

Restoring the Primary Jurisdiction Doctrine

DIANA R. H. WINTERS*

Primary jurisdiction allows a court to refer an issue to an administrative agency for determination when the issue is within the agency's purview, while still retaining jurisdiction over the case. At first, the doctrine seems like an elegant solution to a complicated problem, facilitating the interaction between courts and agencies confronting complex regulatory issues. But although the doctrine was developed within specific subject areas—rate-setting and labor disputes—where a failure to refer the issue would undermine the pertinent regulatory scheme, courts have expanded its use. The doctrine has become a tool that permits courts to stay or dismiss a case while seeking agency advice on a particular issue, without a finding that such a referral is necessary to forward the purpose of the regulatory scheme. The consequential delay has the potential to cause real harm to the interests of the litigants and to the regulatory scheme. Courts should reconfine primary jurisdiction to the rate-setting and labor dispute contexts. If necessary to extend the doctrine to other areas where the consequence of not doing so would gravely injure the regulatory scheme, courts must recognize the value of an explicit articulation of the doctrine's applicability and benefits. The consequences of the abandonment of primary jurisdiction in its "advice referral" manifestation will be slight because courts can utilize other mechanisms to encourage agency participation.

TABLE OF CONTENTS

I.	INTRODUCTION	542
II.	THE DOCTRINE AND ITS HISTORY	546
	A. <i>What Is Primary Jurisdiction and When Is It Used?</i>	547
	B. <i>The Evolution of Primary Jurisdiction</i>	552
	1. <i>The Supreme Court</i>	552
	a. <i>Rate-Setting Cases</i>	555
	b. <i>Labor Disputes and the Garmon Doctrine</i>	562
	c. <i>Other Contexts</i>	565

* Associate Professor of Law, Indiana University McKinney School of Law. Many thanks to Michael Harper, Christina Ho, Michael J. Pitts, Catherine M. Sharkey, Nicolas P. Terry, Christopher J. Walker, and Samuel R. Wiseman for slogging through earlier drafts; to participants at ASLME's Health Law Professors Conference, the American Journal of Law and Medicine's Iron Triangle of Food Policy Symposium, the Tort Law Section at AALS's Annual Meeting, the Indiana University Maurer School of Law's faculty workshop, and the Big Ten Junior Faculty Conference; to research assistants Latoya Higsaw and Nick Moskalick; and to I.U. McKinney librarians Susan DeMaine and Miriam Murphy.

2. Lower Courts	567
a. Medicaid Cases	575
b. Food-Labeling Cases	578
III. THE LEGAL AUTHORITY TO EXPAND PRIMARY JURISDICTION	584
IV. THE CONSEQUENCES OF THE USE OF PRIMARY JURISDICTION	589
A. Rule of Law	590
B. Primary Jurisdiction's Consequences	591
V. RESTORING PRIMARY JURISDICTION	596
VI. CONCLUSION.....	599

I. INTRODUCTION

Primary jurisdiction seems at first like an elegant solution to a complicated problem, facilitating the interaction between courts and agencies confronting complex regulatory issues. The doctrine allows a court to stay or dismiss without prejudice a case, over which a court has jurisdiction, while it “refers” an issue “not within the conventional experience of judges”¹ to the relevant agency. The parties can then return to court, administrative resolution of the regulatory issue in hand, for judicial resolution of any remaining issues in the case.² Not only is the expertise of the agency captured,³ but the uniformity of the regulatory scheme remains intact.⁴ The reality, however, is not so tidy. Although the doctrine developed within circumscribed subject areas, courts have applied it more generally, and this use has the potential to harm the interests of litigants, and the regulatory scheme.

Primary jurisdiction doctrine developed within two separate contexts: common carrier and public utility rate-setting,⁵ and within industrial relations and the National Labor Relations Board.⁶ The Supreme Court first used the doctrine in the context of rate-making by a common carrier, explaining that it would destroy the regulatory scheme to allow a court to determine a case based on the (un)reasonableness of a rate that had been filed with the Interstate

¹ *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952).

² *Id.* at 576–77 (holding that the United States had to bring its complaint for violations of the Sherman Act first before the Federal Maritime Board, but providing that an order of the Board will be subject to review by a circuit court, with the option of more review on a writ of certiorari).

³ *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 291 (1922) (holding that the determination of the reasonableness of a rate, rule, or practice is usually only found after “voluminous and conflicting evidence,” which requires experts).

⁴ *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439–41 (1907) (discussing how, without previous referral to the Interstate Commerce Commission in regard to reasonable shipping rates, courts might reach different conclusions as to what is reasonable, and that a uniform standard of rates would be impossible).

⁵ *See generally id.*

⁶ *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239 (1959). *See infra* Part II.A for a discussion of the evolution of the doctrine.

Commerce Commission before the Commission itself could determine that issue.⁷

In both the rate-setting and the labor dispute contexts, the Court found that referral of the regulatory issue to the relevant agency was necessary to fulfill Congress's purpose in enacting the regulatory scheme, even though the requirement for referral was not expressly written into the governing statute.⁸ Judicial review in these cases (before agency review) would be "repugnant" to the respective statutes and would render them ineffective.⁹ This use of primary jurisdiction is well established and useful. As a mechanism to enact the intention of Congress, the doctrine of primary jurisdiction is one of many doctrines that permit courts to decline or delay hearing cases for reasons of justiciability and comity, including ripeness, the political question doctrine, and the abstention doctrines.¹⁰

The doctrine has been expanded, however—not only outside of the rate-setting and labor dispute contexts, but outside of situations where a failure to refer the issue would undermine the pertinent regulatory scheme.¹¹ In other words, courts have adapted primary jurisdiction to "allow[] a court to refer an issue to an agency that knows more about the issue, even if the agency hasn't been given exclusive jurisdiction to resolve it."¹² The doctrine has become a tool that permits courts to stay or dismiss a case while seeking agency advice on a particular issue without a finding that such a referral is necessary to forward the purpose of the regulatory scheme.¹³ This use of primary jurisdiction causes harm, including delay, loss of state law benefits, and damage to the regulatory scheme,¹⁴ and should be abandoned. As this Article is being written, a new administration focused on reducing the reach of federal regulation is about to take power,¹⁵ and it is likely that federal agencies, like the FDA, will have less resources available. For this reason, it is even more important that courts cease delaying cases to refer issues to these agencies for advice.

There has been surprisingly little analysis of the primary jurisdiction doctrine in scholarly literature. This is surprising because the relationship

⁷ *Abilene Cotton*, 204 U.S. at 448.

⁸ See *Garmon*, 359 U.S. at 240–43, 246; *Abilene Cotton*, 204 U.S. at 436, 439.

⁹ *Abilene Cotton*, 204 U.S. at 448.

¹⁰ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1433–34 (2012) (Sotomayor, J., concurring).

¹¹ See *infra* Part II.B.2.b.

¹² *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001).

¹³ *Id.*

¹⁴ See *infra* Part III.

¹⁵ Press Release, Donald J. Trump for President, Unleashing America's Prosperity to Create Jobs and Increase Wages (Aug. 8, 2016), <https://www.donaldjtrump.com/press-releases/unleashing-american-prosperity-to-create-jobs-and-increase-wages> [<https://perma.cc/XSZ8-WH7A>].

between courts and agencies has been the subject of much recent attention.¹⁶ In this context, primary jurisdiction is occasionally noticed and mentioned as a mechanism with potential to improve court-agency dialogue, and one that merits further study.¹⁷ In 2014, Catherine Sharkey called the doctrine “a bit of an enigma in U.S. jurisprudence.”¹⁸ Some scholars have analyzed its use in specific circumstances,¹⁹ or have looked at specific aspects of the doctrine,²⁰ but there have been few attempts²¹ to analyze its use by the Supreme Court and the lower courts.

This Article fills this gap by taking a close look at the doctrine and thoroughly examining its origins and use within the rate-setting and labor dispute contexts. This examination illustrates the distinction between primary jurisdiction as it is used in those areas—to preserve the regulatory scheme²²—

¹⁶ Catherine M. Sharkey has written extensively about this relationship, in numerous articles. See generally Catherine M. Sharkey, *Preemption as a Judicial End-Run Around the Administrative Process?*, 122 YALE L.J. ONLINE 1 (2012) [hereinafter Sharkey, *Preemption*]; Catherine M. Sharkey, *Tort-Agency Partnerships in an Age of Preemption*, 15 THEORETICAL INQUIRIES L. 359 (2014) [hereinafter Sharkey, *Tort-Agency Partnerships*]. For additional materials on the topic of court-agency relationships, see generally Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014), which provides an overview of the ordinary remand rule. The ordinary remand rule is when a court finds that an agency’s decision is erroneous and remands to the agency to reconsider the issue. *Id.* Finally, for a discussion of the relationship between courts and agencies and the problem of serial litigation, see generally Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011).

¹⁷ See, e.g., Sharkey, *Tort-Agency Partnerships*, *supra* note 16, at 383–85 (discussing reasons why primary jurisdiction may be useful to pursue tort-agency partnerships, but noting possible detriments to the doctrine’s use, including delay and agency capacity); Catherine T. Struve, *Greater and Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims Concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039, 1043–44 (2008) (discussing reasons why primary jurisdiction doctrine may be supported in Food and Drug Administration drug and device litigation).

¹⁸ Sharkey, *Tort-Agency Partnerships*, *supra* note 16, at 384.

¹⁹ See generally, e.g., Louis L. Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws.*, 102 U. PA. L. REV. 577 (1954); Struve, *supra* note 17 (analyzing the primary jurisdiction doctrine in the context of tort suits concerning FDA-approved drugs).

²⁰ See generally, e.g., Nicholas A. Lucchetti, Note, *One Hundred Years of the Doctrine of Primary Jurisdiction: But What Standard of Review Is Appropriate For It?*, 59 ADMIN. L. REV. 849, 861–62 (2007) (describing the circuit split over the standard of review for primary jurisdiction rulings and arguing that federal courts of appeals should adopt a *de novo* standard); Bryson Santaguida, Comment, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV. 1517 (2007) (exploring the different standards of review for primary jurisdiction rulings and recommending an alternative, two-step standard of review).

²¹ In 2007, the Texas Law Review published an insightful note on the doctrine, which I have found very helpful. See generally Paula K. Knippa, Note, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L. REV. 1289 (2007).

²² *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440–41 (1907) (holding that, if a court were to decide the reasonableness of shipping rates without

and primary jurisdiction in its purely advice-seeking manifestation.²³ This Article looks to the application of primary jurisdiction by the federal courts of appeals to investigate the consequences of its use, and to support the conclusion that, in its advice referral role, the harms of primary jurisdiction outweigh its benefits. The debate about the legitimacy of the abstention doctrine corresponds in some aspects to that about the legitimacy of primary jurisdiction, and is a useful analogy. This Article concludes with a call that courts abandon the use of primary jurisdiction as a tool to seek agency advice, and instead utilize other available mechanisms to garner the attention and participation of administrative agencies.²⁴ The doctrine should be reconfinned to its initial purpose—to the “core of the doctrine”²⁵—and only be used in cases concerning rate-setting by common carriers or public utilities and labor dispute cases. In the alternative, and at the very least, courts granting primary jurisdiction referrals should utilize specific tools to insure the reduction of delay.

The Article proceeds as follows: Part I discusses the doctrine of primary jurisdiction, setting out its operation and tracing its history. This Part explains the difference between primary jurisdiction when used in situations of “exclusive agency jurisdiction,”²⁶ and when used merely in an advice-seeking capacity. It examines the origins and evolution of the doctrine in the Supreme Court in the rate-setting and labor dispute contexts and in the other contexts where the Court has occasionally applied the doctrine. It also presents the tests the courts of appeals have developed to guide courts in the application of primary jurisdiction and looks specifically into two areas where lower courts have frequently utilized the doctrine: Medicaid review cases and food litigation cases.²⁷ While the former context resembles the rate-setting cases where the Court developed the doctrine, the latter use of primary jurisdiction can be located squarely within the advice referral category of the doctrine.

In Part II, this Article sets forth the debate over the legitimacy of abstention as a helpful analogue to frame the discussion of the legitimacy of the primary jurisdiction doctrine. Here it becomes apparent that any discussion of the legitimacy of the doctrine must be intertwined with a discussion of the

previous action by the Interstate Commerce Commission, it would be inconsistent with the administrative power given to the Commission to ensure uniformity and equality of rates).

²³ *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (defining primary jurisdiction as allowing a court to refer an issue to an agency that knows more about it, even if the agency lacks exclusive jurisdiction to resolve the issue).

²⁴ Christopher Walker has developed tools to enhance court–agency dialogue in the context of the remand rule that are useful here. *See Walker, supra* note 16, at 1613–14.

²⁵ *Arsberry*, 244 F.3d at 563.

²⁶ *Id.*

²⁷ On food litigation and primary jurisdiction, see generally Diana R.H. Winters, *Inappropriate Referral: The Use of Primary Jurisdiction in Food-Labeling Litigation*, 41 AM. J.L. & MED. 240 (2015), which discusses the adjudication of threshold doctrines such as preemption, primary jurisdiction, standing, and class certification in the context of food litigation.

consequences of the doctrine, which are discussed in Part III. That Part focuses on the delay brought about by the primary jurisdiction advice referral and the effects this delay has on the parties and the regulatory scheme. It also explores the purported benefits of the primary jurisdiction referral and explains why the harms outweigh the benefits.

Part IV presents the argument that primary jurisdiction should be confined to the rate-setting and labor dispute contexts. If courts extend the doctrine's use to like contexts, this should be done with an explicit articulation of the doctrine's applicability and benefits. This Part explains that the consequences of the abandonment of the advice referral type of primary jurisdiction will be slight because of the availability of other mechanisms to encourage agency participation.

II. THE DOCTRINE AND ITS HISTORY

Primary jurisdiction was first used by the Supreme Court in the early twentieth century to coordinate the comprehensive regulatory regime for shipping rates with the nature of judicial review.²⁸ The doctrine developed over the course of the twentieth century and was expanded to include public utility regulation²⁹ in addition to common carrier regulation. It was also applied (in a slightly different format) in the context of labor disputes to negotiate the relationship between national labor laws with the state regulation of labor relationships.³⁰ It is in these two contexts that the vast majority of Supreme Court primary jurisdiction jurisprudence is located, though the doctrine has been expanded by lower courts.³¹ In this Part, I discuss the doctrine's operation and its history to support my argument that it is within these two contexts the doctrine should remain, under most circumstances.

²⁸ *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439–41 (1907).

²⁹ *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (determining whether the plaintiff could have obtained relief against her telephone carrier under the Federal Communications Act only in a federal administrative proceeding, or if she could have obtained relief only through a judicial proceeding, or a combination of both).

³⁰ *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239 (1959) (determining whether the California Supreme Court had jurisdiction to award damages arising out of a union activity).

³¹ *See, e.g., Barnes v. Campbell Soup Co.*, No. C 12-05185JSW, 2013 WL 5530017, at *8–9 (N.D. Cal. July 25, 2013) (order granting in part and denying in part defendant's motion to dismiss second amended class action complaint and staying matter) (invoking primary jurisdiction to dismiss a food-labeling claim, referring it to the FDA for administrative determination, and staying the action for six months); *Miller ex rel. Morrish v. Olszewski*, No. 09-13683, 2009 WL 5201792, at *11 (E.D. Mich. Dec. 21, 2009) (relying on primary jurisdiction to stay the proceedings in a Medicare and Medicaid dispute).

A. *What Is Primary Jurisdiction and When Is It Used?*

Very basically, the doctrine of primary jurisdiction provides a mechanism for courts to refer an issue to an administrative agency for determination when the issue is within the agency's purview while the case itself remains within the court's jurisdiction.³² Definitions of the doctrine tend to emphasize judicial discretion, utilizing expansive Supreme Court language about primary jurisdiction. For example, according to *Black's Law Dictionary*, the primary jurisdiction doctrine is "[a] judicial doctrine whereby a court tends to favor allowing an agency an initial opportunity to decide an issue in a case in which the court and the agency have concurrent jurisdiction."³³ The Second Circuit used this definition last year, and explained "[t]he doctrine is applicable where 'a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body.'"³⁴ The court's description echoes a Supreme Court elucidation of the doctrine from 1956.³⁵

These definitions communicate the basic notion that primary jurisdiction is about forum, not substantive law;³⁶ it is about *where* an issue will be heard (a court or an agency). The application of the doctrine, however, is not always based on what "a court tends to favor."³⁷ Primary jurisdiction can be separated into two strains, as explained by Judge Posner.³⁸ He calls the first type "exclusive agency jurisdiction," and explains that this is the doctrine's "central and original form."³⁹ This type is applicable when, during the course of a case, an issue arises that is within the exclusive original jurisdiction of an administrative agency.⁴⁰ "When such an issue arises, the suit must stop and the

³² Lucchetti, *supra* note 20, at 852–53.

³³ *Primary-Jurisdiction Doctrine*, BLACK'S LAW DICTIONARY (7th ed. 1999).

³⁴ *Schaghticoke Tribal Nation v. Kent Sch. Corp.*, 595 F. App'x 32, 34 (2d Cir. 2014) (quoting *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 58–59 (2d Cir. 1994)).

³⁵ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956) ("'Primary jurisdiction,' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . .").

³⁶ *See, e.g.*, *Knippa*, *supra* note 21, at 1290 ("[T]he doctrine creates a jurisdictional right-of-way whereby courts are advised (or directed) to yield jurisdiction over matters before them to the respective agency whose authority has been invoked in the name of primary jurisdiction.").

³⁷ *Primary-Jurisdiction Doctrine*, *supra* note 33, at 1209.

³⁸ *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) ("[Primary jurisdiction] is really two doctrines.").

³⁹ *Id.*

⁴⁰ *Id.*

issue must be referred to the agency for resolution.”⁴¹ Once the agency has resolved the issue, the case can then be resumed if need be.⁴² Judge Posner clarifies that “the court has jurisdiction of the *case*, but the agency of the *issue*.”⁴³

The second incarnation of primary jurisdiction, which I call the “advice referral,” “allows a court to refer an issue to an agency that knows more about the issue, even if the agency hasn’t been given exclusive jurisdiction to resolve it.”⁴⁴ Judge Posner compares this version of primary jurisdiction to *Burford* abstention (a mechanism for federal courts to defer to state administrative procedures),⁴⁵ and explains that these cases “are not felicitously described as cases of primary *jurisdiction*.”⁴⁶ Here, the court is merely asking for an agency’s advice before it determines the remainder of the case.⁴⁷ This is the type of primary jurisdiction that falls within the definition used by the Second Circuit and *Black’s Law Dictionary*, although the doctrine originated as exclusive agency jurisdiction.

