pointing out that the degree of deference conferred under an abuse of discretion standard is directly proportional to the strength of the factors used to apply the standard in the first instance).

251. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.8 (4th ed. 2004); *see also* Am. Trucking Assoc. v. ICC, 682 F.2d 487, 491 (5th Cir. 1982) ("The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.").

252. Goya Foods, Inc. v. Tropicana Prods., Inc., 846 F.2d 848, 851 (2d Cir. 1988).

between courts and agencies.[253] The similarity between the doctrines is particularly useful here because there is an overwhelming consensus regarding review of the application of exhaustion.[254] When exhaustion is not required by statute, it is within the sound discretion of the court.[255]

The classic statement of exhaustion from *Myers v. Bethlehem Shipbuilding Corp.*[256] is that "no one is entitled to judicial relief for a supposed or threatened

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253. *See* United States v. W. Pac. Ry. Co., 352 U.S. 59, 65 (1956) ("The doctrine of primary jurisdiction thus does more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects of commercial relations."); McCarthy v. Madigan, 503 U.S. 140, 144–45 (1992) (noting that exhaustion, a manifestation of congressional delegation of authority to coordinate branches of government, is one of several doctrines which govern the timing of federal court decisionmaking).

254. *See* CHILDRESS, *supra* note 11, § 14.11 (noting that exhaustion "is almost always reviewed under the abuse of discretion standard").

255. *See* Darby v. Cisneros, 509 U.S. 137, 153–54 (1993) (holding that, with respect to actions brought under the APA, Congress effectively codified the doctrine of exhaustion in 5 U.S.C. § 704; also holding, however, that exhaustion continues to apply as a matter of judicial discretion in cases not governed by the APA); Volvo GM Heavy Truck Corp. v. Dep't of Labor, 118 F.3d 205, 208, 210 (4th Cir. 1997) (stating that the decision to require exhaustion was within the sound judicial discretion of the district court, although the court reviewed the decision to dismiss the complaint de novo); Zephyr Aviation, LLC v. Dailey, 247 F.3d 565, 570 (5th Cir. 2001) (stating that where Congress has not clearly required exhaustion, it is a matter of judicial discretion, but reviewing the district court's decision to grant 12(b)(1) and 12(b)(6) motions de novo); Dixie Fuel Co. v. Comm'r of Social Sec., 171 F.3d 1052, 1059 (6th Cir. 1999) (following *Darby*, the court found the APA to govern the claim and therefore the district court did not have the discretion to require exhaustion in the absence of a statutory or regulatory requirement to do so); Powell v. A.T. & T. Commc'ns, Inc., 938 F.2d 823, 825 (7th Cir. 1991) (stating that the district court's decision to require exhaustion under ERISA could only be overturned if it constituted a clear abuse of discretion); Pension Benefit Guar. Corp. v. Carter & Tillery Enter., 133 F.3d 1183, 1187 (9th Cir. 1998) (reviewing the district court's decision to dismiss for failure to complete the administrative review process for abuse of discretion); EEOC v. Lutheran Social Servs., 186 F.3d 959, 963 (D.C. Cir. 1999) (noting that absent an unequivocal statutory requirement, exhaustion of administrative remedies is a matter of judicial discretion).

256. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (holding that the district court lacked the power to enjoin the National Labor Relations Board (NLRB) because the NLRB had the exclusive authority to prevent unfair labor practices). The union representing the Bethlehem Shipbuilding Corporation's (BSC) workers filed a complaint with the NLRB that BSC was engaging in unfair labor practices. *Id.* at 44. In response, the NLRB notified BSC that it would hold a full evidentiary hearing regarding the allegations. *Id.* at 45. On the day it received this notice, BSC filed suit in district court to enjoin the NLRB from holding the hearing. *Id.* at 46. In support of its prayer for an injunction, BSC argued that the operations at the plant in issue did not affect interstate commerce, that the hearing would be futile, and that the hearing would inflict irreparable injury. *Id.* at 47. On appeal, the Supreme Court held that the district court acted beyond the scope of its power by granting BSC's request and enjoining the NLRB. *Id.* The Court reasoned that Congress had vested the NLRB with exclusive power to prevent unfair labor practices, *id.* at 48, and that it was for the NLRB to determine whether the allegations in the complaint implicated interstate commerce. *Id.* at 49–50. To hold for BSC,

injury until the prescribed administrative remedy has been exhausted."[257] Out of that statement grew a court-created, prudential rule designed to serve two primary objectives: protecting administrative authority and promoting judicial efficiency.[258] With regard to the first purpose, the Court stated that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer."[259] Placing primary responsibility in the agency, according to the Court, is especially important when the claim involves the exercise of administrative discretion or expertise.[260] Note that both the congressional commitment of authority and the utilization of expertise are also primary jurisdiction considerations. Frequent disregard for the administrative process, the Court continued, may undermine the agency's effectiveness.[261]

The Court has also stated that requiring exhaustion is efficient because administrative proceedings may moot a judicial controversy or otherwise provide a useful record for the reviewing court.[262] Here, the Court again emphasizes a primary jurisdiction consideration, the potential benefit to the court. Where the doctrines appear to differ, albeit slightly, is in purpose: Primary jurisdiction focuses on maintaining regulatory uniformity,[263] and exhaustion focuses on reinforcing agency autonomy.[264]

The application of primary jurisdiction and exhaustion also employ similar analytical steps. The Supreme Court stated in *McCarthy v. Madigan*[265] that

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the Court declared, would directly contradict congressional intent. *Id.* at 50. Furthermore, the NLRB procedures and the availability of judicial review were sufficient to protect BSC's interests. *Id.*

257. *Id.* at 50–51.

258. *See* McCarthy v. Madigan, 503 U.S. 140, 145 (1992) (noting the twin aims of the exhaustion doctrine).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *See supra* notes 23–31 and accompanying text (discussing *Abilene Cotton*—the source of this uniformity objective).

264. *See* McKart v. United States, 395 U.S. 185, 195 (1969) (noting that "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors" and that "deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures"); *see also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965) (stating that the exhaustion requirement is an expression of executive and administrative autonomy).

265. *See* McCarthy v. Madigan, 503 U.S. 140 (1992) (holding that exhaustion is not required when a prisoner seeks only money damages). In *McCarthy*, the issue before the Supreme Court was whether an inmate had to exhaust the procedures provided by the Federal Bureau of Prisons before bringing a *Bivens* action in federal court solely for money damages.

"[o]f paramount importance to any exhaustion inquiry is congressional intent."[266] It further stated, "Where Congress specifically mandates, exhaustion is required."[267] These statements represent the threshold question in the exhaustion analysis: Is the issue susceptible to judicial review? If not, the complaining party must exhaust the administrative procedures and the court is without jurisdiction to hear the claim.[268] This threshold exhaustion question mirrors the initial primary jurisdiction inquiry.[269] If Congress has ousted the courts of jurisdiction by the creation of an agency, as it did by creating the ICC with the Commerce Act, then the court must refer the issue to the agency.[270]

Once jurisdiction has been determined, the next step in the exhaustion analysis requires federal courts to "balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."[271] In explaining this process, the Court stated that the "balancing . . . is intensely practical."[272] "[A]ttention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided."[273] More importantly, the Court declared that "where Congress has not clearly required exhaustion, sound judicial discretion governs."[274] Courts and scholars have reasoned that this discretion inheres in the requirement that a trial court weigh numerous factors and exceptions in applying the exhaustion doctrine.[275]

Id. at 141. The Court held that exhaustion was not required. *Id.* at 149. In this context, Congress had not mandated exhaustion and McCarthy's interests outweighed the countervailing institutional interests favoring exhaustion. *Id.*

266. *Id.* at 144.