Both of these versions place original jurisdiction in the court and not the agency, thus distinguishing the doctrine from exhaustion.⁴⁸ Although it sounds like exhaustion, and can sometimes, especially in exclusive agency jurisdiction cases, act like exhaustion, the doctrine differs from exhaustion because the claim at issue “is originally cognizable in the courts,” whereas “[e]xhaustion” applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.⁴⁹ Moreover, in neither version is the subject matter jurisdiction of the court implicated.⁵⁰

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 564.

⁴⁴ *Arsberry*, 244 F.3d at 563.

⁴⁵ *Burford* abstention was originally used in *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943), and has been clarified by several subsequent decisions. In *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989), the Court looked to the need to maintain uniform state procedures to justify *Burford* abstention, *id.* at 362–64, and limited it to use in suits for declaratory and injunctive relief in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 718 (1996).

⁴⁶ *Arsberry*, 244 F.3d at 563.

⁴⁷ *Id.* at 563–64.

⁴⁸ *Ton Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007) (“The doctrine of primary jurisdiction is distinct from the concept of exhaustion, which prevents a federal court from exercising jurisdiction over a claim until all administrative remedies have been pursued.”).

⁴⁹ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956).

⁵⁰ *See, e.g., Ton Servs.*, 493 F.3d at 1238 (“Even where a court has subject matter jurisdiction over a claim, courts have discretion to refer an issue or issues to an administrative agency.”); *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (“Primary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the federal courts. Rather, it is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking

The two versions of primary jurisdiction are very different, though. In the first—exclusive agency jurisdiction—the court determines that it does not have the authority to determine the relevant issue and the case is therefore undeterminable without referral.⁵¹ We see this in the rate-setting cases where the doctrine was first formulated.⁵² In the second—the advice referral—the court *can* answer the question, but, for a variety of reasons, chooses to seek the aid of the agency.⁵³ Some primary jurisdiction cases do not fall neatly into one category or the other and the court may invoke language from both types of primary jurisdiction to support an agency referral.⁵⁴

As to the doctrine's application, Justice Harlan wrote in 1956 that “[n]o fixed formula exists for applying the doctrine In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation,”⁵⁵ but this is not completely accurate. The application of the doctrine varies depending on the context in which it is being applied.⁵⁶ In exclusive agency jurisdiction cases, like rate-setting and labor dispute cases—both of which are discussed below—courts must refer certain issues to the relevant agency, while advice referrals are discretionary.⁵⁷ Each circuit has formulated factors to guide courts in managing that discretion. For example, the First Circuit uses three factors: “(1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court,”⁵⁸ and the Second Circuit uses four: (1) whether the issue is within the agency's expertise, (2) whether the issue is within the agency's discretion, (3) whether there is a “substantial danger of inconsistent rulings,”

responsibility should be performed by the relevant agency rather than the courts.”); *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000) (noting that where the federal district court has subject matter jurisdiction over a claim, the “question remains whether the district court should refer [the] claim to the [Surface Transportation Board] under the doctrine of primary jurisdiction”).

⁵¹ See *Arsberry*, 244 F.3d at 563; Lucchetti, *supra* note 20, at 855.

⁵² See *infra* Part II.B.1.a.

⁵³ *Arsberry*, 244 F.3d at 563–64.

⁵⁴ See, e.g., *Chi. Mercantile Exch. v. Deaktor*, 414 U.S. 113, 114–15 (1973) (per curiam) (explaining that administrative adjudication of alleged violations of the Commodity Exchange Act and the rules were instrumental to the task assigned to the Commission, and adjudication by the Commission would be a “great help” to the deciding court (quoting *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 307 (1973))). Although this is clearly a primary jurisdiction case, and relies on a previous primary jurisdiction case for its ruling, the Court does not use the term “primary jurisdiction.” See generally *Deaktor*, 414 U.S. 113.

⁵⁵ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

⁵⁶ See *id.* (“No fixed formula exists for applying the doctrine of primary jurisdiction.”).

⁵⁷ *Arsberry*, 244 F.3d at 563–64.

⁵⁸ *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580–81 (1st Cir. 1979).

and (4) whether a prior application has been made to the agency.⁵⁹ These factors tend to revolve around the rationales of expertise and uniformity, which were the values the Supreme Court looked to when initially formulating and applying the doctrine.⁶⁰ Some circuits, like the Ninth, take the effect on judicial administration and the potential for delay into account when considering whether the use of the doctrine is appropriate.⁶¹

Courts vary on whether the primary jurisdiction doctrine is mandatory if the required factors are met but the disparity can be roughly explained by looking at the justification the court uses for referral—is it a case of exclusive agency jurisdiction or is the court seeking advice? The first will require an agency referral while the second is discretionary.⁶² For example, in a case regarding the rates that a telecommunications service provider charged several payphone service providers, the Ninth Circuit noted that “the interpretation of an agency order issued pursuant to the agency’s congressionally granted regulatory authority falls within the agency’s primary jurisdiction where the order reflects policy concerns or issues requiring uniform resolution.”⁶³ The Court went on to find that in this case, “the primary jurisdiction doctrine *requires* referral of the threshold issue.”⁶⁴ Rate-setting cases fall squarely within the exclusive agency jurisdiction prong of primary jurisdiction.⁶⁵ Contrast this to Justice Breyer’s discussion of the issue, in a concurrence in a 2003 case regarding the State of Maine’s prescription drug rebate program, where he explains that if the conditions for primary jurisdiction are satisfied, “[a] court may then stay its proceedings—for a limited time, if appropriate—to allow a party to initiate agency review.”⁶⁶ Although cases like this one that involve Medicaid rates are hard to categorize and tend to fall in between the exclusive agency jurisdiction and agency referral prongs of primary

⁵⁹ Nat’l Commc’ns Ass’n v. Am. Tel. & Tel. Co., 46 F.3d 220, 222 (2d Cir. 1995) (quoting Nat’l Commc’ns Ass’n v. Am. Tel. & Tel. Co., No. 93 Civ 3703 (KTD), 1994 WL 116083, at *1 (S.D.N.Y. Mar. 25, 1994)). The Ninth Circuit considers whether there is “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.” *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086–87 (9th Cir. 2006) (quoting *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)).

⁶⁰ See, e.g., *Far E. Conference v. United States*, 342 U.S. 570, 574–75 (1952).

⁶¹ See *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015).

⁶² I am only guessing that the cases would divide neatly along these lines, but did not catalog them as such.

⁶³ *Davel Commc’ns*, 460 F.3d at 1089.

⁶⁴ *Id.* (emphasis added).

⁶⁵ See *infra* Part II.B.1.a.

⁶⁶ *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674 (2003) (Breyer, J., concurring).

jurisdiction,⁶⁷ Justice Breyer would leave it to the discretion of the lower court to invoke primary jurisdiction and utilize available agency expertise.⁶⁸

Other aspects of the application of the primary jurisdiction doctrine, like waiver and standard of review, vary across courts. For example, parties in the Seventh Circuit can waive or forfeit application of the doctrine because “primary jurisdiction is quite different from subject matter jurisdiction,” and does not “concern a court’s power to hear a case in the first instance.”⁶⁹ But in the Eighth Circuit, “[i]t is well established . . . that [primary jurisdiction’s] invocation cannot be waived by the failure of the parties to argue it, ‘since the doctrine exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the parties.’”⁷⁰ There is also disagreement among circuits as to whether a determination that primary jurisdiction should be applied is subject to de novo review or abuse of discretion review.⁷¹

When a court decides that the application of primary jurisdiction is appropriate, it can stay the case until the issue is determined by the agency or dismiss the case without prejudice.⁷² Parties must usually approach the relevant agency themselves.⁷³ The Ninth Circuit has stated, “There is no formal transfer mechanism between the courts and the agency; rather, upon invocation of the primary jurisdiction doctrine, the parties are responsible for initiating the appropriate proceedings before the agency.”⁷⁴ In some circumstances, courts will stay a case for a specific amount of time while the parties seek resolution of the issue.⁷⁵

⁶⁷ See *infra* notes 220–27 and accompanying text.

⁶⁸ See *infra* notes 220–27 and accompanying text.

⁶⁹ *Gross Common Carrier, Inc. v. Baxter Healthcare Corp.*, 51 F.3d 703, 706 (7th Cir. 1995) (cited in James W. Hilliard, *Tapping Agency Expertise: The Doctrine of Primary Jurisdiction*, 96 ILL. B.J. 256, 258 (2008)).

⁷⁰ *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (quoting *Distrigas of Mass. Corp. v. Bos. Gas Co.*, 693 F.2d 1113, 1117 (1st Cir. 1982)) (also cited in Hilliard, *supra* note 69, at 259).

⁷¹ According to Bryson Santaguida and Nicholas A. Lucchetti, the Second, Eighth, and Ninth Circuits use a de novo standard, and the Third, Fourth, Fifth, Tenth, and D.C. Circuits use an abuse of discretion standard. Lucchetti, *supra* note 20, at 859–60; Santaguida, *supra* note 20, at 1533–34. The authors differ as to whether the First Circuit should be included in the de novo camp, and neither can place the Sixth nor the Eleventh Circuit. See Lucchetti, *supra* note 20, at 850–51; Santaguida, *supra* note 20, at 1533–34.

⁷² See *Reiter v. Cooper*, 507 U.S. 258, 268–69 (1993).

⁷³ See, e.g., *id.* at 268 n.3 (“‘Referral’ is sometimes loosely described as a process whereby a court refers an issue to an agency. But the ICA (like most statutes) contains no mechanism whereby a court can on its own authority demand or request a determination from the agency; that is left to the adversary system, the court merely staying its proceedings while the shipper files an administrative complaint” (citation omitted)).

⁷⁴ *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1087 (2006) (quoting *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 782 n.3 (9th Cir. 2002)).

⁷⁵ See *Hiser v. Pa. Dep’t of Pub. Welfare (In re St. Mary Hosp.)*, 125 B.R. 422, 427 (Bankr. E.D. Pa. 1991) (suspending the proceeding for 120 days while parties appealed a

B. *The Evolution of Primary Jurisdiction*

Although Supreme Court rhetoric on primary jurisdiction has been expansive, invoking the proper relationship between agencies and courts and evoking a mechanism that can facilitate the purpose of the administrative state, the Court has applied the doctrine, for the most part, only in narrow circumstances. The rhetoric, though, invoking discretion and balancing, has contributed to the misapplication of the primary jurisdiction doctrine by lower courts.⁷⁶ This Part discusses the development of the doctrine in the Supreme Court and surveys its application in lower courts.

1. *The Supreme Court*

In 1907, the Supreme Court prohibited a shipper of cotton seed from suing a railroad for charging an allegedly unreasonable rate.⁷⁷ The Court explained that the shipper had to go first to the Interstate Commerce Commission (ICC), which set the rates, to determine whether the rate was reasonable.⁷⁸ This case, *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, is often referred to as the origin of primary jurisdiction,⁷⁹ and the parameters of the doctrine began to take shape through the first half of the twentieth century, mostly in the context of common carrier rate-setting cases.⁸⁰

From 1956, when a case called *United States v. Western Pacific Railroad* was decided, through April 2015, there were about seventy-three Supreme Court cases that considered whether the application of primary jurisdiction was warranted—whether a court should have postponed decision in a case while it referred an issue to an administrative agency.⁸¹ It is in *Western*

disallowance of Medicaid claims by the Pennsylvania Department of Public Welfare), *abrogated on other grounds by* *Sacred Heart Hosp. v. Pa. Dep't of Pub. Welfare (In re Sacred Heart Hosp.)*, 204 B.R. 132, 142 (E.D. Pa. 1997).

⁷⁶ See *Tafflin v. Levitt*, 493 U.S. 455, 469 (1990) (Scalia, J., concurring) (“Such dicta, when repeatedly used as the point of departure for analysis, have a regrettable tendency to acquire the practical status of legal rules.”).

⁷⁷ *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907).

⁷⁸ *Id.*

⁷⁹ See Jaffe, *supra* note 19, at 579; Knippa, *supra* note 21, at 1293; Santaguidda, *supra* note 20, at 1519.

⁸⁰ See discussion *infra* Part II.B.1.b–c.

⁸¹ This number, for the most part, only includes cases that actually include the words “primary jurisdiction.” I did include one case that was clearly a primary jurisdiction case but did not use the term. This case, *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), where the district court should have referred actions against the commodity exchange to the Commodity Exchange Commission for an initial determination, *id.* at 115, is based on another primary jurisdiction case, *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), in which the term is used only by the dissenters. *Id.* at 310, 315, 317 n.6, 319 n.7, 320–21 (Marshall, J., dissenting). I very well may have missed other cases where the doctrine is not named, but I feel confident that the majority of primary jurisdiction cases are in the common carrier and public utility rate-setting area and the labor dispute

Pacific, which is addressed below, that the Court coalesces the doctrine of primary jurisdiction and explains the function of the doctrine.⁸² Courts⁸³ and commentators⁸⁴ often cite *Western Pacific* and *Far East Conference*, a 1952 case,⁸⁵ to explain the doctrine of primary jurisdiction.

Of the cases between 1956 and 2015 where primary jurisdiction was considered, the doctrine was accepted (agency referral approved) in about 40% of the cases.⁸⁶ Of the cases where the Court approved an agency referral, the subject matter was roughly divided as follows:

Table 1: *Cases Where Agency Referral Was Approved*

Number of Cases	Subject Matter
15	Common carrier/public utility rate-setting and antitrust disputes
12	Labor disputes
2	Commodity exchange
1	Food and Drug Administration regulation

context. There are also cases that include the words “primary jurisdiction” to indicate that a court or institution has jurisdiction in the first place, or to refer to a supporting case where a certain institution had jurisdiction in the first instance over an issue, but do not refer to the “primary jurisdiction doctrine” as discussed in this Article, and it is possible that I inadvertently included one or two of these in my count. *See, e.g.*, *Keystone Bituminous Coal Ass’n v. DeBenedictus*, 480 U.S. 470, 486 (1987) (not mentioning the term, but the term is mentioned in cited authority, *Pennsylvania’s Subsidence Act*, 52 PA. STAT. AND CONS. STAT. ANN. § 1406.2 (West 2011)). The unpublished chart compiling collected cases is on file with the author.

⁸² *See* discussion *infra* pp. 559–62.

⁸³ *See, e.g.*, *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 67–68 (2d Cir. 2002); *United States v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 68, 77–78 (D.D.C. 2011); *United States v. Seibert*, 403 F. Supp. 2d 904, 911–12 (S.D. Iowa 2005); *Phone-Tel Commc’ns, Inc. v. AT & T Corp.*, 100 F. Supp. 2d 313, 318 (E.D. Pa. 2000).

⁸⁴ *See, e.g.*, *Knippa, supra* note 21, at 1295–300; *Santaguida, supra* note 20, at 1520–24.

⁸⁵ *See* *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952).

⁸⁶ *See generally supra* note 81 and accompanying text.

In the cases where an agency referral was not approved, the subject matter looked like this:

Table 2: *Cases Where Agency Referral Was Not Approved*

Number of Cases	Subject Matter
16	Common carrier/public utility rate-setting and antitrust disputes
18	Labor disputes
3	Bank regulation
2	Department of Health, Education, and Welfare (Health and Human Services) regulation
5	Other (Department of Agriculture, Commodity Exchange Commission, state employment issues, workers' compensation issues, election issues)

These tables show that the vast majority of the primary jurisdiction cases that have reached Supreme Court review were in the contexts of common carrier and public utility rate-setting and labor disputes. In these areas, the question of whether an issue should be referred to the relevant agency falls into the exclusive agency jurisdiction category of primary jurisdiction, meaning that the court has determined that the case cannot go on until the agency has considered the issue.⁸⁷ Theoretically, these cases differ from exhaustion cases in that they are properly before the court, though the issue at hand must be determined by the agency in the first instance.⁸⁸ In practice, these cases are very similar to exhaustion cases because they must stop for the issue's consideration by the agency, though there may be issues left over for the court to decide when the case returns.⁸⁹

⁸⁷ See *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001); Lucchetti, *supra* note 20, at 856.

⁸⁸ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956) (“‘Exhaustion’ applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. ‘Primary jurisdiction,’ on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.”).

⁸⁹ *Reiter v. Cooper*, 507 U.S. 258, 268–69 (1993) (“[A primary jurisdiction referral] does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.”).

a. Rate-Setting Cases

Abilene Cotton first established the primary jurisdiction doctrine in the rate-setting context.⁹⁰ The Interstate Commerce Act (ICA), passed in 1887, “made it the duty of carriers subject to its provisions to charge only just and reasonable rates.”⁹¹ The Act required “establishing and publishing schedules of such rates,” and “forbade all unjust preferences and discriminations, [and] made it unlawful to depart from the rates in the established schedules.”⁹² Rates of motor common carriers had to be filed with the ICC and the ICA “specifically prohibit[ed] a carrier from providing services at any rate other than the filed . . . rate.”⁹³ It was the statute’s anti-discrimination focus that supported the uniformity and expertise rationales for primary jurisdiction; fair treatment for all shippers could only be guaranteed if one administrative body monitors rates.⁹⁴

In *Abilene Cotton*, the railroad defended against the shipper’s charge on the basis that it had filed these rates with the ICC, and that the lower court could therefore not adjudicate the issue.⁹⁵ Although this case is noted as the first primary jurisdiction case, and in primary jurisdiction cases we usually see jurisdiction retained in the courts, here the Court found that there was no jurisdiction in the court to hear the case.⁹⁶ The Court explained that although

⁹⁰ *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907).

⁹¹ *Id.* at 437.

⁹² *Id.*

⁹³ *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 120 (1990). This doctrine is called the filed rate doctrine and is strictly applied. *See Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998). This is to “prevent carriers from intentionally ‘misquoting’ rates to shippers as a means of offering them rebates or discounts” because “the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services.” *Id.* at 223 (quoting in part *Maislin*, 497 U.S. at 127) (applying the filed rate doctrine in the telecommunications context and noting that relevant provisions in the Communications Act were modeled after similar provisions in the ICA).

⁹⁴ *See, e.g., Interstate Commerce Comm’n v. Atl. Coast Line R. Co.*, 383 U.S. 576, 591–92 (1966) (“If shippers could challenge the filed rates by proceedings before a court, without prior resort to the Commission, different conclusions might be reached by different courts; and the prevailing shippers would thereby obtain a rate preference as compared to unsuccessful shippers, which would violate the principle of uniform rates.”). All but two of the rate-setting primary jurisdiction cases since 1956 have to do with whether the ICC should have the primary review of Interstate Commerce Act issues. The remaining two concerned the Shipping Act of 1916 and the Federal Maritime Board. These cases reference the same policy justifications as support of the use of primary jurisdiction in the ICC cases, and tend to cite the same precedent, including *Abilene Cotton* and *Far East Conference*. *See, e.g., Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970).

⁹⁵ *Abilene Cotton*, 204 U.S. at 430–31.

⁹⁶ *Id.* at 448. This may be because this case only involved the specific issue that had to be referred to the agency; there was nothing left for the court to hear.

there were two issues—whether the Act passed by Congress to regulate commerce divested the lower court of jurisdiction, and whether, even if it had jurisdiction, the court could grant relief, based on an unreasonable rate, even if such rate had not been found unreasonable by the ICC—“these questions are only seemingly different, because they present but different phases of the fundamental question.”⁹⁷ This question was whether a shipper could bring an action against a common carrier in court to recover damages based on the charging of an unreasonable rate even though the rate had properly been filed with the ICC.⁹⁸

To determine that the lower court could not hear the claim, but that the “Interstate Commerce Commission . . . is vested with power originally to entertain proceedings for the alteration of an established schedule,”⁹⁹ the Court looked closely at the purpose and intended operation of the relevant Act.¹⁰⁰ Even though the Act preserved common law remedies,¹⁰¹ the Court refused to construe that clause to allow for concurrent jurisdiction because “the act cannot be held to destroy itself.”¹⁰² The Court noted that one of the Act’s main goals was to establish uniform shipping rates,¹⁰³ and that if courts as well as the Commission could hear rate disputes, “there might be a divergence between the action of the Commission and the decision of a court.”¹⁰⁴ The Court here refused to allow courts to have jurisdiction over a rate filed with an administrative body, based on the uniformity concerns represented by the relevant statute.¹⁰⁵

Over the next few decades, the Court continued to protect the authority of the Commission to determine rates and to grapple with the extent of its authority over tangential questions. In *Great Northern Railway Co. v. Merchants Elevator Co.*, for example, the resolution of a disputed charge rested solely on whether the shipment fell within a tariff’s published rule or within an enumerated exception to that rule.¹⁰⁶ The question for the Court, however, was whether this should be resolved by the ICC or a lower court.¹⁰⁷ In deciding that the question could be decided by a court, the Court here noted that there was no need here for administrative discretion, and that because the issue could be appealed to the Supreme Court and this would satisfy uniformity concerns, there was no need for the ICC to determine the issue

⁹⁷ *Id.* at 435–36.

⁹⁸ *Id.* at 436.

⁹⁹ *Id.* at 448.

¹⁰⁰ *Id.* at 437–39.

¹⁰¹ *Abilene Cotton*, 204 U.S. at 439.

¹⁰² *Id.* at 446.

¹⁰³ *Id.* at 439.

¹⁰⁴ *Id.* at 439, 441.

¹⁰⁵ *Id.* at 440–41.

¹⁰⁶ *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 289 (1922).

¹⁰⁷ *Id.* at 290.

preliminarily.¹⁰⁸ The Court concludes that “[p]reliminary resort to the Commission,” is necessary only in issues of “fact and of discretion in technical matters,” and when it is necessary for uniformity reasons.¹⁰⁹

In *United States Navigation Co. v. Cunard Steamship Co.*, a 1932 case, the Court considered whether an antitrust challenge to a group of cargo ships could be heard in federal district court or was “within the exclusive jurisdiction of the United States Shipping Board, under the Shipping Act of 1916.”¹¹⁰ The Court explained that although the claim itself did state a cause of action under the Sherman Antitrust Act, the Shipping Act may “stand[] in the way.”¹¹¹ Analyzing other cases the Court had heard regarding the ICA, like *Abilene Cotton* and *Great Northern Railway Co.*, the Court concluded that the Shipping Act “should have like interpretation, application and effect,” to the ICA, and the important inquiry was whether the expertise of the ICC or the Shipping Board was needed to secure the uniformity that was the purpose of the ICA and the Shipping Act.¹¹² Here, because the Shipping Act did cover the facts of the case, preliminary resort to the Board was necessary.¹¹³

The Court continued to affirm the primary jurisdiction of the ICC and the Shipping Board through the first half of the twentieth century.¹¹⁴ *Abilene Cotton* was cited for the proposition that a party challenging the reasonableness of railroad rates must first have this issue heard by the ICC:

[T]his Court so construed the Interstate Commerce Act in the famous *Abilene Cotton Oil* case as to withdraw from the shipper the historic common law right to sue in the courts for charging unreasonable rates. It required resort to the Interstate Commerce Commission because not to do so would result in the impairment of the general purpose of that Act.¹¹⁵

¹⁰⁸ *Id.* at 290–91, 294.

¹⁰⁹ *Id.* at 291.

¹¹⁰ *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 478–79 (1932).

¹¹¹ *Id.* at 480.

¹¹² *Id.* at 481–85.

¹¹³ *See id.* at 483, 485. The Court explained that even though the ICA and the Shipping Act should be construed similarly, there was even a stronger case to refer shipping issues to the Board because the Shipping Act did not contain a savings clause for common law or statutory remedies as did the ICA. *See id.* at 485–86.

¹¹⁴ *See, e.g.*, *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 428 (1940) (holding that the district court had jurisdiction but should have stayed the case while the Commission decided the validity of a tariff practice).

¹¹⁵ *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 759 (1945) (Frankfurter, J., dissenting) (citation omitted); *see also, e.g.*, *United States v. Interstate Commerce Comm’n*, 337 U.S. 426, 437 (1949) (“[I]t has been established doctrine . . . that a shipper cannot file a § 9 proceeding in a district court where his claim for damages necessarily involves a question of ‘reasonableness’ calling for exercise of the Commission’s primary jurisdiction.” (citing *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907))); *Mitchell Coal & Coke Co. v. Pa. R.R. Co.*, 230 U.S. 247, 259, 266–67 (1913) (pointing to *Abilene Cotton* in finding that the court should stay the case so plaintiff could

The Court continued to clarify the boundaries of primary jurisdiction in the context of common carriers during the 1950s, and while these cases are firmly within the established tradition of providing the ICC and the Shipping Board with exclusive jurisdiction over rate-setting issues, the rhetoric the Court uses in these cases is broad. In *Far East Conference v. United States*, the Court held that the United States had to bring its complaint for violations of the Sherman Act against an association of steamship companies before the Federal Maritime Board before it could be heard in federal court, as did the private shippers in *Cunard*.¹¹⁶ The Court elaborated 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,” and that this principle was “now firmly established.”¹¹⁷ The Court discussed *Abilene Cotton* in depth, explaining that in that case, although “the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction,” the Court had engaged in “one of those creative judicial labors whereby modern administrative law is being developed.”¹¹⁸ According to this philosophy, courts and agencies should work together to achieve the intended end of the relevant statute.¹¹⁹ *Far East Conference* relies on the language in *United States v. Morgan*, a 1939 case, to justify its conclusion that the federal government’s antitrust action had to be heard by the Federal Maritime Board before being brought in a district court.¹²⁰ *Morgan* was not about which body—a court or an administrative agency—should hear a specific issue, but rather one about whether, and when, a court should distribute a fund it held pending a proceeding before the Secretary of Agriculture regarding the reasonableness of rates for services at the Kansas City stockyards.¹²¹ We see, in the *Far East Conference* Court’s reliance on *Morgan*, where the issue was whether a court, acting in equity, could discharge funds, a perception that primary jurisdiction is one tool among many available to facilitate the interaction between courts and agencies.

Abilene Cotton is a “creative judicial labor” in the sense that it found a mandate in “the act of Congress to regulate commerce,”¹²² that was not found in the language of the statute—that “a shipper seeking reparation predicated

appeal the reasonableness of rates to the ICC, and that plaintiff could return to the district court if plaintiff prevailed).

¹¹⁶ See *Far E. Conference v. United States*, 342 U.S. 570, 573–74 (1952).

¹¹⁷ *Id.* at 574.

¹¹⁸ *Id.* at 575.

¹¹⁹ See *id.* (“Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.” (quoting *United States v. Morgan*, 307 U.S. 183, 191 (1939))).

¹²⁰ *Id.* at 575–76.

¹²¹ *Morgan*, 307 U.S. at 185.

¹²² *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 430 (1907).

upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission.”¹²³ The *Abilene Cotton* Court acknowledged that if one read the relevant provision of the statute in isolation, referral to the Commission may not seem proper, but, “when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible.”¹²⁴ The Court is reading the text of the statute within its context with a recognition of the congressional purpose behind the law.

Because the Act in question in *Abilene Cotton* did not explicitly withdraw a shipper’s common law right to challenge the reasonableness of rates in a court of law, doing so (as the court did) would be a “repeal[] by implication,” which is not favored.¹²⁵ The Court, therefore, explains that it can only justify its holding if the “preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy,” which it was here.¹²⁶ The *Abilene Cotton* Court read referral requirements into the statutes that were not written, but found that the statutes’ anti-discriminatory purposes could only be effected through a policy of uniformity enforced by the implementing administrative agencies.¹²⁷

Abilene Cotton’s holding was applied consistently through the following decades only in the same context—that of common carrier rate regulation. It was not a broad mandate to courts to negotiate the roles of agencies and courts.¹²⁸ *Far East Conference*’s expansive rhetoric, though, when read independently of the facts of the case, permits courts to refer all cases containing “issues of fact not within the conventional experience of judges,” and within the purview of an administrative agency, to that agency instead of deciding the issue in the first instance.¹²⁹

In *United States v. Western Pacific Railroad Co.*, a 1956 case, several railroad companies sued the United States for the difference in the rate the government had paid for shipment of steel bomb cases and the rate the

¹²³ *Id.* at 448.

¹²⁴ *Id.* at 442.

¹²⁵ *Id.* at 436–37.

¹²⁶ *Id.* at 437.

¹²⁷ *Id.* at 436–40.

¹²⁸ The dissent in *Far East Conference* argued that the majority, by finding the Shipping Act to vest primary jurisdiction over antitrust suits in the Federal Maritime Board, stretched its interpretive authority. *Far E. Conference v. United States*, 342 U.S. 570, 577–79 (1952) (Douglas, J., dissenting). The Shipping Act shielded shippers from unjust discrimination in rate-setting, but made no provision for the activity the Department of Justice was challenging here—an unlawful combination. *See id.* at 578. An antitrust challenge, as we see in *Far East Conference*, is profoundly different than a challenge to the reasonableness of rates, such as was seen in *Abilene Cotton*. Allowing the latter challenge to go forward in court would thwart the purpose of the relevant statute directly, whereas the same cannot be said—and was not said by the majority—for the former challenge.

¹²⁹ *See id.* at 574–75 (majority opinion).

railroads said that they were due.¹³⁰ The Court of Claims adjudicated part of the claim—the construction of the tariff—but allocated the determination of the reasonableness of the claim to the ICC.¹³¹ The Supreme Court disagreed with this application of the primary jurisdiction doctrine, holding “both the issues of tariff construction and the reasonableness of the tariff as applied were initially matters for the Commission’s determination.”¹³² The Court instructed lower courts to analyze whether the need for uniformity or agency expertise was present in deciding whether to apply the doctrine, explaining that these were the values supporting the doctrine.¹³³ Uniformity and agency expertise “are part of the same principle,” which is “concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.”¹³⁴ The Court cited *Far East Conference’s* statement that it was “now firmly established” that agencies should have a part in determining “issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion.”¹³⁵

Since the primary jurisdiction doctrine was articulated in *Abilene Cotton* in 1907, the Court maintained and negotiated the jurisdiction of the relevant administrative agency over the rate-setting (and connected activities) for common carriers and public utilities¹³⁶ to protect the anti-discrimination purpose of the regulatory statutes.¹³⁷ To protect the uniformity of rates, the

¹³⁰ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 60 (1956).

¹³¹ *Id.* at 62–63.

¹³² *Id.* at 70.

¹³³ *Id.* at 64 (“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”).

¹³⁴ *See id.* at 63–64.

¹³⁵ *Id.* at 64 (quoting *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952)).

¹³⁶ *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) (“Public utility regulation and common carrier regulation (essentially the same form of regulation, the term ‘common carrier’ being generally used of firms providing transportation or communications and ‘public utility’ of firms providing electricity or gas) have been rolled back very far in recent years. But a piece of it survives in its pristine form in the provision of long-distance telephone service. The terms and conditions of service are set forth in ‘tariffs,’ which are essentially offers to sell on specified terms, filed with the FCC and subject to modification or disapproval by it. Once a tariff is filed and until it is amended, modified, superseded, or disapproved, the carrier may not deviate from its terms.”).

¹³⁷ The regulatory regime has changed over the past century. For example, the Interstate Commerce Commission Termination Act (ICCTA) was passed in 1995, “which abolished the 108-year-old Interstate Commerce Commission and substantially deregulated the rail and motor carrier industries.” *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 197 (1st Cir. 2000). The Surface Transportation Board (STB) was established in the place of the ICC. *Id.* “The ICCTA creates exclusive federal regulatory jurisdiction and exclusive federal remedies” over others. *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 804, 806–07 (5th Cir. 2011) (explaining that the relevant provision of the ICCTA “completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad’s decisions in the economic realm”). The Supreme Court has

Court construed these agencies' jurisdiction broadly,¹³⁸ and parsed the availability of judicial review.¹³⁹ Referral to the agency is not subject to judicial discretion if the issue falls within the agency's rate-setting or construing authority; the Court has consistently stated that such a case must go first to the agency—which “alone is vested with power originally to entertain proceedings for the alteration of an established schedule”¹⁴⁰—before judicial review of any remaining issues.¹⁴¹ The Court located the requirement for agency referral in the text, context, and purpose of the relevant statutes,¹⁴² but

not decided a case regarding the primary jurisdiction of the STB. Lower courts have used primary jurisdiction to refer cases to the STB. See *infra* note 206 and accompanying text, recognizing the ICCTA's continuity with the ICA. See, e.g., *Elam*, 635 F.3d at 809 (“[C]ourts have repeatedly applied the judicial doctrine of ‘primary jurisdiction’ in the context of both the ICCTA and its predecessor statute, the Interstate Commerce Act (ICA).”).

¹³⁸ See, e.g., *Burlington N., Inc. v. United States*, 459 U.S. 131, 141 (1982) (“[U]nder the Interstate Commerce Act, primary jurisdiction to determine the reasonableness of rates lies with the Commission”); *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 460 (1979) (holding that the merits of a rate-change suspension decision by the ICC are unreviewable: “Judicial review would once again undermine the Commission’s primary jurisdiction by bringing the courts into the adjudication of the lawfulness of rates in advance of administrative consideration.”); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 697–98 (1973); *Arrow Transp. Co. v. S. Ry. Co.*, 372 U.S. 658, 668 (1963) (discussing the timing of rate changes under ICC’s exclusive primary jurisdiction: “Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction.”); *W. Pac. R.R. Co.*, 352 U.S. at 62–63 (questioning whether both construction and reasonableness of tariffs are within primary jurisdiction of the ICC); see also *Cahnmann*, 133 F.3d at 487 (noting that public utility regulation has been rolled back).

¹³⁹ See, e.g., *Seaboard Allied Milling Corp.*, 442 U.S. at 446–47 (determining the reviewability of an ICC rate-change suspension decision); *Interstate Commerce Comm’n v. Atl. Coast Line R. Co.*, 383 U.S. 576, 592 (1966) (“Of course a preliminary determination by the Commission would have little effect in achieving uniformity if its determination were subject to *de novo* review”).

¹⁴⁰ *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907).

¹⁴¹ See also *Burlington N.*, 459 U.S. at 138 (holding that federal courts must defer to the ICC “on questions concerning the applicable rates”); *Arrow Transp. Co.*, 372 U.S. at 667 (“[Congress] meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief.”); *W. Pac. R.R. Co.*, 352 U.S. at 70 (“[T]he issues of tariff construction and the reasonableness of the tariff as applied were initially matters for the Commission’s determination.”); *Far E. Conference v. United States*, 342 U.S. 570, 576–77 (1952) (dismissing the government’s complaint and holding that “initial submission to the Federal Maritime Board is required”).

¹⁴² See, e.g., *S. Ry. Co.*, 442 U.S. at 454 (“[T]he ultimate analysis is always one of Congress’ intent, and . . . ‘there is persuasive reason to believe that [nonreviewability] was the purpose of Congress.’”) (second alteration in original) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)); *Arrow Transp. Co.*, 372 U.S. at 664–67.

cushioned this within a more broad and generalized rhetoric about the interaction between courts and agencies.

Just as courts have been negotiating the parameters of the congressional delegation of supervision over certain aspects of regulation to an administrative body in rate-setting cases over the last century, there has been judicial attention on the interaction between courts and the National Labor Relations Board (NLRB), the administrative agency charged with the oversight over certain aspects of industrial relations since the passage of the National Labor Relations Act in 1935.¹⁴³ This is the other main locus of primary jurisdiction activity.

b. Labor Disputes and the Garmon Doctrine

The National Labor Relations Act (NLRA) marked an enormous change in the oversight of labor relations, shifting the regulatory balance from the states to the federal government. In 1959, Justice Frankfurter wrote, “The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations.”¹⁴⁴ Courts were of course concerned with “determining the extent to which state regulation must yield to subordinating federal authority,”¹⁴⁵ or when state law was preempted by federal law, but their purview extended to the appropriate body before which disputes would be heard—courts or the NLRB. This is because:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.¹⁴⁶

In the context of labor disputes, therefore, courts must determine not just what law (federal or state) to apply to a labor dispute, but whether such a determination could even be properly made by a court, or should be made by the NLRB.

¹⁴³National Labor Relations Act, Pub. L. No. 198, § 3, 49 Stat. 449, 451 (1935) (codified as amended at 29 U.S.C. § 153 (2012)).

¹⁴⁴*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239 (1959).

¹⁴⁵*Id.* at 241.

¹⁴⁶*Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953).

San Diego Building Trades Council v. Garmon involved a dispute between several unions and a lumber business in California over whether the business should employ nonunion workers.¹⁴⁷ The unions were picketing the lumber business, and the business brought an action in California state court asking for an injunction and damages, and simultaneously petitioned the NLRB for adjudication of the dispute.¹⁴⁸ The NLRB declined jurisdiction and the California state court awarded an injunction and damages under state law.¹⁴⁹ The Supreme Court had previously vacated the injunction,¹⁵⁰ and the question before the Court here was whether the damages award could stand or was precluded by the NLRA.¹⁵¹

The Court held that even though the NLRB had declined jurisdiction, the State had no authority to act in the matter.¹⁵² The challenged activity “arguably” fell within the purview of sections 7 or 8 of the NLRA, and was therefore subject to “the exclusive competence of the National Labor Relations Board.”¹⁵³ Sections 7 and 8 are “broad provisions” that “govern both protected ‘concerted activities’ and unfair labor practices. They regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions.”¹⁵⁴

The *Garmon* Court supported this conclusion by pointing to Congress’s intention that labor disputes be handled uniformly and the need for centralized expertise to ensure this uniformity.¹⁵⁵ The NLRB’s primary jurisdiction over matters covered by sections 7 and 8 is crucial to the federal regulation of industrial relations, and its declination of the issue “does not give the States the power to act.”¹⁵⁶ The activity here arguably fell within sections 7 or 8 of the NLRA, which displaced state jurisdiction.¹⁵⁷ This was so even though the NLRB could not have awarded damages even had it accepted the case.¹⁵⁸

In *Garmon*, the challenged activity was “arguably” protected by federal law.¹⁵⁹ The Court explained in a later case that matters arguably protected by federal law fall under the primary jurisdiction of the NLRB for the purpose of ensuring uniformity of administration of the national labor relations laws.¹⁶⁰

¹⁴⁷ *Garmon*, 359 U.S. at 237.