267. *Id.*

268. *See McKart*, 395 U.S. at 193 (stating that a primary purpose of the exhaustion doctrine is to avoid the premature interruption in the administrative process); *see also* Bangura v. Hansen, 434 F.3d 487, 493 (6th Cir. 2006) ("Where a statute requires a plaintiff to exhaust his or her administrative remedies before seeking judicial review, federal courts do not have subject matter jurisdiction to review the plaintiff's claim until the plaintiff has [done so]. . . .").

269. *See supra* Part IV.A (discussing the analytical steps in applying primary jurisdiction).

270. *See supra* Part II.A (discussing the jurisdictional inquiry in *Abilene Cotton*).

271. McCarthy v. Madigan, 503 U.S. 140, 146 (1992).

272. *Id.*

273. *Id.*

274. *Id.* at 144.

275. *See* CHILDRESS, *supra* note 11, § 14.11 (listing the factors to be balanced in the application of the exhaustion doctrine). These factors include:

> [C]lear abuse of administrative jurisdiction, presence of a question of law peculiarly within judicial competence that would be case-dispositive, the futility of pursuing an administrative remedy . . . , prior consideration by the agency of the exact issue under review . . . , the need to develop a record, the need to reflect agency expertise, conservation of judicial resources, a clear violation of the

The similarities to the primary jurisdiction doctrine are compelling. For the second step in the primary jurisdiction analysis, "[n]o fixed formula exists . . . . [T]he question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."[276] Under both doctrines, then, a trial court is required to balance a number of similar factors, including the need to reflect agency expertise, the need to conserve judicial resources, the need to develop the record, and the futility of administrative action.[277] More importantly, neither doctrine is to be imposed if the burdens on the parties are too great.[278]

Primary jurisdiction and exhaustion are different means to promote the broad concepts of judicial restraint, efficiency, and deference to administrative decisionmaking. In fact, they are but two of several paths a court may take when relinquishing its adjudicatory power to an agency. The doctrines of abstention, finality, and ripeness also govern the timing of federal court decisionmaking.[279] The conceptual overlap in all of these doctrines demonstrates that there does not have to be bright lines between them—having a unique purpose or focus is sufficient.[280]

The distinctions that can be made between exhaustion and primary jurisdiction are inadequate to justify differing standards of review. Beginning with *Western Pacific*, the Supreme Court has attempted to distinguish the doctrines. It declared that exhaustion applies "where a claim is cognizable in the

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claimant's constitutional or statutory rights, the need to allow the agency to correct errors, the likelihood of irreparable injury, the likelihood of unusual hardship, and the fact that administrative proceedings would be void.

Id.; see also STEIN, *supra* note 4, § 49.02 (explaining the most common exceptions to the doctrine of exhaustion).

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

277. *Compare* Far E. Conference v. United States, 342 U.S. 570, 573–74 (1952) (finding that utilization of administrative expertise was necessary), *and* Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 306 (1973) (noting that referral would either moot the controversy or develop a useful record), *and* Rosado v. Wyman, 397 U.S. 397, 406 (1970) (finding primary jurisdiction inapplicable because the agency lacked the appropriate procedures to address the petitioners claim), *with* CHILDRESS, *supra* note 11, § 14.11 (listing exhaustion factors).

278. *Compare* Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988) (stating that a court may defer only if the benefits of agency review exceed the costs imposed on the parties), *with* CHILDRESS, *supra* note 11, § 14.11 (listing exhaustion factors, including the likelihood of irreparable injury and the likelihood of unusual hardship).

279. McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (noting that exhaustion is among the closely related doctrines of abstention, finality, and ripeness).