¹⁴⁸ *Id.* at 237–38.

¹⁴⁹ *Id.*

¹⁵⁰ *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 29 (1957).

¹⁵¹ *Garmon*, 359 U.S. at 239.

¹⁵² *Id.* at 246.

¹⁵³ *Id.* at 245.

¹⁵⁴ *Id.* at 241.

¹⁵⁵ *See id.* at 242–43.

¹⁵⁶ *Id.* at 246.

¹⁵⁷ *Garmon*, 359 U.S. at 246.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 245.

¹⁶⁰ *Brown v. Hotel & Rest. Emps. & Bartenders Int’l Union Local 54*, 468 U.S. 491, 502 (1984) (“[A] presumption of federal pre-emption applies even when the state law regulates conduct only arguably protected by federal law. Such a pre-emption rule avoids

This situation differs from when the activity is actually protected by federal law, in which case federal law preempts state law.¹⁶¹

The distinction between NLRB primary jurisdiction to protect the uniformity of the regulatory scheme and primary jurisdiction as a matter of preemption introduces an element of discretion into the primary jurisdiction deliberation. In the case where activity is actually protected, and federal law preempts state law, “pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right.”¹⁶² While *Garmon* provides that when “regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility,” states may regulate “in the absence of compelling congressional direction,”¹⁶³ this exception is not available when the matter is one of preemption.¹⁶⁴

The primary jurisdiction of the NLRB differs slightly from what we see in the context of rate-setting activities by common carriers and public utilities in that jurisdiction does not return to the referring court after the issue has been litigated:

the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB.”).

¹⁶¹ The *Garmon* doctrine is one of two NLRA preemption doctrines. The second “protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated.” *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985). This doctrine expands the reach of exclusive federal jurisdiction over labor issues, but does not directly implicate the primary jurisdiction of the NLRB. See *Brown*, 468 U.S. at 502–03 (“[P]resumption of federal pre-emption, based on the primary jurisdiction rationale, properly admits to exception when unusually ‘deeply rooted’ local interests are at stake.”).

¹⁶² *Brown*, 468 U.S. at 503.

¹⁶³ *Garmon*, 359 U.S. at 244. The Court has grappled with the boundaries of this exception. The Court has, for example, determined that an employer could have a trespass action against a union heard by a state court, *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 198 (1978); that a union member’s claim for wrongful expulsion was not within the NLRB’s primary jurisdiction, *Int’l Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 237–38 (1971); that a defamation suit within the context of a labor dispute can be heard by a state court, *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966); and that the question of whether a marketing restriction is a condition of employment is not within the primary jurisdiction of the NLRB, *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685–86 (1965).

¹⁶⁴ *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 n.9 (1985) (“So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests. The present tort suit would allow the State to provide a rule of decision where Congress has mandated that federal law should govern. In this situation the balancing of state and federal interests required by *Garmon* pre-emption is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail.”).

[T]he term “primary jurisdiction” [in regards to industrial relations] is used to refer to the various considerations articulated in *Garmon* and its progeny that militate in favor of pre-empting state-court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board. . . .

. . . .
 . . . While the considerations underlying *Garmon* are similar to those underlying the primary-jurisdiction doctrine, the consequences of the two doctrines are therefore different. Where applicable, the *Garmon* doctrine completely pre-empts state-court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act.¹⁶⁵

This theoretical distinction is not applied wholly consistently, however, as the Court describes, at other times, the *Garmon* doctrine by reference to the rate-setting cases described above,¹⁶⁶ including *Western Pacific* and *Far East Conference*.¹⁶⁷

The *Garmon* doctrine protects the primary jurisdiction of the NLRB to consider certain aspects of labor disputes, and to determine whether or not it is federal or state law that should govern. Courts can balance state and federal interests in determining the appropriateness of primary jurisdiction in certain circumstances, and thus the NLRB’s jurisdiction cannot be categorized as exclusive agency jurisdiction. Courts, however, are not basing referral to the agency on whether they need advice about the issue at hand, as in the advice referral model of primary jurisdiction. The case will not return to the court after the agency determines the issue. Moreover, it is uniformity concerns that are paramount. As with rate-setting cases, the purpose and structure of the relevant statute requires adjudication by the relevant administrative agency, or the uniformity relied upon by the federal scheme will be destroyed. The federal scheme will fail without this mechanism.¹⁶⁸

c. Other Contexts

Outside of the context of rate-setting and labor disputes, the Court has decided approximately three cases in the last six decades that use primary

¹⁶⁵ *Sears, Roebuck & Co.*, 436 U.S. at 199 n.29.

¹⁶⁶ See *supra* Part II.B.1.a.

¹⁶⁷ See *Local Union No. 189, Amalgamated Meat Cutters*, 381 U.S. at 684–85 (citing *Western Pacific* and *Far East Conference* to hold that the district court had jurisdiction to hear the case); see also *Int’l. Bhd. of Boilermakers*, 401 U.S. at 238 (citing *Western Pacific* and *Far East Conference* to hold that the NLRB did not have “exclusive competence” to hear the case).

¹⁶⁸ See *Garmon*, 359 U.S. at 244 (“[T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.”); *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (“This clause . . . cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.”).

jurisdiction to send an issue to an administrative agency.¹⁶⁹ While none of these cases can be called exclusive agency jurisdiction cases, neither are they pure advice referrals.

Two of the three involved referral to the Commodity Exchange Commission: *Ricci v. Chicago Mercantile Exchange* and *Chicago Mercantile Exchange v. Deaktor*.¹⁷⁰ In *Ricci*, the Court affirmed the Seventh Circuit's decision to stay an antitrust action against the Chicago Mercantile Exchange while the Commodity Exchange Commission decided whether there had been a violation of the rules of the Exchange and the Commodity Exchange Act in the first instance (the petitioner alleged that his membership in the Exchange had been improperly transferred to another).¹⁷¹ The decision that the administrative proceedings should take place before the antitrust action went forward was based on three considerations:

(1) that it will be essential for the antitrust court to determine whether the Commodity Exchange Act or any of its provisions are "incompatible with the maintenance of an antitrust action"; (2) that some facets of the dispute between *Ricci* and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question.¹⁷²

In short, the Court thought it would be useful to the lower courts to know whether or not there had been a violation of the Exchange rules before it decided whether those rules constituted a violation of the Sherman Act. The *Deaktor* case followed the *Ricci* case and reversed the court of appeals for not ordering the district court to stay two cases challenging actions of the Chicago Mercantile Exchange (the Exchange) while the Commodity Exchange Commission determined the issues within its jurisdiction.¹⁷³

On one hand, *Ricci* and *Deaktor* can be characterized as exclusive agency jurisdiction cases. The majority in *Ricci* explains that if the Exchange's action in transferring a petitioner's membership were valid, then the courts would have to determine whether these rules violated the antitrust law or whether Congress meant to insulate them "from antitrust attack."¹⁷⁴ If, though, the action violated the Exchange's rules, "the antitrust action should very likely take its normal course."¹⁷⁵ To properly decide the case, therefore, the lower courts must know the administrative outcome. But on the other hand, there is

¹⁶⁹ See generally *Chi. Mercantile Exch. v. Deaktor*, 414 U.S. 113, 115 (1973) (per curiam); *Weinberger v. Bentex Pharm., Inc.*, 412 U.S. 645 (1973); *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289 (1973).

¹⁷⁰ *Deaktor*, 414 U.S. at 115; *Ricci*, 409 U.S. at 302.

¹⁷¹ *Ricci*, 409 U.S. at 302.

¹⁷² *Id.* (citation omitted).

¹⁷³ *Deaktor*, 414 U.S. at 115-16.

¹⁷⁴ See *Ricci*, 409 U.S. at 303.

¹⁷⁵ *Id.* at 304.

no allegation that the antitrust action, if it proceeded concurrently with the administrative action, would destroy the regulatory scheme of the Commodity Exchange Act, nor would the antitrust action be in any way reviewing the decision of the administrative body (as courts would be doing in the rate-setting and labor dispute cases). Therefore, this can be read as an advice case. This characterization is supported by the dissenters in *Ricci*, who focus on the fact that “the Commodity Exchange Commission has neither the authority nor power to make a determination on the issues underlying the civil action.”¹⁷⁶ In his dissent, Justice Marshall explains that the doctrine of primary jurisdiction must be used sparingly and carefully:

Where the plaintiff has no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the administrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote, I would strike a balance in favor of immediate court action.¹⁷⁷

In *Weinberger v. Bentex Pharmaceuticals, Inc.*, the Court decided that it had been appropriate for the district court to refer a question of whether several drugs had to be classified as “new drugs,” and therefore be subjected to rigorous regulatory requirements, to the FDA for determination.¹⁷⁸ The Court looked to the expertise of the FDA, explaining, “these are the kinds of issues peculiarly suited to initial determination by the FDA.”¹⁷⁹ Turning to *Ricci* and *Far East Conference* for support, the Court found that this kind of question was delegated to the agency by Congress, and “it is implicit in the regulatory scheme, not spelled out *in haec verba*, that FDA has jurisdiction to decide with administrative finality, subject to the types of judicial review provided, the ‘new drug’ status of individual drugs or classes of drugs.”¹⁸⁰ Although the Court does not state that an alternate conclusion would destroy the regulatory scheme, it does list the delay, inefficiency, and unfairness that would result if determinations such as this did not go to the FDA.¹⁸¹

2. Lower Courts

Each circuit has promulgated factors for courts to use in determining whether or not primary jurisdiction is appropriate in any particular situation.¹⁸²

¹⁷⁶ *Id.* at 309 (Douglas, J., dissenting).

¹⁷⁷ *Id.* at 321 (Marshall, J., dissenting).

¹⁷⁸ See *Weinberger v. Bentex Pharm., Inc.*, 412 U.S. 645, 653 (1973).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 653–54.

¹⁸¹ *Id.*

¹⁸² I focus on federal cases in this Part. Further study on whether there is significant difference between state and federal court primary jurisdiction practice is an important project I hope to undertake in the future. Catherine M. Sharkey’s work on the difference between regulatory preemption by the Federal Drug and Cosmetic Act in pharmaceutical

These factors derive from the Supreme Court's primary jurisdiction jurisprudence and emphasize uniformity and expertise. The factors are as follows:

cases in state and in federal courts shows that there are important conclusions to be drawn from the nuance of primary jurisdiction practice. *See generally* Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013 (2007) (discussing the divergent approaches of state and federal courts in deciding whether the FDCA and accompanying regulations, promulgated by the FDA, preempt state failure to warn claims brought by pharmaceutical companies).

Table 3: *Factors Used to Determine Whether Primary Jurisdiction Is Appropriate*

Circuit	Primary Jurisdiction Factors
First	“(1) whether the agency determination [lies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [i]s required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court.” ¹⁸³
Second	“(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s particular field of expertise; (2) whether the question at issue is particularly within the agency’s discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.” ¹⁸⁴ “The court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings.” ¹⁸⁵
Third	Same as Second Circuit. ¹⁸⁶
Fourth	Same as Second Circuit. ¹⁸⁷
Fifth	“[A]gency referral is favored when (a) it will promote even-handed treatment and uniformity in a highly regulated area, or

¹⁸³ *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000) (alterations in original) (quoting *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995)). In *Pejepscot*, the court held that the district court did have subject matter jurisdiction over the shipping dispute, so it should not dismiss the case with prejudice but should stay the case and refer it to the Surface Transportation Board (STB) for expertise reasons. *See id.* at 205–06. *Blackstone Valley* involved a Comprehensive Environmental Response, Compensation, and Liability Act claim, and the court held that the matter should be referred to the EPA for determination based on considerations of expertise and uniformity. *Blackstone Valley*, 67 F.3d at 992.

¹⁸⁴ *Federal Trade Comm’n v. Verity Int’l, Ltd.*, 443 F.3d 48, 60 (2d Cir. 2006) (quoting *Nat’l Commc’ns Ass’n v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 222–23 (2d Cir. 1995)). Primary jurisdiction did not warrant referring telecommunications billing case to the FCC. *Id.* at 61.

¹⁸⁵ *Nat’l Commc’ns Ass’n*, 46 F.3d at 223.

¹⁸⁶ *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (citing *Glob. NAPs, Inc. v. Bell Atl.–N.J., Inc.*, 287 F. Supp. 2d 532, 549 (D.N.J. 2003)). An environmental citizen suit brought under the Resource Conservation and Recovery Act did not require primary jurisdiction referral to the New Jersey Department of Environmental Protection. *Id.* at 692.

¹⁸⁷ *Longo v. Trojan Horse Ltd.*, 992 F. Supp. 2d 612, 617 (E.D.N.C. 2014) (citing *Nat’l Commc’ns Ass’n*, 46 F.3d at 222). Primary jurisdiction did not require a stay in this ERISA case. *Id.*

	when sporadic action by federal courts would disrupt an agency's delicate regulatory scheme; or (b) the agency possesses expertise in a specialized area with which the courts are relatively unfamiliar." ¹⁸⁸
Sixth	"A review of the case law shows that courts have considered referring matters to agencies for a variety of reasons: (1) to advance regulatory uniformity; (2) to answer a 'question . . . within the agency's discretion'; and (3) to benefit from 'technical or policy considerations within the agency's . . . expertise.' '[T]he outstanding feature of the doctrine is . . . its flexibility permitting . . . courts to make a workable allocation of business between themselves and the agencies.'" ¹⁸⁹
Seventh	"[W]e are at the heart of the doctrine of primary jurisdiction 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 to resolve, although the agency's resolution of it will usually be subject to judicial review. When such an issue arises, the suit must stop and the issue must be referred to the agency for resolution. If the agency's resolution of the issue does not dispose of the entire case, the case can resume, subject to judicial review of that resolution along whatever path governs review of the agency's decisions, whether back to the court in which the original case is pending or, if the statute governing review of the agency's decisions designates another court, to that court.'" ¹⁹⁰
Eighth	"Under the doctrine of primary jurisdiction a court may leave an issue for agency determination when it involves the special

¹⁸⁸ *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 811 (5th Cir. 2011). The court had subject matter jurisdiction over the shipping dispute and referral to the STB under the primary jurisdiction doctrine was not warranted. *Id.*

¹⁸⁹ *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010) (alterations in original) (citations omitted) (first quoting *Fed. Trade Comm'n v. Verity Int'l Ltd.*, 443 F.3d 48, 60 (2d Cir. 2006); then quoting *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82–83 (2d Cir. 2006); and then quoting *Civil Aeronautics Bd. v. Modern Air Transp., Inc.*, 179 F.2d 622, 625 (2d Cir. 1950)). The court referred questions raised under the Telephone Act to the FCC under primary jurisdiction on the FCC's urging. *Id.* at 461.

¹⁹⁰ *Ill. Bell Tel. Co. v. Global NAPs Ill., Inc.*, 551 F.3d 587, 595–96 (7th Cir. 2008) (quoting *Arsberry v. Illinois*, 244 F.3d 558, 563–64 (7th Cir. 2001)). The district court did have personal jurisdiction over the suit. *Id.* at 599. After threshold issues were resolved, reference to the Illinois Commerce Commission under the primary jurisdiction doctrine may be warranted. *Id.* at 596. *Burford* abstention was not appropriate because the issues were not of local concern. *Id.* at 595.

	expertise of the agency and would impact the uniformity of the regulated field.” ¹⁹¹
Ninth	<p>“Although the question is a matter for the court’s discretion, courts in considering the issue have traditionally employed such factors as (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.”¹⁹²</p> <p>“Not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction. Rather, the doctrine is reserved for a ‘limited set of circumstances’ that ‘requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency.’ . . .</p> <p>. . . Under our precedent, ‘efficiency’ is the ‘deciding factor’ in whether to invoke primary jurisdiction.”¹⁹³</p>
Tenth	<p>“[A] district court’s decision to invoke the primary jurisdiction doctrine ‘require[s] it to consider whether the issues of fact in the case: (1) are not within the conventional experience of judges; (2) require the exercise of administrative discretion; or (3) require uniformity and consistency in the regulation of the business entrusted to the particular agency.’ Additionally, when the regulatory agency has actions pending before it which may influence the instant litigation, invocation of the doctrine may be appropriate.”¹⁹⁴</p>

¹⁹¹ Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903, 909 (8th Cir. 2015) (quoting DeBruce Grain, Inc. v. Union Pac. R.R. Co., 149 F.3d 787, 789 (8th Cir. 1998)). The district court correctly referred the claim to the STB regarding whether a railway shipping requirement was reasonable. *Id.* at 913.

¹⁹² Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775, 781 (9th Cir. 2002). The issues were properly referred to the Register of Copyrights under primary jurisdiction. *Id.* at 782.

¹⁹³ Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 760 (9th Cir. 2015) (first quoting Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008); and then quoting Rhoades v. Avon Prods., Inc., 504 F.3d 1151, 1165 (9th Cir. 2007)).

¹⁹⁴ TON Servs., Inc. v. Qwest Corp., 493 F.3d 1225, 1239 (10th Cir. 2007) (second alteration in original) (citation omitted) (quoting Crystal Clear Commc’ns, Inc. v. Sw. Bell Tel. Co., 415 F. 3d 1171, 1179 (10th Cir. 2005)). The referral of a telecommunications dispute issue to the FCC was appropriate under the primary jurisdiction doctrine, but the case was remanded to the district court for proper consideration of the factors. *See id.* at 1240.

Eleventh	Compared to <i>Burford</i> abstention; justifications for the rule of primary jurisdiction are expertise and uniformity. ¹⁹⁵
D.C. Circuit	“[W]e have found the primary jurisdiction doctrine applicable when the precise question before the district court was one within the particular competence of an agency: whether a tariff levied by local exchange carriers complied with FCC regulations, . . . or whether, under FDA regulations, a new drug was ‘safe and effective for interstate sale.’” ¹⁹⁶
Federal Circuit	“The doctrine of ‘primary jurisdiction’ requires 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.’” ¹⁹⁷ Courts look to experience and expertise. ¹⁹⁸

As we saw, the Supreme Court’s primary jurisdiction jurisprudence falls mainly into the “exclusive agency jurisdiction” category. In the rate-setting and labor dispute cases, the agency is required to weigh in on an issue before a court can. Many lower court primary jurisdiction cases¹⁹⁹ are also exclusive

¹⁹⁵ *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000). Primary jurisdiction or *Burford* abstention is inapplicable when federal law (in this case, the Resource Conservation and Recovery Act) preempts state law. *Id.* at 1270.

¹⁹⁶ *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 837–38 (D.C. Cir. 2012) (citation omitted) (quoting *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 280 (D.C. Cir. 1972)). Primary jurisdiction referral to the FDA is not appropriate for RICO claims. *Id.* at 839.

¹⁹⁷ *Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 1350 (Fed. Cir. 2006) (quoting *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000)). There is no need to refer purely legal issues to the Customs Service. *Id.* at 1351.

¹⁹⁸ *Id.* at 1350–51.

¹⁹⁹ Since 2010, the federal courts of appeals have accepted referrals to administrative agencies pursuant to primary jurisdiction in only about nine cases. Five were labor cases. *See Ignacio v. Cty. of Haw. Police Dep’t*, 585 F. App’x. 645, 645 (9th Cir. 2014); *Lydon v. Local 103, Int’l Bhd. of Elec. Workers*, 770 F.3d 48, 50 (1st Cir. 2014); *DiPonio Constr. Co. v. Int’l Union of Bricklayers, Local 9*, 687 F.3d 744, 747 (6th Cir. 2012); *Copeland v. Penske Logistics LLC*, 675 F.3d 1040, 1044 (7th Cir. 2012); *Int’l Union of Painter & Allied Trades, Local 159 v. J & R Flooring, Inc.*, 616 F.3d 953, 955 (9th Cir. 2010), *withdrawn and superseded by* 656 F.3d 860 (9th Cir. 2011). Two were in the realm of telecommunications. *See Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 461 (6th Cir. 2010); *N. Cty. Commc’ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1162 (9th Cir. 2010). Two involved referrals to the FDA concerning specific issues of fact. *See generally Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 761 (9th Cir. 2015) (referring the definition of “natural” in the context of cosmetics to the FDA); *Endo Pharm. Inc. v. Actavis Inc.*, 592 F. App’x. 131 (3d Cir. 2014) (determining whether one party’s generic drug was equivalent to the other’s brand name drug, a question that had already been submitted by application to the agency).

original jurisdiction cases like shipper/carrier rate disputes,²⁰⁰ labor disputes,²⁰¹ and telecommunications rate-setting cases,²⁰² but the broad rhetoric of the factors devised by the circuits for determining whether primary jurisdiction is appropriate (see chart above) supports a widening of the doctrine. Consider the First Circuit's directive to see whether a determination would "materially aid" a court,²⁰³ and the Second Circuit's instruction to look for whether there are technical or policy issues present that are within an agency's expertise.²⁰⁴ These factors do not instruct courts to confine the use of primary jurisdiction to situations where an exercise of jurisdiction by the court would severely injure the regulatory scheme, as the Court explained would happen in the rate-setting and labor dispute cases.²⁰⁵

For example, lower courts apply primary jurisdiction to refer shipping disputes to the Surface Transport Board (STB) (the successor to the ICC) even in cases that do not involve rate-setting.²⁰⁶ The courts use balancing advice referral language to support this application, not the exclusive agency jurisdiction argument of *Abilene Cotton, Far East Conference*, and *Western Pacific*. For example, in *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, a shipper brought an action against a carrier alleging that the carrier violated a provision of the Interstate Commerce Commission Termination Act that "requires carriers to provide service upon reasonable request."²⁰⁷ The First Circuit found that referral to the STB would forward uniformity and expertise that "would materially aid the district court," not that a judicial determination would destroy the regulatory scheme.²⁰⁸ Courts have also used primary jurisdiction to refer cases to the EPA in complex environmental law disputes,²⁰⁹ to the FDA in food-labeling cases,²¹⁰ and to the

²⁰⁰ See, e.g., *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 197 (1st Cir. 2000).

²⁰¹ See, e.g., *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distribs.*, 689 F.2d 1339, 1340 (9th Cir. 1982).

²⁰² See, e.g., *Nat'l Commc'ns Ass'n v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 222 (2d Cir. 1995).

²⁰³ See, e.g., *Pejepscot*, 215 F.3d at 205 (quoting *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995)).

²⁰⁴ See, e.g., *Nat'l Comm'n's Ass'n*, 46 F.3d at 223; see also *Federal Trade Comm'n v. Verity Int'l, Ltd.*, 433 F.3d 48, 60 (2d Cir. 2006).

²⁰⁵ See *supra* note 83.

²⁰⁶ *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 912–13 (8th Cir. 2015); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 809–10 (5th Cir. 2011) (holding that primary jurisdiction inapplicable here, but interpreting the provision of the ICCTA to arguably vest STB with "exclusive" primary jurisdiction over remedies in the ICCTA); *Pejepscot*, 215 F.3d at 197.

²⁰⁷ *Pejepscot*, 215 F.3d at 197.

²⁰⁸ *Id.* at 205–06.

²⁰⁹ See, e.g., *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 991 (1st Cir. 1995).

²¹⁰ See, e.g., *In re Gen. Mills, Inc. Kix Cereal Litig.*, No. 12-249(KM), 2013 WL 5943972, at *1 (D.N.J. Nov. 1, 2013); *Barnes v. Campbell Soup Co.*, No. C 12-05185

Centers for Medicare and Medicaid Services (CMS) or state health agencies in Medicare and Medicaid disputes.²¹¹

Two of these issues—referral to CMS in challenges to state Medicaid plans and referral to the FDA in food-labeling consumer protection suits—highlight the difference between the use of primary jurisdiction as a mechanism to enable congressionally intended exclusive original agency jurisdiction and as advice referral, and also how the lines between these categories can blur.

Both of these broad areas—food labeling and the provision of Medicaid—involve complex federal schemes that interact with areas of state discretion and flexibility. And in both food labeling and Medicaid determinations, agency expertise and uniformity (to streamline marketing and to prevent discrimination) are recognized as important values by the courts.²¹² There are differences, however. Medicaid cases implicate a system closer to the rate-setting cases in which the Supreme Court imagined primary jurisdiction a century ago,²¹³ whereas food-labeling cases are pure advice referral cases.²¹⁴ In the Medicaid cases, courts must negotiate the boundaries of areas where exclusive jurisdiction has been granted to administrative agencies, either statutorily or by longstanding court precedent, much as they do in the context of shipping cases and labor disputes.²¹⁵ These primary jurisdiction cases look

JSW, 2013 WL 5530017, at *9 (N.D. Cal. July 25, 2013) (order granting in part and denying in part defendant’s motion to dismiss second amended class action complaint and staying matter); *Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013) (order granting motion to dismiss in part and for referral to the United States Food and Drug Administration).

²¹¹ See, e.g., *Miller ex rel. Morrish v. Olszewski*, No. 09-13683, 2009 WL 5201792, at *8–9 (E.D. Mich. Dec. 21, 2009).

²¹² See *infra* notes 232–34.

²¹³ See *Wis. Hosp. Ass’n v. Reivitz*, 733 F.2d 1226, 1232–33 (7th Cir. 1984); see also Sara Rosenbaum & Timothy Westmoreland, *The Armstrong v. Exceptional Child Inc. Medicaid Payment Case: Now What?*, HEALTH AFF. BLOG (Apr. 30, 2015), <http://healthaffairs.org/blog/2015/04/30/the-armstrong-v-exceptional-child-inc-medicaid-payment-case-now-what/> [<https://perma.cc/F77P-DFFB>].

²¹⁴ See Archis A. Parasharami & Andrea Weiss, *Primary Jurisdiction Is Gaining Some Weight in the Food Court*, MAYER BROWN (June 2, 2014), <http://www.classdefenseblog.com/2014/06/02/primary-jurisdiction-is-gaining-some-weight-in-the-food-court/> [<https://perma.cc/9B8P-U5QH>].

²¹⁵ Compare *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 614 (2012) (“After all, the agency is comparatively expert in the statute’s subject matter. . . . [T]o allow a Supremacy Clause action to proceed once the agency has reached a decision threatens potential inconsistency or confusion.”), with *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907) (explaining that conflicting determinations regarding the reasonableness of rates would undermine the purpose of the Interstate Commerce Act and “render the enforcement of the act impossible”), and *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 139 (1976) (noting that the NLRA embodies “important federal interests in a uniform law of labor relations centrally administered by an expert agency”).

very much like exhaustion cases at times.²¹⁶ Food-labeling cases, on the other hand, sound in tort and state consumer protection law, which, notwithstanding the FDA's and the FTC's regulation of food labeling, maintain a continued vitality. In this area, we see courts that are uncomfortable grappling with areas of scientific uncertainty using advice referral primary jurisdiction to ask the FDA to fill regulatory gaps.²¹⁷

a. Medicaid Cases

“Medicaid is a cooperative federal-state program”²¹⁸ which provides “federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.”²¹⁹ To take part in the program, states have to submit a plan and any amendments to the plan for approval by the CMS (a division of the Department of Health and Human Services).²²⁰ One of the goals of this centralized review is consistency and uniformity in application.²²¹

Before I discuss primary jurisdiction in the context of Medicaid challenges, it is important to note that access to the courts for providers and beneficiaries of Medicaid seeking to challenge state plans has been vastly restricted.²²² The Medicaid Act does not contain a private right of action.²²³ In March 2015, the Supreme Court held in *Armstrong v. Exceptional Child Center, Inc.* that the Supremacy Clause of the United States Constitution, which providers had invoked to challenge a state Medicaid plan, does not either.²²⁴ The provision at issue in *Armstrong* was § 30(A) of the Medicaid Act, its “equal access provision,” which “requires that a state Medicaid plan must provide ‘payments . . . sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic

²¹⁶ See e.g., *Affiliates, Inc. v. Armstrong*, Nos. 1:09-cv-00149-BLW, 1:11-cv-00307-BLW, 2011 WL 3421407, at *5 (D. Idaho Aug. 4, 2011) (explaining the potential problems if the Idaho Department of Health and Welfare had implemented its state plan, but was subsequently rejected by CMS).

²¹⁷ *Cox v. Gurma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013) (order granting motion to dismiss in part and for referral to the United States Food and Drug Administration).

²¹⁸ *Indep. Living Ctr.*, 565 U.S. at 610.

²¹⁹ *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003).

²²⁰ *Indep. Living Ctr.*, 565 U.S. at 610; *Affiliates, Inc.*, 2011 WL 3421407, at *1; *Miller ex rel. Morrish v. Olszewski*, No. 09-13683, 2009 WL 5201792, at *2 (E.D. Mich. Dec. 21, 2009); see also 42 C.F.R. §§ 430.14–15 (2015).

²²¹ *Indep. Living Ctr.*, 565 U.S. at 610 (“Congress intended [uniformity] by centralizing administration of the federal program in the agency . . .”).

²²² See *Rosenbaum & Westmoreland*, *supra* note 213.

²²³ *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015).

²²⁴ *Id.* at 1387–88.

area.”²²⁵ The Court also found that the providers could not challenge the plan in equity.²²⁶ The full implications of this decision remain to be seen.

Before *Armstrong*, courts faced with a challenge by a private party to a state plan or policy that allegedly violated the Medicaid Act sometimes had to negotiate the timing of the lawsuit with pending CMS review. These cases, where exhaustion is not statutorily mandated but a determination by CMS on the amendment’s reasonableness is forthcoming, were appealing cases for the application of primary jurisdiction. Courts did not want to issue a ruling that would potentially conflict with a CMS ruling.²²⁷ In *Douglas v. Independent Living Center of Southern California*, which was the precursor to *Armstrong*, for example, the Court decided not to decide the propriety of a Supremacy Clause action for the enforcement of the Medicaid statute because CMS had approved California’s challenged rate reductions during the pendency of the action.²²⁸ Plaintiffs brought the case while CMS’s review was pending, and it reached the Supreme Court during administrative review.²²⁹ CMS approved the rate reductions after the Court heard oral argument.²³⁰ Sending the case back to the Ninth Circuit to consider whether a Supremacy Clause challenge was appropriate in light of CMS’s approval, the Court used the language of expertise and uniformity to explain why it was important to give weight to the agency’s determination: “After all, the agency is comparatively expert in the statute’s subject matter. . . . [T]o allow a Supremacy Clause action to proceed once the agency has reached a decision threatens potential inconsistency or confusion.”²³¹

Although it was not determining whether to refer the issue to CMS in *Douglas*, and therefore did not need to invoke primary jurisdiction, the Court’s deference to the agency’s determination relied on the doctrine’s twin rationales. This was clearly a determination that has been placed within “the special competence” of an administrative body, here CMS.²³² Indeed, Justice Breyer (who wrote the majority opinion in *Douglas*) says just this in a 2003 concurrence—that a district court should invoke primary jurisdiction to refer a Medicaid plan amendment to the Department of Health and Human Services.²³³ This would allow the court the benefit of the Secretary’s views

²²⁵ Rosenbaum & Westmoreland, *supra* note 213 (alteration in original) (quoting Social Security Act § 1902(a)(30)(A), 42 U.S.C. 1396a (2012)).

²²⁶ *Armstrong*, 135 S. Ct. at 1385.

²²⁷ *See, e.g., Affiliates, Inc. v. Armstrong*, Nos. 1:09-cv-00149BLW, 1:11-cv-00307-BLW, 2011 WL 3421407, at *5 (D. Idaho Aug. 4, 2011).

²²⁸ *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 616 (2012).

²²⁹ *Id.* at 613.

²³⁰ *Id.*

²³¹ *Id.* at 614–15.

²³² *Miller ex rel. Morrish v. Olszewski*, No. 09-13683, 2009 WL 5201792, at *8–9 (E.D. Mich. Dec. 21, 2009).

²³³ *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673–74 (2003) (Breyer, J., concurring) (affirming court of appeals decision vacating injunction against implementation of Maine’s prescription drug rebate program).

because “[i]nstitutionally speaking, that agency is better able than a court to assemble relevant facts . . . and to make relevant predictions.”²³⁴

Courts referring issues to CMS under the primary jurisdiction doctrine describe their decision as discretionary, and the referral as a way to gain the expertise of CMS and further the goals of the Medicaid Act.²³⁵ In *Affiliates, Inc. v. Armstrong*, a district court in Idaho held that the question of whether an Idaho state plan amendment complied with the Medicaid Act’s waiver provision was a matter “appropriately left to CMS,” because “while not unduly complex, uniformity in administration is critical.”²³⁶ In that case the court granted a preliminary injunction against the implementation of the state plan until CMS made its determination.²³⁷ In *Miller ex rel. Morrish v. Olszewski*, a district court in Michigan held that Michigan’s proposed plan amendment should be considered first by CMS, and stayed the case for approximately ninety days for the agency to consider the issue.²³⁸ And in *Dartmouth-Hitchcock Clinic v. Toumpas*, a court in New Hampshire invoked *Abilene Cotton*, and invited CMS to appear “on an *amicus* basis or otherwise,” to provide its expert views.²³⁹ The court explained that getting the agency’s views in a challenge to a New Hampshire Medicaid rate reduction “will certainly advance the sound disposition of this litigation, facilitate the Secretary’s own exercise of her administrative enforcement authority, and insure uniformity and consistency in results in similar cases nationwide.”²⁴⁰

It is hard to characterize the Medicaid primary jurisdiction cases. The courts treat them like advice referrals, using language of discretion and expertise, and with explanations that a referral to CMS would aid the court and forward the purposes of the regulatory scheme.²⁴¹ Approval by CMS is mandatory, however, and disapproval by CMS would most likely nullify a judicial approval.²⁴² For this reason, these cases fit comfortably with the Supreme Court’s rate-setting and labor dispute primary jurisdiction cases. And

²³⁴ *Id.* at 672.

²³⁵ *Dartmouth-Hitchcock Clinic v. Toumpas*, No. 11-cv-358-SM, 2012 WL 4482857, at *4 (D.N.H. Sept. 27, 2012) (“[T]he generality of the [Medicaid Act’s] goals and the structure for implementing them suggest that plan review by the Secretary is the central means of enforcement intended by Congress.” (quoting *Long Term Care Pharmacy All. v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004))); *Affiliates, Inc. v. Armstrong*, Nos. 1:09-cv-00149-BLW, 1:11-cv-00307-BLW, 2011 WL 3421407, at *7 (D. Idaho Aug. 4, 2011).

²³⁶ *Affiliates, Inc.*, 2011 WL 3421407, at *7.

²³⁷ *Id.* at *9.

²³⁸ *Miller ex rel. Morrish v. Olszewski*, No. 09-13683, 2009 WL 5201792, at *11 (E.D. Mich. Dec. 21, 2009).

²³⁹ *Dartmouth-Hitchcock Clinic*, 2012 WL 4482857, at *4–5.

²⁴⁰ *Id.* at *4.

²⁴¹ See *supra* notes 218–26 and accompanying text (providing examples of courts referring issues to CMS under the primary jurisdiction doctrine as a way to gain the expertise of the CMS).

²⁴² See, e.g., *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 613–16 (2012).

fundamentally, Medicaid cases are rate-setting cases. This is acknowledged by both courts²⁴³ and commentators.²⁴⁴ Interestingly, one of the criticisms of the *Armstrong* case is that the majority relied, in part, on the complexity of rate-setting to support its decision that courts were not the proper venue for the enforcement of Medicaid standards,²⁴⁵ but that “courts decide rate-setting cases all the time.”²⁴⁶ This is not the case, however. Leaving aside the question of whether it should be up to Congress or the Judiciary to make this decision, the primary jurisdiction doctrine has been used for over a century to remove rate-setting cases from judicial review and place them into the purview of administrative agencies.²⁴⁷

The affinity of the Medicaid primary jurisdiction cases with the rate-setting and labor dispute primary jurisdiction cases becomes more apparent when the use of primary jurisdiction in these cases is juxtaposed with the doctrine’s use in food-labeling cases.

b. Food-Labeling Cases

There has been a large increase in the number of food-labeling class actions over the past half-decade, and the majority of these cases have been filed in California.²⁴⁸ The Northern District of California is nicknamed “the Food Court.”²⁴⁹ In these cases, plaintiffs allege that they have purchased a food product with a label that violates state law, either because it is mislabeled or because it is deceptive or misleading.²⁵⁰ Although food labeling is regulated

²⁴³ See *Wis. Hosp. Ass’n v. Reivitz*, 733 F.2d 1226, 1232–33 (7th Cir. 1984).

²⁴⁴ See Rosenbaum & Westmoreland, *supra* note 213 (criticizing the *Armstrong* decision).

²⁴⁵ *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015).

²⁴⁶ Rosenbaum & Westmoreland, *supra* note 213.

²⁴⁷ See *supra* Part II.B.