280. *See* STRAUSS, *supra* note 15, at 1238 (noting that because the doctrines are so closely related it is helpful to think of exhaustion as focusing on party behavior, finality on agency behavior, and ripeness on judicial behavior).

first instance by an administrative agency alone."[281] The Court continued that "'primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts."[282] For many cases, this distinction holds true, but the Court's statement about exhaustion is necessarily false when exhaustion is not required by statute. In such instances, a trial court may invoke certain established exceptions to exhaustion and proceed with the claim.[283] Furthermore, exhaustion may be waived by an agency at any time to enable it to seek judicial assistance in enforcing its orders.[284] Therefore, exhaustion may still apply when the claim is originally cognizable by both court and agency—and not the agency alone—which is exactly when primary jurisdiction may apply.

Another means of distinguishing exhaustion and primary jurisdiction lies in the remedies available to the court. For example, the Fifth Circuit in *Wagner & Brown* deferred to the primary jurisdiction of the FERC.[285] But in order to prevent irreparable harm to the plaintiff, it ordered that judicial proceedings be stayed for only 180 days.[286] If the FERC failed to act within that timeframe, then the district court was instructed to adjudicate the plaintiff's claim.[287] If the court had instead invoked the doctrine of exhaustion, perhaps focusing on agency autonomy, it could not have imposed such a time restriction. The court would have to await administrative action.

The distinctions between exhaustion and primary jurisdiction fail to undermine the conclusion that the same standard of review should apply primarily because they do not strike at the heart of the doctrines. That is, the differences do not speak to the reasons why discretion should be conferred on the trial court. Most importantly, both doctrines include the fact-sensitive balancing of the benefits and burdens.

B. The Burford *Abstention Doctrine*

Like other abstention doctrines, *Burford* abstention permits a district court to defer to the jurisdiction of a state adjudicatory body. It is grounded in the concept

281. United States v. W. Pac. Ry. Co., 352 U.S. 59, 63 (1956).

282. *Id.* at 63–64.

283. *See* STEIN, *supra* note 4, § 49.02 (finding that courts will retain jurisdiction when the administrative remedy is inadequate, dismissal would result in irreparable injury, the agency is acting beyond its authority, and further agency proceedings would be futile).

284. *Id.* § 49.01.

285. Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 206 (5th Cir. 1988).

286. *Id.*

287. *Id.*

of judicial restraint and a sense of comity for state law.[288] Specifically, it "is appropriate when a case involves an unclear state law question of vital local concern, which must be addressed through a centralized, unified state administrative system."[289] Because *Burford* abstention involves the referral of a claim which a state legislature has entrusted to a more knowledgeable tribunal, it is conceptually analogous to the primary jurisdiction doctrine,[290] and it presents another argument in support of abuse of discretion review of primary jurisdiction decisions.[291]

In *Burford v. Sun Oil Co.*,[292] the respondent challenged an order of the Texas Railroad Commission in federal district court, invoking its diversity jurisdiction.[293] The Commission had granted Burford a permit to drill four oil wells in a small field in Eastern Texas[294] based on an exception to a regulatory scheme that would have otherwise prohibited the wells.[295] The issue before the Supreme Court was not whether the permit should have been issued, but whether the federal district court should have declined to exercise its jurisdiction.[296] The Court held that the state courts should be given the first opportunity to review claims involving the Texas oil and gas rationing

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288. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941) (stating that abstention doctrines contribute to a "harmonious relationship" between state and federal authority); Younger v. Harris, 401 U.S. 37, 44 (1971) (noting that an underlying reason for judicial restraint is respect for state functions).

289. MOORE, *supra* note 10, § 122.04[1].

290. *See* Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1265–66 (11th Cir. 2000) (noting that both primary jurisdiction and *Burford* abstention are concerned with protecting administrative process from judicial interference and stating that "[i]n the context of this case, *Burford* abstention and primary jurisdiction are different labels for the same thing").

291. *See* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 90 (2d Cir. 2004) (reviewing *Burford* abstention decisions for abuse of discretion); Riley v. Simmons, 45 F.3d 764, 770 (3d Cir. 1995) (reviewing the decision to abstain for abuse of discretion, but reviewing the district court's legal analysis de novo); Wilson v. Valley Elec. Membership Corp., 8 F.3d 311, 313 (5th Cir. 1993) (reviewing decision to abstain for abuse of discretion); Int'l Coll. of Surgeons v. City of Chicago, 153 F.3d 356, 360 (7th Cir. 1998) (reviewing a district court's decision to abstain from exercising jurisdiction for an abuse of discretion); City of Tucson v. U.S. West Commc'ns, Inc., 284 F.3d 1128, 1132 (9th Cir. 2002) (reviewing the decision to abstain for abuse of discretion when the requirements for abstention are present); Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1265 (11th Cir. 2000) (reviewing the decision to abstain for abuse of discretion).

292. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943) (holding that, given the nature of the state regulatory scheme involved, the district court abused its discretion by failing to abstain from exercising its jurisdiction).

293. *Id.* at 317.

294. *Id.*

295. *Id.* at 324.

296. *Id.* at 318.

programs.[297] In support of its holding, the Court noted that the Texas legislature had vested the power to review the orders of the Commission in the courts of a single county.[298] The rationale behind this decision, according to the Texas courts, was to prevent "interminable confusion."[299] The Court also pointed out that confining review of the Commission's actions to particular state courts allowed those courts to develop "specialized knowledge."[300] By emphasizing consistent treatment of a regulatory scheme and the unique knowledge of the state court, the Supreme Court highlights the parallels between *Burford* abstention and primary jurisdiction. Later cases draw the two doctrines even closer together.

In *New Orleans Public Service, Inc. v. Council of City of New Orleans*,[301] the Court more explicitly articulated the uniformity objective of *Burford* abstention. *Burford* abstention, the Court declared, is not required simply because a complex state regulatory scheme exists.[302] Rather, the doctrine is intended to prevent disruption in the State's efforts "to ensure uniformity in the treatment of an essentially local problem."[303] In addition, as lower courts have applied this abstention doctrine, it has been expanded to include not only deference to state courts, but to state administrative agencies as well.[304]

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297. *Burford*, 319 U.S. at 332.

298. *Id.* at 326.

299. *Id.*

300. *Id.* at 327.

301. *See* New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) (holding that the lower court abused its discretion by invoking *Burford* abstention when the claim turned on a matter of preemption). New Orleans Public Service (NOPSI) is a producer and retailer of electricity that supplies power to the City of New Orleans. *Id.* at 353. NOPSI entered into an agreement with other power companies to share the cost of building and operating a nuclear reactor, Grand Gulf 1. *Id.* at 353–54. After completion of the reactor, the FERC conducted an investigation to determine the reasonable allocation of Grand Gulf's costs and output. *Id.* at 354. The FERC concluded that NOPSI was responsible for 17% of Grand Gulf's costs. *Id.* NOPSI then sought permission from the New Orleans City Council to raise its rates in order to cover the newly imposed expenses. *Id.* at 355. Ultimately, the City Council decided to prevent NOPSI from recovering $135 million of its Grand Gulf costs. *Id.* at 356. NOPSI then filed suit in federal court asserting that the Council's rate order was preempted by federal law. *Id.* at 357. The district court abstained from deciding the issue, leaving review of the Council's order to the Louisiana courts. *Id.* On appeal, the Supreme Court held that *Burford* abstention was inapplicable because the preemption inquiry would not intrude into state government processes or undermine the State's ability to maintain uniformity. *Id.* at 363.

302. *Id.* at 362.

303. *Id.* (citations omitted).

304. *See* MOORE, *supra* note 10, § 122.04[3] (stating that "*Burford* abstention . . . defers to a state administrative agency or state procedures for judicial review of agency action").

Consequently, *Burford* abstention has come to resemble primary jurisdiction both in purpose and in procedure.