²⁴⁸ Perkins Coie projected ninety-six food class actions filed in 2014, up from forty-five in 2010 and nineteen in 2008. Information on file with author; see also Jessica Dye, *Food Companies Confront Spike in Consumer Fraud Lawsuits*, SUSTAINABILITY (June 13, 2013), <http://sustainability.thomsonreuters.com/2013/06/14/food-companies-confront-spike-in-consumer-fraud-lawsuits/> [<https://perma.cc/WKG8-DY8M>] (citing data compiled by Perkins Coie).

²⁴⁹ Vanessa Blum, *Welcome to Food Court*, RECORDER (Mar. 1, 2013), <http://advance.lexis.com> (in the “Filters” drop-down menu, select “Legal News” in the “Category” tab; search “Welcome to Food Court”); Glenn G. Lammi, *Who’s Filling the ‘Food Court’ with Lawsuits: Consumers or Lawyers*, FORBES (July 22, 2013), <http://www.forbes.com/sites/wlf/2013/07/22/whos-filling-the-food-court-with-lawsuits-consumers-or-lawyers/#331a57ac6235> [<https://perma.cc/57EM-F9U2>].

²⁵⁰ See e.g., *Swearingen v. Santa Cruz Nat., Inc.*, No. C 13-04291 SI, 2014 WL 1339775, at *1 (N.D. Cal. Apr. 2, 2014) (order granting defendant’s motion to dismiss plaintiffs’ first amended class action complaint) (alleging the labeling of products was misleading and deceptive), *judgment set aside by* 2014 WL 2967585 (N.D. Cal. July 1, 2014).

by the FDA, claims must be brought under state law because the Food Drug and Cosmetic Act (FDCA) does not contain a private right of action.²⁵¹

The question of whether state law litigation is preempted by the FDCA is pervasive in these cases.²⁵² Although the FDCA does not contain a global preemption provision, the Nutrition Labeling and Education Act (NLEA) of 1990, which amended the FDCA's food labeling provisions, does have an express preemption provision.²⁵³ This provision prohibits the establishment of any state or local labeling, product ingredient listing, health claim, or nutrient content claim requirements that are not identical to federal requirements,²⁵⁴ leaving room for the establishment of identical state and local requirements.²⁵⁵ If a claim is not expressly preempted by the NLEA, though, it may still be impliedly preempted by the FDCA.²⁵⁶

In addition to the preemption argument in these cases, defendants often argue that the court should refer these cases to the FDA under primary jurisdiction.²⁵⁷ Defendants allege that these issues, as to what comprises an informative and truthful label, have been placed within the special competence

²⁵¹ 21 U.S.C. § 337(a) (2012) (“[A]ll such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.”); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4 (2001) (“The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions . . .”).

²⁵² For more on preemption and food-labeling cases, see Diana R.H. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 TUL. L. REV. 815, 830–35 (2015); see also Winters, *supra* note 27, at 244–46.

²⁵³ 21 U.S.C. § 343-1.

²⁵⁴ *Id.* § 343-1(a) (“[N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce . . . (2) any requirement for the labeling of food of the type required by section 343(c), 343(e), 343(i)(2), 343(w), or 343(x) of this title that is not identical to the requirement of such section . . . [or] (3) any requirement for the labeling of food of the type required by section 343(b), 343(d), 343(f), 343(h), 343(i)(1), or 343(k) of this title that is not identical to the requirement of such section . . . [or] (4) any requirement for nutrition labeling of food that is not identical to the requirement of section 343(q) of this title . . .”).

²⁵⁵ *Farm Raised Salmon Cases*, 175 P.3d 1170, 1178 (Cal. 2008) (“The words of section 343–1 clearly and unmistakably evince Congress’s intent to authorize states to establish laws that are ‘identical to’ federal law.” (quoting 21 U.S.C. § 343-1)).

²⁵⁶ See, e.g., *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1123–24 (N.D. Cal. 2010).

²⁵⁷ See Winters, *supra* note 27, at 252–54, for a more thorough discussion of these claims.

of the FDA.²⁵⁸ This, according to the defendants, is evidenced by the comprehensive federal regulatory scheme of the FDCA and the NLEA.²⁵⁹

Courts have been generally reluctant to dismiss or stay food-labeling suits based on primary jurisdiction,²⁶⁰ with one exception—the context of “evaporated cane juice” (ECJ).²⁶¹

ECJ is a term used by food manufacturers to indicate the inclusion of a specific type of sweetener in the food product.²⁶² Plaintiffs in the many suits brought concerning this term²⁶³ allege that the use of ECJ violates the FDA’s regulations that food labels must “reflect the common or usual name of an ingredient,” and for this reason violates state consumer protection laws.²⁶⁴ In 2009, the FDA issued draft guidance “for comment purposes only,” explaining that ECJ was not the common or usual name of any kind of sweetener.²⁶⁵ In March 2014, the FDA reopened the comment period on this draft guidance, with the intention of issuing it in final form.²⁶⁶ Before March 2014, courts considering this issue had sporadically accepted the primary jurisdiction

²⁵⁸ *Swearingen v. Santa Cruz Nat., Inc.*, No. C 13-04291 SI, 2014 WL 1339775, at *1 (N.D. Cal. Apr. 4, 2014) (order granting defendant’s motion to dismiss plaintiffs’ first amended class action complaint) (“Santa Cruz argues that, because food labeling is within the special competence of the FDA . . . the Court should apply the doctrine of primary jurisdiction, defer to the agency, and dismiss the action without prejudice.”), *judgment set aside* by 2014 WL 2967585 (N.D. Cal. July 1, 2014).

²⁵⁹ *See, e.g., Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013) (order granting motion to dismiss in part and for referral to the United States Food and Drug Administration) (referring issue of whether a food containing genetically engineered ingredients could be labeled “natural” to the FDA to avoid the risk of “‘usurp[ing] the FDA’s interpretive authority[,]’ and ‘undermining, through privation litigation, the FDA’s considered judgments’” (alterations in original) (quoting *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1176, 1178 (9th Cir. 2012))).

²⁶⁰ Theodore E. Tsekerides & Melody E. Akhavan, *FDA’s Primary Jurisdiction Won’t Save Food Manufacturers*, LAW360 (July 17, 2014), <http://www.law360.com/articles/557504/fda-s-primary-jurisdiction-won-t-save-food-manufacturers> [<https://perma.cc/CBZ3-VEJV>] (seeing “a pattern of limited, waning success for defendants” arguing for FDA’s primary jurisdiction).

²⁶¹ Since 2013, there have been published decisions that discuss primary jurisdiction in the context of food-labeling litigation in close to seventy cases. Courts have accepted the primary jurisdiction argument in about thirty of these cases. *See* Diana R.H. Winters, *Primary Jurisdiction Chart* (Jan. 9, 2017) (unpublished research) (on file with author). About two-thirds of the accepted cases have involved the issue of evaporated cane juice.

²⁶² *Swearingen*, 2014 WL 1339775, at *1.

²⁶³ In 2013, ninety-four food class actions were filed, and approximately 28% of these were on the issue of evaporated cane juice. Research by Perkins Coie (on file with author). This number went down somewhat in 2014: out of sixty-four class actions filed by mid-October, 8% involved evaporated cane juice. *See supra* note 261.

²⁶⁴ *Swearingen*, 2014 WL 1339775, at *1.

²⁶⁵ *Id.* at *2 (quoting the 2009 draft guidance).

²⁶⁶ *Id.* at *3.

argument.²⁶⁷ After the FDA's reopening of the comment period, however, most courts considering the issue stayed or dismissed these actions under the primary jurisdiction doctrine to await a definitive FDA statement on the matter.²⁶⁸

As of mid-2015, there has been no FDA statement on ECJ, and the ECJ cases stayed or dismissed by courts in mid-2014 are starting to return to the courts now. In one case the court vacated its dismissal without prejudice on the grounds that the FDA had primary jurisdiction over the ECJ issue, entering a stay pursuant to the doctrine instead.²⁶⁹ The court found that although plaintiffs did not move for a stay when the case was dismissed, "the Court [was] persuaded that Plaintiffs were unaware at that time how long it would take the FDA to issue final guidance on the use of the term ECJ."²⁷⁰ Another court issued an order almost a year after it had stayed an ECJ case requesting that the Commissioner of the FDA "inform the Court whether a final determination regarding ECJ 'is feasible within agency priorities and resources.' . . . In particular, the Court would like to know if the FDA is likely to issue any further guidance regarding ECJ within the next 180 days."²⁷¹

Although ECJ cases compose the majority of accepted primary jurisdiction cases, courts have stayed or dismissed cases under the doctrine in other contexts as well. Primary jurisdiction has been accepted in cases involving issues such as whether a food containing genetically engineered ingredients can be labeled "natural," whether a particular label constitutes an implied health claim, and whether a claim of "zero impact" violates California consumer protection laws.²⁷² The cases regarding "natural" claims were stayed

²⁶⁷ *Compare* Hood v. Wholesoy & Co., No. 12-cv-5550-YGR, 2013 WL 3553979, at *5 (N.D. Cal. July 12, 2013), with Kane v. Chobani, Inc., No. 12-CV-02425-LHK, 2013 WL 3703981, at *17 (N.D. Cal. July 12) (order granting in part and denying in part motion to dismiss the first amended complaint), order vacated, 2013 WL 5529723 (N.D. Cal. July 25, 2013).

²⁶⁸ See Parasharami & Weiss, *supra* note 214.

²⁶⁹ Swearingen v. Attune Foods, Inc., No. C 13-4541 SBA, 2015 WL 370167, at *4 (N.D. Cal. Jan. 28, 2015) (order granting motion to alter or amend judgment and/or for relief from judgment).

²⁷⁰ *Id.* at *4.

²⁷¹ Swearingen v. Healthy Beverage, LLC, No. 3:13-cv-4385 EMC, slip op. at 1-2 (N.D. Cal. May 15, 2015) (order regarding Food & Drug Administration action and referral to commissioner). The "agency priorities and resources" language is from 21 C.F.R. § 10.25(c) (2016), which provides: "The Commissioner will institute a proceeding to determine whether to . . . take or refrain from taking any other form of administrative action whenever any court, on its own initiative, holds in abeyance or refers any matter to the agency for an administrative determination and the Commissioner concludes that an administrative determination is feasible within agency priorities and resources."

²⁷² See *In re* Kind LLC "Healthy and All Natural" Litigation, 209 F. Supp. 3d 689, 692 (S.D.N.Y. 2016); Haggag v. Welch Foods, Inc., No. CV 13-00341-JGB (OPx), 2014 WL 1246299, at *7 (C.D. Cal. Mar. 24, 2014); Watkins v. Vital Pharm., Inc., No. CV 12-09374 SJO (JCx), 2013 WL 5972174, at *2 (C.D. Cal. Nov. 7, 2013).

for six months while the issue was appealed to the FDA,²⁷³ but the FDA declined the invitation to rule on the issue.²⁷⁴

Similarly, the FDA declined to define “natural” in the context of cosmetic products. In a case regarding whether cosmetics containing certain synthetic ingredients could be labeled “natural,” a district court stayed the case under primary jurisdiction.²⁷⁵ Plaintiffs’ counsel then wrote to the FDA requesting the agency’s input on the issue, and the FDA declined the request by letter.²⁷⁶ Notwithstanding the FDA’s refusal to answer a plaintiff’s inquiry in this case, as well as the agency’s refusal in earlier cases involving the word “natural,” the Ninth Circuit approved of the district court’s stay of the case under primary jurisdiction (although it did remand the case for the court to enter a stay instead of a dismissal, and for the court to consider whether primary jurisdiction was still warranted in light of recent developments).²⁷⁷ The Ninth Circuit explained that the most important factor in determining whether primary jurisdiction was warranted was efficiency, and that “a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation.”²⁷⁸ The district court had acted appropriately on the record before it,²⁷⁹ but should take these considerations into account on remand.

²⁷³ *In re* Gen. Mills, Inc. Kix Cereal Litig., No. 12-249(KM), 2013 WL 5943972, at *1 (D.N.J. Nov. 1, 2013); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *9 (N.D. Cal. July 25, 2013) (order granting in part and denying in part defendant’s motion to dismiss second amended class action complaint and staying matter); *Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013) (order granting motion to dismiss in part and for referral to the United States Food and Drug Administration).

²⁷⁴ Letter from Leslie Kux, Assistant Comm’r for Policy, FDA, to Honorable Yvonne Gonzalez Rodgers, Honorable Jeffrey S. White & Honorable Kevin McNulty (Jan. 6, 2014), <http://www.hpm.com/pdf/blog/FDA%20Lt%201-2014%20re%20Natural.pdf> [<https://perma.cc/KDM4-XCEG>]. On November 10, 2015, the FDA requested comments on the use of the term “natural” on human food products. See *FDA Requests Comments on Use of the Term “Natural” on Food Labeling*, FDA: CONSTITUENT UPDATE, <http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm471919.htm> [<https://perma.cc/F67L-2Y8Z>] (last updated Dec. 24, 2015). It is possible that this call for comments may lead to an increase in cases stayed or dismissed under the primary jurisdiction doctrine, although the FDA has given no timeframe for action. See Sarah L. Brew & Courtney A. Lawrence, *FDA Takes a Step Forward on ‘Natural’ Food Labeling*, LAW360 (Nov. 25, 2015), <http://www.law360.com/articles/731406/fda-takes-a-step-forward-on-natural-food-labeling> [<https://perma.cc/K6PG-3RMD>]. This comment period is now closed.

²⁷⁵ *Astiana v. Hain Celestial Grp., Inc.*, 905 F. Supp. 2d 1013, 1016–17 (N.D. Cal. 2012), *rev’d and remanded*, 783 F.3d 753 (9th Cir. 2015).

²⁷⁶ *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 759–60 (9th Cir. 2015).

²⁷⁷ *Id.* at 761–62.

²⁷⁸ *Id.* at 761.

²⁷⁹ *Id.* The primary jurisdiction dismissal was entered prior to the FDA declining the invitations to define “natural” in the context of food labeling and cosmetics.

Primary jurisdiction referrals to CMS in the context of the Medicaid regulatory scheme are fundamentally different than those in the food-labeling area. CMS approval of state plans and state plan changes is mandatory, and a conflicting court decision would “defeat the uniformity that Congress intended by centralizing administration of the federal program in the agency.”²⁸⁰ This language invokes the rhetoric used to justify the primary jurisdiction of the ICC in rate-setting cases²⁸¹ and the NLRB in labor disputes.²⁸² The food-labeling regulatory scheme, on the other hand, maintains space for state regulation alongside federal regulation.²⁸³ Uniformity is prioritized in certain areas, and Congress included an express preemption provision in the NLEA to protect this interest.²⁸⁴ Areas that fall outside of the NLEA and that have not been ruled upon by the FDA—like what “natural” means—are not areas that the FDA is required to review and are subject to state consumer protections.²⁸⁵

Moreover, there is a difference between the regulated activities in the food-labeling and the Medicaid cases. In the food-labeling cases, the agency is regulating the provision of information to consumers for the purpose of protecting the health of the consumer and the integrity of the marketplace. The information itself, though, is not created by the agency, nor, in many instances, is it independently verifiable. The questions the food-labeling litigation engages are matters of subjective judgment. For example, litigants challenge whether a food labeled “natural” can contain genetically modified ingredients.²⁸⁶ Because the FDA has not defined the word “natural,”²⁸⁷ the answer to this question is a matter of judgment. In these cases, plaintiffs

²⁸⁰ *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 615 (2012).

²⁸¹ *See, e.g., Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907) (explaining that conflicting determinations regarding the reasonableness of rates would undermine the purpose of the Interstate Commerce Act and “render the enforcement of the act impossible”).

²⁸² *See Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 139 (1976) (explaining that the NLRA embodies “important federal interests in a uniform law of labor relations centrally administered by an expert agency”); *see also Garner v. Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953) (“Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.”).

²⁸³ *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (recognizing the “historic primacy of state regulation of matters of health and safety”); *Winters, supra* note 252, at 831–33.

²⁸⁴ *Winters, supra* note 252, at 830–31.

²⁸⁵ *See, e.g., Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013) (order granting motion to dismiss in part and for referral to the United States Food and Drug Administration) (holding that the FDCA and NLEA “unquestionably and squarely” give the FDA the authority to determine whether food labels “may properly state that GMO products can be labeled ‘all natural.’”).

²⁸⁶ *See id.*

²⁸⁷ *See id.*

invoke state consumer protection and deceptive practices laws for activities that also implicate federal law.²⁸⁸ In Medicaid cases, however, the question specifically regards the operation of federal law.²⁸⁹ Moreover, CMS is statutorily required to review amendments to state Medicaid plans.²⁹⁰ Whether or not the plan conforms to federal standards is for CMS to determine.²⁹¹

In short, we see primary jurisdiction used in different forms: (1) In its exclusive agency jurisdiction incarnation, like in the rate-setting and labor dispute cases, (2) in its advice referral incarnation, like in the food-labeling cases, and (3) somewhere in between, like the Medicaid cases, that resemble rate-setting cases but use advice referral language. But is primary jurisdiction, in any of these forms, ever appropriate? Should courts be able to abstain from exercising their jurisdiction without a direct congressional directive?²⁹² In the next Part, I look at where the doctrine fits into scholarly discussions of when it is appropriate for courts to choose not to hear cases otherwise within their jurisdiction.

III. THE LEGAL AUTHORITY TO EXPAND PRIMARY JURISDICTION

In the previous Part, I looked at how primary jurisdiction has developed over the course of the last century, and the areas in which it has been applied most often. In this Part, I take a detour into the debate over another doctrine, “under which considerations of justiciability or comity lead courts to abstain from deciding questions whose initial resolution is better suited to another time, or another forum.”²⁹³ These doctrines include abstention, ripeness, mootness, and the political question doctrine.²⁹⁴ Primary jurisdiction is most similar to abstention; courts choose not to hear cases that they otherwise could.²⁹⁵ The debate over abstention speaks to a consideration of the propriety of the use of primary jurisdiction as a matter of legal authority and process. I conclude that to resolve the question of the legitimacy of primary jurisdiction we must look to the consequences of its use, which I do in the next Part.

Abstention comprises several “doctrines under which federal courts may choose to decline to exercise their jurisdiction over cases otherwise

²⁸⁸ See, e.g., *Swearingen v. Santa Cruz Nat. Inc.*, No. C 13-04291 SI, 2014 WL 1339775, at *1 (N.D. Cal. Apr. 2, 2014) (order granting defendant’s motion to dismiss plaintiffs’ first amended class action complaint), *judgment set aside by* 2014 WL 2967585 (N.D. Cal. July 1, 2014).

²⁸⁹ See generally *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012).

²⁹⁰ 42 C.F.R. §§ 430.14–.15 (2015).

²⁹¹ *Id.* § 430.15.

²⁹² In the first category, that of exclusive agency jurisdiction, it is arguably a direct congressional directive that requires the doctrine’s use.

²⁹³ *Zivotofsky ex rel Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1434 (2012) (Sotomayor, J., concurring) (citations omitted).

²⁹⁴ *Id.*

²⁹⁵ See *id.*

appropriately before them.”²⁹⁶ The oldest of the abstention doctrines, *Pullman* abstention, named by the 1941 case of *Railroad Commission of Texas v. Pullman Co.*, counsels a federal court to abstain from hearing a case where there is unclear state law, the state court resolution of which could eliminate the necessity of a decision on a constitutional question.²⁹⁷ In addition to *Pullman* abstention, there is *Burford* abstention (abstention because of unclear state law and complex administrative procedures),²⁹⁸ *Thibodaux* abstention (uncertain state law and important state interests),²⁹⁹ *Younger* abstention (pending state court criminal proceedings),³⁰⁰ and *Colorado River* abstention (parallel state proceedings).³⁰¹

While abstention involves federal courts abstaining in deference to state court proceedings and primary jurisdiction involves courts, usually federal but sometimes state, deferring to administrative agencies, the doctrines have much in common. In both contexts a court decides in deference to another entity not to determine a question over which it otherwise has jurisdiction, based on judicially created doctrine.³⁰² While certain of the abstention doctrines, like *Burford*, require the court to dismiss the case,³⁰³ thus terminating federal court review, in others, like *Pullman*, the federal court retains jurisdiction so that it can determine remaining federal issues after the state law issues are resolved.³⁰⁴ This is similar to primary jurisdiction procedure, where courts will dismiss without prejudice or stay a case pending agency determination of the relevant issue.

For decades, commentators have discussed the legitimacy and the propriety of the abstention doctrines, a debate that is highly relevant to the consideration of primary jurisdiction.³⁰⁵

²⁹⁶ William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 NW. U. L. REV. 881, 883 (2013).

²⁹⁷ *Id.*; RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1058–59, 1062–63 (6th ed. 2009).

²⁹⁸ *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943); Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 870–71 (1993).

²⁹⁹ *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29–30 (1959); Marshall, *supra* note 296, at 883–84.

³⁰⁰ *Younger v. Harris*, 401 U.S. 37, 40–41 (1971); Marshall, *supra* note 296, at 884.

³⁰¹ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976); Marshall, *supra* note 296, at 884.

³⁰² *Compare* *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952), with Marshall, *supra* note 296, at 883–84.

³⁰³ See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 803 (5th ed. 2007).

³⁰⁴ *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 416 (1964) (“[A]bstention ‘does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.’” (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959))).

³⁰⁵ Many of these debates begin with Chief Justice John Marshall’s famous 1821 statement regarding the mandatory grant of jurisdiction to the federal courts:

In the 1980s, Professor Martin H. Redish wrote *Abstention, Separation of Powers, and the Limits of the Judicial Function*,³⁰⁶ which has been called “one of the most important and transformative accounts of the law of federal courts,”³⁰⁷ and a “landmark.”³⁰⁸ The thesis of Redish’s article, which Professor William P. Marshall called “as simple as it was elegant,”³⁰⁹ was that the abstention doctrines violate the principle of separation of powers and are wrong “as a matter of legal process.”³¹⁰ Redish also argued that as matters of policy the costs of abstention outweigh its benefits, and “that their total abolition would not seriously undermine the efficient workings of judicial federalism.”³¹¹

The principle of the separation of powers is enshrined in the structure of our government: “The Framers perceived that “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”³¹² For this reason, “the Framers vested the executive, legislative, and judicial powers in separate branches.”³¹³ Redish explained the principle of separation of powers between the Judicial and Legislative Branches as a question of the proper role of an unelected Judiciary.³¹⁴ The only laws that such a body can invalidate are those that are unconstitutional.³¹⁵ Otherwise, the Judicial Branch has no power to

It is most true that this Court will not take jurisdiction if it should not. but [sic] it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution [sic]. Questions may occur which we would gladly avoid, but we cannot avoid them.

Cohens v. Virginia, 19 U.S. 264, 404 (1821).

³⁰⁶ Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

³⁰⁷ Marshall, *supra* note 296, at 883.

³⁰⁸ *Id.*; see also Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 850 (2013).

³⁰⁹ Marshall, *supra* note 296, at 889.

³¹⁰ Redish, *supra* note 306, at 74.

³¹¹ *Id.* Besides Professor Redish’s separation of powers critique of abstention, there are several other common criticisms of the doctrines. Professor Marshall distills these to seven, including the complicated nature of the area of law because of the multiple types of abstention, and the tendency of abstention to result in “nightmares in judicial administration.” Marshall, *supra* note 296, at 884–87. Moreover, he writes that “abstention is inconsistent with the Court’s own rhetoric,” and points to the language from *Cohens v. Virginia* cited above. *Id.* at 886.

³¹² *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J., concurring) (alteration in original) (quoting THE FEDERALIST NO. 47 (James Madison)).

³¹³ *Id.* at 962.

³¹⁴ See Redish, *supra* note 306, at 76–77.

³¹⁵ *Id.* at 76.

refuse jurisdiction that has been granted to it by the Legislative Branch.³¹⁶ Repealing or altering the legislative scheme, which granted enforcement power to federal courts, manifests “disagreement with the social policy choices that the scheme manifests,” and an unacceptable usurpation of legislative power.³¹⁷

Redish categorized abstention doctrines as “partial abstention” doctrines—which encompass the traditional abstention doctrines—and “total abstention” theories, which “would effectively prohibit the federal courts from enforcing federal civil rights laws, in particular section 1983, and from exercising their congressionally-vested jurisdiction to enforce those laws,” and he found neither to be justified.³¹⁸ He argued that Congress did not impliedly delegate the power to modify a jurisdictional grant to courts,³¹⁹ that the abstention doctrines cannot stem from equity,³²⁰ and that the abolition of abstention would not have catastrophic effects on the judicial system.³²¹ Ultimately, according to Redish, “[the] electorally accountable legislature [should] make the basic policy decisions concerning how the nation is to be governed. . . . not the judiciary.”³²²

A year after Redish’s article was published, Professor David L. Shapiro responded to Redish’s separation of powers critique of abstention.³²³ Shapiro argued that the judicial discretion at the heart of abstention—which Redish found to be an inappropriate usurpation of legislative authority—is consistent with our legal tradition, and is also a good thing, normatively speaking.³²⁴ He began by outlining the instances where courts have “been free to choose whether or not to exercise or assume jurisdiction,”³²⁵ and then explained that, because it is difficult to determine when a grant of jurisdiction permits a court to exercise discretion to modify or decline this jurisdiction,³²⁶ “the courts are functionally better adapted to engage in the necessary fine tuning than is the legislature.”³²⁷ Shapiro looked to equitable discretion, federalism and comity, separation of powers, and judicial administration as discretionary factors that can be weighed against a presumption in favor of exercising jurisdiction, and discussed their importance to our jurisprudential tradition.³²⁸ He argued that

³¹⁶ *Id.* at 77.

³¹⁷ *Id.*

³¹⁸ *Id.* at 72–74 (footnote omitted).

³¹⁹ *Id.* at 81.

³²⁰ Redish, *supra* note 306, at 84.

³²¹ *Id.* at 74, 91.

³²² *Id.* at 115.

³²³ David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 544 (1985).

³²⁴ *Id.* at 545.

³²⁵ *Id.* at 546.

³²⁶ *See id.* at 545–70.

³²⁷ *Id.* at 574.

³²⁸ *See id.* at 579–88.

judicial discretion in matters of jurisdiction can lead to a “productive dialogue . . . between the courts and the legislature.”³²⁹

Shapiro’s critique of Redish’s criticism of the abstention doctrine was rooted in the entrenched presence of judicial discretion regarding judicial authority in our legal tradition and in the desirable consequences of this system. Professor Richard H. Fallon, writing in 2013, agreed with Shapiro, and found Redish to be wrong as a matter of statutory interpretation, as a matter of democratic theory, and as a matter of the rule of law.³³⁰ In terms of interpreting the jurisdictional statutes, Redish’s assertion as to the ultimate illegitimacy (not merely incorrectness) of the abstention doctrines could not stand.³³¹ As to democratic theory, Redish’s accounting of the division of authority between the Legislature and the Judiciary was too narrow.³³² And regarding legal process, Fallon agreed with Shapiro that judicial discretion is deeply rooted in our legal tradition.³³³ Moreover, the role of precedent in our legal system would speak to maintaining the abstention doctrines, regardless.³³⁴

While Shapiro and Fallon focused on the need to view abstention in its historical and normative contexts to critique Redish, other critics just found him to be wrong. Marshall wrote that scholars found Redish to be wrong in his reading of § 1983, in his reading of the jurisdictional statutes, and in his reading of how jurisdiction is allocated.³³⁵ Marshall too, while finding Redish’s article “brilliant, creative, and prescient,” also found it unconvincing.³³⁶

The debate over the legitimacy and wisdom of the abstention doctrines speaks directly to the appropriateness and utility of the primary jurisdiction doctrine. Although the entity to which the court directs the question it declines is different—state courts in abstention cases, administrative agencies in primary jurisdiction cases—the role of the court is similar. In each instance, the court decides whether or not to exercise the jurisdiction it was granted. The fact that courts in primary jurisdiction cases retain jurisdiction for later adjudication of remaining issues does not necessarily change the calculation; to Redish, “even a delay in the exercise of federal jurisdiction may be considered a violation of separation of powers if it has not been contemplated by Congress.”³³⁷ Is the use of primary jurisdiction appropriate as a matter of legal process and wise as a matter of policy? In the next Part, I look at the implications of the granting of primary jurisdiction to administrative agencies,

³²⁹ Shapiro, *supra* note 323, at 577.

³³⁰ Fallon, *supra* note 308, at 859–61, 863, 870–71.

³³¹ *Id.* at 859–60.

³³² *Id.* at 863.

³³³ *Id.* at 870.

³³⁴ *Id.*

³³⁵ Marshall, *supra* note 296, at 893–94.

³³⁶ *Id.* at 892.

³³⁷ Redish, *supra* note 306, at 90.

in both exclusive original jurisdiction and advice referral cases, and try to answer these questions.

IV. THE CONSEQUENCES OF THE USE OF PRIMARY JURISDICTION

Part II of this Article analyzed the history, trajectory, and application of the primary jurisdiction doctrine by courts over the last century of its use. Part III discussed a scholarly debate over the legitimacy and wisdom of the abstention doctrines, to which primary jurisdiction is a close relative. In this Part, I pivot to look at the consequences of the determination to use primary jurisdiction, and the implications of the doctrine.

I focus here on legal process and on policy implications and leave constitutional implications to the side, for the most part. Professor Martin H. Redish's argument that the traditional abstention doctrines violated the principle of separation of powers because they "could be characterized as a judicial usurpation of legislative authority,"³³⁸ has failed to gain traction.³³⁹ In addition to the compelling scholarly critiques of his work, it appears that the theory has never been taken up, much less accepted by the Supreme Court.³⁴⁰

In 2008, Professor Catherine T. Struve explored whether a hypothetical statute requiring courts to "refer to the FDA issues arising in tort suits concerning FDA-approved drugs" would be constitutional under Article III (protecting separation of powers values) and under the Seventh Amendment.³⁴¹ She concludes that such a statute could pass Article III scrutiny if courts were very careful to maintain the FDA as an "adjunct" to the court's decision making.³⁴² The adjunct model, according to Struve, would entail a court deferring to FDA findings of fact while reviewing legal issues *de novo*.³⁴³ Because "separation-of-powers concerns are stronger when Congress seeks to assign to a non-Article-III tribunal the adjudication of a claim that Congress has not created," (i.e. in her hypothetical situation, Congress is mandating courts refer state tort suits to the FDA) courts must be bound to primary jurisdiction to avoid constitutional problems.³⁴⁴ She suggests, "the more searching the review, the more likely the referral will fit within the 'adjunct' model."³⁴⁵ As to the Seventh Amendment, Professor Struve concludes that the use of primary jurisdiction would only be constitutional if

³³⁸ *Id.* at 76.

³³⁹ Marshall, *supra* note 296, at 892.

³⁴⁰ *Id.* ("The Supreme Court, as far as I am aware, has never directly engaged the theory that abstention constitutes a constitutional violation of separation of powers . . .").

³⁴¹ Struve, *supra* note 17, at 1043.

³⁴² *Id.* at 1050.

³⁴³ *Id.* at 1051.

³⁴⁴ *Id.* at 1052, 1054.

³⁴⁵ *Id.* at 1054.

the FDA's findings were deemed *prima facie* evidence and if a jury could reexamine the issues determined by the FDA.³⁴⁶

There is no statute on the table such as the one posed by Struve. Nevertheless, courts are currently referring issues to the FDA in food-labeling cases, in which plaintiffs seek both damages and injunctive relief.³⁴⁷ It is difficult to judge whether these cases comply with Struve's recommendations, as the cases that have been referred to the FDA and have then returned to court are few, if any.³⁴⁸ I address problems with these cases under the policy Part below. Regardless, however, it is important to flag the constitutional concern for future advice referral state tort suits.³⁴⁹

A. *Rule of Law*

Professor Richard H. Fallon interprets Redish's argument against abstention as involving a rule of law argument in addition to the one regarding democratic accountability and the proper role of an unelected Judiciary.³⁵⁰ Fallon characterizes Redish as asserting "that abstention doctrines . . . had come so unloosed from the traditional disciplines of law and the 'legal process' that they affronted the ideal of the rule of law."³⁵¹ Fallon disagrees that abstention violates rule of law values, pointing to Professor David Shapiro's description of abstention as consistent with our legal tradition, and to the Supreme Court's moves to cabin the doctrine.³⁵² Moreover, he points to the importance of precedent to argue against the wholesale abolition of the abstention doctrines, writing that "rule of law ideals require reasonable stability."³⁵³

In the context of primary jurisdiction, while exclusive agency jurisdiction primary jurisdiction cases have a long history and can be seen as consistent with our legal tradition,³⁵⁴ advice referral primary jurisdiction cases do not

³⁴⁶ *Id.* at 1059–60.

³⁴⁷ *See Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800 (N.D. Cal. July 11, 2013) (order granting motion to dismiss in part and for referral to the United States Food and Drug Administration); Winters, *supra* note 252, at 853–55.

³⁴⁸ Shortly after the staying and dismissing of several cases involving the meaning of the term "natural," the FDA refused to define the term. *See infra* note 382.

³⁴⁹ Struve's analysis does not apply to the exclusive original jurisdiction cases. These comply with her "adjunct" model in that courts are refusing to consider the issue, whether it be rate-setting or labor disputes, until the agency has. *See Struve, supra* note 17, at 1049. The court retains jurisdiction, and the issue is then subject to judicial review.

³⁵⁰ Fallon, *supra* note 308, at 865.

³⁵¹ *Id.* at 866. Fallon acknowledges that he is reading Redish "liberally and loosely."
Id.

³⁵² *Id.* at 867.

³⁵³ *Id.* at 870.

³⁵⁴ *See supra* Part II (discussing the history of the primary jurisdiction doctrine); *see also* *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (describing exclusive agency jurisdiction as the doctrine's "central and original form").

have the same sort of background. The doctrine was conceived in, and has mainly been applied to, rate-setting and labor dispute cases.³⁵⁵ The Supreme Court interpreted the statutory scheme in these contexts as prohibiting court determination of the relevant questions.³⁵⁶ A judicial determination in these areas would destroy the legislative scheme and undermine the statutory purpose. The doctrine's extension to pure advice referral cases—like the food-labeling context—is unmoored from this background. In that area, Congress allocated decisionmaking authority between the courts and administrative agencies, and a court's determination that this allocation is wrong, or inefficient, or otherwise unwise, is not enough to shift this allocation.

If, however, an argument could be made that the benefits of the advice referral outweighed the costs of this type of primary jurisdiction, or that its use is crucial to the interaction between courts and agencies, maybe the advice referral could still be justified. The exclusive original jurisdiction strain of primary jurisdiction was imagined in the early twentieth century, before the birth of the modern administrative state.³⁵⁷ Perhaps its extension to the advice referral is a natural response to the administrative state and can provide a mechanism for courts and agencies to engage in productive dialogue.³⁵⁸ Redish's critics make this policy argument in support of the abstention doctrines. For example, Shapiro writes, "the continued exercise of discretion in these matters [(the abstention doctrines)] has much to contribute to the easing of interbranch and intergovernmental tensions in our complex system of government,"³⁵⁹ and Fallon explains that Redish's critics (including Shapiro), "appear[] to rely on the notion . . . that acceptance of broad judicial discretion in the interpretation of jurisdictional legislation will yield good results."³⁶⁰

The advice referral, however, results in delay and the loss of state law benefits, and has the potential to interfere with agency decisionmaking. Moreover, its perceived benefits—a fostering of uniformity and expertise—are specters.

B. *Primary Jurisdiction's Consequences*

The use of the primary jurisdiction doctrine results in delay. At the very least, the lawsuit will be delayed by a specific amount of time (sixty days, ninety days) to give the relevant agency time to weigh in on an issue, before

³⁵⁵ See *supra* Tables 1 & 2.

³⁵⁶ See *supra* Part II.B.1.a–b.

³⁵⁷ See *supra* Part II.B.

³⁵⁸ Shapiro writes regarding the division of authority between courts and the Legislature regarding jurisdictional discretion that "[p]rinciples of separation and allocation of powers seldom involve rigid boundaries." Shapiro, *supra* note 323, at 577.

³⁵⁹ *Id.* at 545.

³⁶⁰ Fallon, *supra* note 308, at 878.

the case returns to court.³⁶¹ And in many situations, courts issue a stay or dismiss a case without prejudice without setting a time frame.³⁶² Lengthy delays are inevitable as litigants approach the relevant agency, request a determination, and then reapproach the court in the event of a decision or the failure of the agency to consider the question. This was taking place in the food-labeling context as this Article was being written. Although the Ninth Circuit states that “[u]nder our precedent, ‘efficiency’ is the ‘deciding factor’ in whether to invoke primary jurisdiction,” and that “‘efficiency’ precludes needless delay,”³⁶³ courts within the circuit continue to apply the doctrine to refer cases to the FDA, an agency that has shown itself to be subject to delay.³⁶⁴ For example, courts were reconsidering their dismissals without prejudice for primary jurisdiction referrals to the FDA in the ECJ context as the FDA failed to issue expected final guidance.³⁶⁵ Moreover, an administration that has promised to reduce federal regulation has just taken office.³⁶⁶ This will mean, most likely, less agency resources available to respond to court calls for clarification of nuanced food-labeling regulations.