The match between the doctrines, however, is inexact. On a fundamental level, abstention doctrines are motivated out of respect for federalism and state autonomy. Such concerns are wholly irrelevant to primary jurisdiction.[305] Moreover, when a federal court abstains and refers a case to the state court or agency under *Burford*, the court has in effect disposed of the case permanently.[306] Primary jurisdiction—or even exhaustion for that matter—presupposes that the federal courts may continue to be involved.[307]

The Eleventh Circuit has also pointed out key distinctions between primary jurisdiction and *Burford* abstention.[308] First, as conceived in primary jurisdiction, uniformity is a national concept. Federal courts defer to federal agencies in order to ensure uniform policies and therefore uniform results.[309] In contrast, when an issue falls within the authority of a state court or agency, the same scope of uniformity is "neither expected nor prized."[310] Second, the Eleventh Circuit noted that the very existence of a federal agency with adjudicatory responsibilities suggests that Congress intended to limit the power of the federal courts.[311] When a state legislature creates state agencies, the same conclusion with regard to federal courts is untenable.[312]

Admittedly, the distinctions presented by the Eleventh Circuit provide a persuasive argument that primary jurisdiction should not be employed as a means of referring an issue to a state agency,[313] but not all courts have adopted

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305. *See* Taffet v. S. Co., 930 F.2d 847, 854 (11th Cir. 1991) (noting that primary jurisdiction involves deference by a federal court to a federal agency entrusted to implement a federal regulatory scheme).

306. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714 (1996) (noting that when a court invokes *Burford* abstention, it retains nothing of the matter on the federal court's docket); Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 1995) (noting that the effect of *Burford* abstention is not to postpone federal court review but to prevent it entirely).

307. *See supra* note 51 and accompanying text (stating that primary jurisdiction allows courts to stay, rather than dismiss, proceedings pending administrative action); STRAUSS, *supra* note 15, at 1244 (noting that disputes referred to an agency under primary jurisdiction usually find their way back to the court for further review).

308. *See* Taffet v. S. Co., 930 F.2d 847, 854 (11th Cir. 1991) (discussing primary jurisdiction as applied to state regulatory agencies); *see also* County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1309–11 (2d Cir. 1990) (reasoning that primary jurisdiction does not provide an appropriate means of deferring to state agencies).

309. *Taffet*, 930 F.2d at 854.

310. *Id.*

311. *Id.*

312. *Id.*

313. *See supra* note 308 (citing sources that discuss the validity of primary jurisdiction referrals to state agencies).

this position.[314] Primary jurisdiction and *Burford* abstention are still seen to have substantial common ground.[315] Furthermore, the differences do not undermine the need for trial court discretion in applying the doctrines. Each doctrine has contextual considerations. That is, if a judge finds that application to the particular case will not further the objectives of the doctrine, she is free to retain jurisdiction of the claim. Thus, the differences discussed above are not meaningful to the appropriate standard of review.

VI. Conclusion

Most of the confusion surrounding the primary jurisdiction doctrine results from the manner in which the Court used the phrase, "primary jurisdiction," in *Abilene Cotton* and *Merchants Elevator*. In the context of those early cases, the Court actually meant jurisdiction when it said "jurisdiction." But over the course of the twentieth century, primary jurisdiction evolved into a doctrine that—for better or worse—has departed from the plain implication of its name.[316] Today, primary jurisdiction does not define the actual scope of authority of courts or agencies.[317] Rather, it allows a court to refrain from exercising its authority to further the objectives that the doctrine has now come to represent. Primary jurisdiction, as currently conceived, is a means of deciding which tribunal is the more advantageous decisionmaker when the issue could be presented to either.[318]

The evolution of the doctrine has broadened its applicability. Trial courts are now able to refer issues to administrative decision makers in a greater number of contexts because the doctrine is no longer limited to those situations in which the court is actually divested of its jurisdiction. It is raised in both

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314. *See* PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998) (stating that primary jurisdiction may be applicable "in cases in which a state has a formal administrative proceeding in progress that the citizen's suit would disrupt"); Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1265 n.11 (11th Cir. 2000) (leaving unaddressed whether primary jurisdiction could justify deference in favor of a state agency).