In exclusive agency jurisdiction cases, the delay is necessary because the agency must rule before the case can continue, and leaving this determination to the agency forwards the regulatory scheme. In rate-setting cases, for example, the case is stayed or dismissed without prejudice for the agency (i.e. the ICC or STB) to consider the reasonableness of the challenged rate. This maintains consistency, and avoids rate discrimination, thereby fulfilling the purposes of the ICA.³⁶⁷ The case may return to the court for the adjudication of remaining issues.

³⁶¹ See, e.g., *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at *9 (N.D. Cal. July 25, 2013) (order granting in part and denying in part defendant’s motion to dismiss second amended class action complaint and staying matter) (staying the case for six months “for an administrative determination, the question of whether and under what circumstances food products containing ingredients produced using bioengineered ingredients may or may not be labeled as ‘Natural’”); *Miller ex rel. Morrish v. Olszewski*, No. 09-13683, 2009 WL 5201792, at *11 (E.D. Mich. Dec. 21, 2009) (staying case for 120 days pending a determination by CMS on whether Michigan’s state plan amendment is to be approved).

³⁶² See, e.g., *Hood v. Wholesoy & Co.*, No.12-cv-5550-YGR, 2013 WL 3553979, at *6 (N.D. Cal. July 12, 2013) (dismissing the case without prejudice so the FDA can determine the ECJ issue).

³⁶³ *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (quoting *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007)).

³⁶⁴ See Lisa Heinzerling, *Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence*, 37 VT. L. REV. 1007, 1029 (2013) (describing FDA delays); Diana R.H. Winters, *Intractable Delay and the Need to Amend the Petition Provisions of the FDCA*, 90 IND. L.J. 1047, 1056–57 (2015) (describing efficiency measures taken within the 9th Circuit).

³⁶⁵ Winters, *supra* note 27, at 254.

³⁶⁶ See *supra* note 15.

³⁶⁷ See *supra* notes 90–94.

But in advice referral cases, the resulting delay is a problem. As Justice Marshall wrote regarding primary jurisdiction's delay in his dissent in *Ricci v. Chicago Mercantile Exchange*, one of the Supreme Court's two advice referral cases:³⁶⁸

[I]nvoication of the doctrine derogates from the principle that except in extraordinary situations, every citizen is entitled to call upon the judiciary for expeditious vindication of his legal claims of right. . . . And surely the right to a "meaningful opportunity to be heard" comprehends within it the right to be heard without unreasonable delay.³⁶⁹

The harms inherent in delay are even more acute in the context of health and safety regulation.³⁷⁰ For example, the longer products with misleading or deceptive labels are on the shelves, the more harm results. Moreover, the role of judicial review in many of these cases is to fill gaps in the regulatory scheme, or to supplement the scarce resources of the relevant agency.³⁷¹ In the context of food labeling, the preemption scheme was carefully drawn so as to leave room for state regulation, both by allowing state regulation that is identical to federal regulation (and thereby allowing litigants to seek state remedies for actions that violate state law) and by confining an express preemption clause to specific labeling actions, thereby leaving others open to state regulation.³⁷² The benefit of preserving state consumer law protections is located not only in substantive law coverage, but also in judicial review. This benefit vanishes if issues—issues that Congress decided not to preempt through the FDCA—are removed from the judicial forum.

This interference with the regulatory scheme causes harm in two ways. First, the beneficial effects of state regulation (including those realized through the tort system) are lost, and second, there is the potential for the interference with agency resource allocation and decisionmaking. State regulation can have

³⁶⁸ *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289 (1973).

³⁶⁹ *Id.* at 320 (Marshall, J., dissenting) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)).

³⁷⁰ *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (“[D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake . . .”).

³⁷¹ *Winters*, *supra* note 364, at 1048 (“The administrative state relies on private enforcement to remedy deficiencies in agency action . . .”); *see also* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003) (“All of [the Administrative Procedure Act's] basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties.”).

³⁷² For a detailed discussion of this scheme, *see Winters*, *supra* note 252, at 830–35. *See generally Winters*, *supra* note 27 (discussing the use of primary jurisdiction in food-labeling litigation).

a compensatory and a regulatory function,³⁷³ and financial liability can also serve to control behavior.³⁷⁴ A liability award in a common law suit “is designed to be[] a potent method of governing conduct and controlling policy.”³⁷⁵ Moreover, state law lawsuits can provide a forum where information about products, after they have been introduced to the market, can be developed, and products can be monitored.³⁷⁶ In advice referral primary jurisdiction cases, these benefits are delayed, if not lost.

Next, when a court refers an issue to an administrative agency, it asks the agency to prioritize that specific issue at that time. Agencies, however, are not structured to respond immediately to every issue of public concern.³⁷⁷ Agency discretion over resource allocation and prioritization are important interests, protected by their enabling statutes and administrative law deference doctrines.³⁷⁸ Consider the restriction on judicial interference in agency procedures required by the Supreme Court decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.³⁷⁹ The Court held that “[a]bsent constitutional constraints or extremely compelling circumstances the ‘administrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’”³⁸⁰ Judicial referral, while not violating this directive, operates within its reach.

For example, the FDA has explained its refusal to define the term “natural” by pleading a lack of resources and internal priority setting. In short, the agency chooses not to define the term at this time.³⁸¹ Nevertheless, whether it is appropriate for courts to be referring this issue to the agency is

³⁷³ See, e.g., *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63–64 (1966) (“[S]tate remedies have been designed to compensate the victim and enable him to vindicate his reputation.”).

³⁷⁴ Winters, *supra* note 252, at 859.

³⁷⁵ *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

³⁷⁶ See Brief of Public Law Scholars as *Amici Curiae* in Support of Respondents at 16, *Mutual Pharm. Co. v. Bartlett*, 133 S.Ct. 2466 (2013) (No. 12-142) (“[S]tate law . . . provides incentives and a forum for the development of new information about drug safety . . .”).

³⁷⁷ Agencies may have different conceptions of what matters need attention than does the public. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 19–20, 33 (1993).

³⁷⁸ See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 4–5 (2008).

³⁷⁹ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978). For an informative discussion of *Vermont Yankee* and its critics, see Walker, *supra* note 16, at 1601–05.

³⁸⁰ *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 543 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

³⁸¹ Letter from Leslie Kux, *supra* note 274.

still an open question.³⁸² If one thinks the agency can and should just ignore these missives, primary jurisdiction referrals become a futile exercise, causing pointless delay to the litigants. If the agency has to respond, however, even to say it will not respond, resources have been diverted.

And what about the benefits of uniformity and expertise? Regarding uniformity, the argument is that the specific question (usually of fact), which is “within the special competence of an administrative body,”³⁸³ should not be left to individual courts that may issue decisions conflicting with each other and the agency’s determination if and when it chooses to make one. In exclusive agency primary jurisdiction cases, the Supreme Court’s decisions have shown that the uniformity is paramount to the regulatory scheme, which would be fatally undermined if there were conflicting decisions.³⁸⁴ For example, conflicting decisions regarding the reasonableness of a railroad rate would undermine the anti-discriminatory purpose of the ICA.³⁸⁵

In the context of the advice referral, however, there are at least two reasons why this is not a convincing argument. First, uniformity can be fostered through the courts. If the cause of action arises under federal law, there is the ultimate possibility of Supreme Court review, in which place “uniformity in construction may be secured.”³⁸⁶ Of course, such review is rare, and many advice referral cases arise under state law. The consolidation of certain strains of cases in specific jurisdictions, like food-labeling cases in the Northern District of California, may lead to an informal uniformity, as courts take each other’s decisions into account and the cases percolate to courts of appeal.

Even if, however, such uniformity is not achieved, this potential messiness is a product of the pertinent regulatory scheme. Congress chose to allow a certain amount of state regulation, the maintenance of which respects the sovereignty and history of state authority and preserves the compensatory and regulatory functions of state law. The consequence of this may be heterogeneity. We see this compromise in certain regulatory arenas, like food

³⁸² See *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 759–61 (9th Cir. 2015) (affirming the district court’s 2012 primary jurisdiction referral of the of the “natural” question in the cosmetics context but remanding for the court to consider whether a stay would be more appropriate than a dismissal, and whether the referral should be reconsidered in light of intervening developments). See generally *Winters*, *supra* note 252 (discussing the question of whether referral to the FDA is appropriate in food-labeling cases). For information on developments in the FDA’s consideration of whether to define “natural,” see *Swearingen v. Santa Cruz Nat. Inc.*, No. C 13-04291 SI, 2014 WL 1339775, at *2–3 (N.D. Cal. Apr. 2, 2014) (order granting defendant’s motion to dismiss plaintiffs’ first amended class action complaint), *judgment set aside by* 2014 WL 2967585 (N.D. Cal. July 1, 2014).

³⁸³ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

³⁸⁴ See *supra* Part II.B.1.a–b.

³⁸⁵ See *supra* Part II.B.1.a.

³⁸⁶ *Pan Am. Petroleum Corp. v. Super. Ct. of Del.*, 366 U.S. 656, 666 (1961) (quoting *Great N. Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922)).

labeling. Ostensibly for a comprehensive federal regulatory scheme that fosters uniformity,³⁸⁷ gaps in the labeling scheme permit a certain amount of difference. We saw states, for example, experiment with requiring the labeling of genetically engineered ingredients, although this experimentation has recently been cut off by federal law.³⁸⁸ Although industry has argued that complying with varying regulations across the country will be difficult and costly, this has not resulted in federal regulation.³⁸⁹

Regarding expertise, in many cases courts are actually well-suited to resolve questions of fact, even if they are complex and technical. This is especially the case in the context of state law consumer protection issues. While in primary jurisdiction cases “the expert and specialized knowledge of the agencies involved has been particularly stressed,”³⁹⁰ the mechanisms of lawsuits are designed so as to distill information from the expert to the fact finder for determination.³⁹¹ Unless the issue has been removed from judicial review by Congress, private law suits under state law are questions “courts are well-equipped to handle.”³⁹² If the issue’s complexity is insurmountable, courts can request agency input by amicus brief if necessary.³⁹³

V. RESTORING PRIMARY JURISDICTION

The Supreme Court created the doctrine of primary jurisdiction to ensure the uniformity of rates in the context of common carriers.³⁹⁴ This uniformity was essential to the paramount purpose of the shipping statutes, which was to

³⁸⁷ Winters, *supra* note 252, at 827.

³⁸⁸ Vermont passed a law requiring the labeling of genetically modified ingredients, scheduled to take effect in 2016, but a federal labeling law preempts state law. *See, e.g., Judge: Vermont’s GMO-Labeling Law and Industry Lawsuit Can Both Proceed*, FOOD SAFETY NEWS (Apr. 29, 2015), <http://www.foodsafetynews.com/2015/04/judge-vermonts-plans-for-gmo-labeling-law-and-industry-lawsuit-can-both-proceed/#.VZNQWRNViko> [<https://perma.cc/6FN3-YFVV>]; *see also* Dan Charles, *Congress Just Passed a GMO Labeling Bill. Nobody’s Super Happy About It*, NPR (July 14, 2016), <http://www.npr.org/s-ctions/thesalt/2016/07/14/486060866/congress-just-passed-a-gmo-labeling-bill-nobodys-super-happy-about-it> [<https://perma.cc/S7GG-QZR9>].

³⁸⁹ *See* Lydia Wheeler, *GMO Bill Intensifies Federal Food Fight*, HILL (Mar. 28, 2015), <http://thehill.com/regulation/237268-gmo-bill-intensifies-federal-food-fight> [<https://perma.cc/8PDW-X6KL>].

³⁹⁰ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

³⁹¹ *See, e.g., Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) (stating that, even in the context of labor disputes, primary jurisdiction is not warranted: “[C]ourts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment.”).

³⁹² *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010).

³⁹³ *See, e.g., Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc.*, 423 F.3d 1056, 1061, 1666–67 (9th Cir. 2005) (deferring to FCC’s interpretation of the statute put forward in an agency’s amicus brief).

³⁹⁴ For a more detailed history of the evolution of the Supreme Court’s primary jurisdiction doctrine, *see supra* Part II.B.1.

eliminate discrimination. The Court found that allowing judicial review of the reasonableness of rates would destroy the statutes.³⁹⁵ Similarly, the federal scheme regulating industrial relations included not just substantive law, but an administrative agency designed to insure the uniformity of the application of the laws. Although primary jurisdiction took a slightly different form in the labor dispute context, the Court developed jurisprudence to negotiate the boundaries of the NLRB's authority.³⁹⁶ And again, the Court found that allowing judicial review of areas within the NLRB's exclusive jurisdiction would destroy the regulatory scheme.³⁹⁷ A large majority of the Court's primary jurisdiction cases have been in these two contexts over the last six or seven decades.³⁹⁸ And it is within these contexts that the doctrine should remain.

Would the benefits of eliminating the doctrine beyond rate-setting and labor dispute cases outweigh any harm caused? If the doctrine were to be bounded to rate-setting and labor dispute cases, parties in cases involving administrative law issues would no longer be subjected to uncertainty as to whether the court would refer the issue and the potential for long delay if it did. Regulated entities could operate under the assumption that they were subject to review under state consumer protection laws. Notwithstanding the great variety of law and practice under these laws, this assumption can provide its own form of predictability. And the potential loss of uniformity is not as frightening a prospect as it may seem, as is discussed above.³⁹⁹ Moreover, the doctrine, a matter of judicial discretion, is applied haphazardly as it stands now,⁴⁰⁰ and this lack of consistency in its application undermines the doctrine's purported benefits.

There are tools available for courts seeking to engage administrative agencies outside of the primary jurisdiction referral. In an article on the remand rule, Professor Christopher Walker developed a set of tools that courts can use to enhance court-agency dialogue to resolve complex administrative law disputes.⁴⁰¹ These mechanisms enable courts to maintain supervision and a measure of authority over agency decisionmaking, even after the ordinary remand rule requires the court to send an erroneously-determined issue back to the agency to reconsider. Several of these tools may be useful to courts seeking to engage agencies in the determination of administrative law issues, but in contexts where a primary jurisdiction referral is inappropriate. For example, Walker suggests the "escalation of an issue within the Executive," by, for example, ordering supplemental briefing on a particular issue.⁴⁰²

³⁹⁵ See *supra* note 128.

³⁹⁶ See *supra* note 163.

³⁹⁷ See *supra* note 168.

³⁹⁸ See *supra* Tables 1 & 2.

³⁹⁹ See *supra* pp. 594–95.

⁴⁰⁰ See *supra* Table 3.

⁴⁰¹ Walker, *supra* note 16, at 1607–14.

⁴⁰² *Id.* at 1610–11.

Because an agency may not be before the court in cases where primary jurisdiction referrals are considered, this may take the form here of requesting amicus briefs or agency input.⁴⁰³ Although an agency may simply refuse to participate, this itself provides the court an important signal.

Courts can also “escalate an issue within the executive” by “messages [they] send[] to the agency via [their] published opinions,”⁴⁰⁴ explains Walker. This has recently happened: the FDA issued its recent call for input on the definition of the term “natural” based partly on the large number of cases asking for judicial resolution of the matter under state law.⁴⁰⁵ While the FDA may not resolve the matter expeditiously, this is still an indication that activity in the courts can spark agency action.

Should primary jurisdiction be available in cases such as those involving Medicaid, discussed above, that fall roughly into the same category as the rate-setting cases—cases that depend on the adjudication of an administrative agency for a judicial determination? The use of primary jurisdiction in cases like these should be expressly bound to their context and analogized to the rate-setting primary jurisdiction precedent. Decisions relying on primary jurisdiction rarely articulate why the use of the doctrine is appropriate in the particular circumstance, and such an articulation could help to prevent doctrine spillover.

If a court does refer an issue to an agency under the primary jurisdiction doctrine, it should at the very least take steps to reduce delay and minimize the potential that the issue, and therefore the case, disappears down an administrative black hole. Cases should be stayed, not dismissed, and the court should provide a limited timeframe for the parties to approach the relevant agency. This would minimize delay and uncertainty, and ensure the parties have access to judicial review in the event that the agency does not respond to the inquiry. As Christopher Walker writes about the retention of jurisdiction in remand cases, “the panel jurisdiction retention tool facilitates court-agency dialogue by signaling to the agency that the court is interested in the outcome on remand and that the panel itself is particularly interested in continuing the dialogue.”⁴⁰⁶ This applies to primary jurisdiction referrals as well. Limited timeframes also indicate a strong interest in the resolution of the issue and

⁴⁰³ The unavailability of primary jurisdiction

does not mean . . . that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever possible the district courts should obtain the views of [the agency] in those cases where it has not set forth its views,

either by agency participation or amicus brief. *Rosado v. Wyman*, 397 U.S. 397, 406 (1970).

⁴⁰⁴ Walker, *supra* note 16, at 1611.

⁴⁰⁵ *FDA Requests Comments on Use of the Term “Natural” on Food Labeling*, *supra* note 274.

⁴⁰⁶ Walker, *supra* note 16, at 1593.

strong interest of the court in determining any remaining issues post referral.⁴⁰⁷ In cases where a court has been asked to consider an issue that is currently before an administrative agency, with a defined period in which an agency determination will be made, a stay pending administrative decision may be in order. These situations will be rare, however.⁴⁰⁸

VI. CONCLUSION

Primary jurisdiction has served an important function over the last century. With it, courts can maintain jurisdiction over a case while referring an administrative law issue to the relevant agency, when the governing regulatory scheme requires that referral. Here, primary jurisdiction supports congressional purpose and allows courts and agencies to work together to achieve the same goal. Courts have also used the doctrine to refer issues to agencies when they seek the agencies' advice, however, and this use of primary jurisdiction delays the resolution of cases, eliminates the benefits of judicial review, and harms the regulatory scheme. Courts should clearly articulate the reasons for and benefits of the doctrine's use when it is applied in the former context, and should stop using primary jurisdiction in the advice referral manifestation.

⁴⁰⁷ See *id.* at 1594.

⁴⁰⁸ For instance, compare *Endo Pharm. Inc. v. Actavis Inc.*, 592 F. App'x 131 (3d Cir. 2014), with *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015). In *Endo*, a district court dismissed a false advertising and unfair competition case without prejudice on primary jurisdiction grounds while the FDA determined whether the Respondent's generic was equivalent to Petitioner's brand name drug, for which an application had been filed with the agency. *Endo*, 592 F. App'x at 133. The agency responded to the application in a timely manner and the Third Circuit returned the case to the district court for resolution of the remaining issues. *Id.* at 134. In *Astiana*, the district court had dismissed a case on primary jurisdiction grounds for the FDA to consider the definition of "natural," a decision for which the agency had no timeframe. *Astiana*, 783 F.3d at 761. The Ninth Circuit affirmed the lower court's initial dismissal of the case but remanded it for the court to consider whether the dismissal was still appropriate. *Id.* at 760. The delay resulting from the latter use of primary jurisdiction is unacceptable. *Id.*