315. *Boyes*, 199 F.3d at 1265–66 (stating that primary jurisdiction and *Burford* abstention are different labels for the same thing).

316. *See* In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1162 (3d Cir. 1993) ("[T]he doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts.").

317. *See* Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304 (1973) (refusing to decide the jurisdictional question, yet applying the primary jurisdiction doctrine).

318. *See* PIERCE, *supra* note 251, § 5.8 (noting that primary jurisdiction is a "pragmatic evaluation of the advantages and disadvantages of allowing the agency to resolve an issue in the first instance").

criminal and civil suits,[319] and it can be applied to matters of pure statutory interpretation.[320] This expansion of the doctrine is perfectly consistent with the Supreme Court's increased deference to agencies in general.[321] Particularly since *Chevron U.S.A. v. Natural Resources Defense Council*,[322] deference to administrative authority via primary jurisdiction is appropriate in more cases.[323] Consequently, the doctrine is raised more often by litigants and courts,[324] and defining the standard of review is increasingly important to the proper review of these decisions.

The standard of review debate boils down to a choice between some—even minimal—deference to the trial court and none at all.[325] The initial response, especially to the name of the doctrine, may be to accord no deference.[326] But after more thorough analysis, the better answer is to provide

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319. *See, e.g.*, United States v. Culliton, 328 F.3d 1074, 1081 (9th Cir. 2003) (addressing the criminal defendant's argument regarding primary jurisdiction); ASAP Paging, Inc. v. CenturyTel of San Marcos Inc., 137 Fed. Appx. 694, 697 (5th Cir. 2005) (unpublished opinion) (discussing primary jurisdiction as it related to a claim that an order of the Texas Public Utility Commission was preempted by federal law).

320. *See* Far E. Conference v. United States, 342 U.S. 570, 576 (1952) (referring the case to the Federal Maritime Board for a determination of the scope of the Shipping Act of 1916); *see also* Jaffe, *supra* note 23, at 1049 (noting that *Far East Conference* extended the primary jurisdiction doctrine to include referral of questions of law).

321. *See* Davis, *supra* note 161, at 62–64 (discussing a series of cases following *Chevron U.S.A. v. Natural Resources Defense Council* that showed increased deference to agencies' statutory interpretation).

322. *See* Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837 (1984) (holding that a reasonable administrative interpretation of ambiguous statutory language is entitled to judicial deference). In *Chevron*, the issue before the Supreme Court was whether the EPA had defined "stationary source" based on a reasonable construction of the Clean Air Act. *Id.* at 839–40. The Court reasoned that when a statute is silent or ambiguous as to the specific issue, Congress has implicitly delegated authority to the agency, *id.* at 843–44, and the court is not free to impose its own interpretation. *Id.* at 844. Rather, the only question on appeal was whether the agency's interpretation was permissible. *Id.* at 843. The Court held that the EPA's use of the term was a reasonable policy choice. *Id.* at 845.

323. *See* Am. Auto. Mfrs. Ass'n v. Massachusetts Dep't of Envt'l Prot., 163 F.3d 74, 81 (1st Cir. 1998) (pointing out that primary jurisdiction referral is appropriate in those situations where the court would defer to the agency under *Chevron*); United States v. Haun, 124 F.3d 745, 750 n.5 (6th Cir. 1997) (noting that, because the statute at issue is unambiguous, *Chevron* does not factor into the analysis and a primary jurisdiction referral is inappropriate); *see also* STRAUSS, *supra* note 15, at 1244 (finding that "courts have discerned new impetus for [the] invocation of primary jurisdiction in Chevron v. NRDC").

324. *See* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 674 (2003) (Breyer, J., concurring) (stating that a court can raise the primary jurisdiction doctrine on its own motion).

325. *See supra* Part III.A (noting that de novo review allows the appellate court to conduct its own analysis without any deference to the trial court's decision).

326. *See* MOORE, *supra* note 10, § 206.08 (finding that the standard of review is de novo for jurisdictional issues).

trial judges at least some discretion in applying the doctrine. First, more appellate courts have adopted the abuse of discretion standard once they address the issue directly, although they provide little rationale as to why.[327]

Second, deconstructing the primary jurisdiction doctrine suggests that discretion ought to be conferred.[328] In particular, the last factor of the analysis—the burden of referral on the parties—calls for trial court discretion.[329] This is especially true when a trial judge refuses to apply the doctrine in order to avoid excessive burdens. In addition, the number of scenarios in which the doctrine may now be raised makes it resistant to a rule of decision applicable to all cases. Without precedent on point, a trial court is required to exercise its own judgment.[330]

Third, and perhaps most persuasively, the primary jurisdiction, exhaustion, and *Burford* abstention doctrines are remarkably alike, and the latter two are decisively committed to the discretion of the trial court.[331] Although there are differences among the doctrines, the differences are immaterial to the standard of review issue. Each of the three doctrines can be characterized as a form of judicial abstention because their application brings about the same basic result. Consequently, primary jurisdiction should share the same standard of review.[332]

As discussed earlier, the abuse of discretion standard carries a wide range of deference.[333] Some decisions are practically irreversible, while others are more closely scrutinized.[334] The degree of deference is generally a matter of how heavily the decision is guided by legal standards. Primary jurisdiction has established factors and a substantial amount of case law. Therefore, applying the abuse of discretion standard does not set a trial judge adrift at sea.[335] Her

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327. *See supra* Part II.C.2 (discussing the circuits that review for an abuse of discretion).

328. *See supra* Part IV (finding that the rationales for trial court discretion weigh in favor of trial court discretion).

329. *See supra* Part IV.A.4 (describing the uniqueness of this factor to command appellate court deference).

330. *See supra* Part IV.B (discussing the inability to fashion a rule of decision as a rationale for trial court discretion).

331. *See supra* Part V (comparing primary jurisdiction to exhaustion and *Burford* abstention, both of which are reviewed for an abuse of discretion).

332. *See* MOORE, *supra* note 10, § 122.08[2] (finding that most appellate courts review all abstention decisions for an abuse of discretion).

333. *See supra* Part III.B (explaining the abuse of discretion standard).

334. *See supra* notes 173–75 and accompanying text (explaining the varying treatment of decisions under the abuse of discretion standard).

335. *See* Friendly, *supra* note 155, at 763 (quoting Delno v. Mkt. St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942)). Judge Friendly approvingly recites that, at one end of the spectrum, discretion may be defined as follows:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or

decision is still guided by the doctrine itself, i.e. application to the litigation must further the objectives the doctrine embodies.[336] Moreover, if the trial judge commits legal error while exercising her discretion, e.g. misinterprets controlling precedent, she has by definition abused her discretion.[337] In sum, a trial judge ought to be accorded enough leeway to fine tune the analysis to the case at hand, while appellate judges ought to be free to refine and develop the legal doctrine.[338] Because of its flexibility, the abuse of discretion standard achieves both of these goals.

> unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Id.

336. *See* United States v. W. Pac. Ry. Co., 352 U.S. 59, 64 (1956) (providing general guidelines for the application of the doctrine).

337. *See* MOORE, *supra* note 10, § 206.05[1] ("Abuse of discretion is found if the district court's decision rests upon a clearly erroneous finding of fact, upon an errant conclusion of law, or upon improper application of law to the facts.").

338. *See* Friendly, *supra* note 155, at 768 (noting the benefits of developing generally applicable rules while allowing the trial court to depart when the circumstances require).