

NOTES AND COMMENTS

ONE HUNDRED YEARS OF THE DOCTRINE OF PRIMARY JURISDICTION: BUT WHAT STANDARD OF REVIEW IS APPROPRIATE FOR IT?

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INTRODUCTION

The federal courts of appeals are currently split on which standard of review to give a district court's determination of whether an issue before it falls within an administrative agency's primary jurisdiction.¹ The Second,² Eighth,³ and Ninth Circuits⁴ currently use a de novo standard.⁵ The Third,⁶

1. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (identifying the split among the circuit courts and adhering to the abuse of discretion standard of review); *Current Circuit Splits*, 2 SETON HALL CIR. REV. 509, 521 (2006) (summarizing the explanation of the split described in *S. Utah Wilderness Alliance*, 425 F.3d at 750); Fred Huntsman, Comment, *Who Makes the Call? The Primary Jurisdiction Doctrine in Texas After Cash America International, Inc. v. Bennett, Subaru of America, Inc. v. David McDavid Nissan, Inc., and Butnaru v. Ford Motor Co.*, 54 BAYLOR L. REV. 897, 910 (2002) (reporting that the circuits are split and concluding that the majority of courts use a de novo standard of review).

2. See *Ellis v. Tribune Television Co.*, 443 F.3d 71, 83 n.14 (2d Cir. 2006) ("We review de novo the district court's decision not to apply the primary jurisdiction doctrine." (citing *Nat'l Commc'ns Ass'n v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995))); *Nat'l Commc'ns Ass'n*, 46 F.3d at 222 (clarifying that "[a]lthough sometimes framed in terms of whether the district court abused its discretion," the circuit actually reviewed issues of primary jurisdiction de novo (citing *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 854 (2d Cir. 1988))). But see *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 72 (2d Cir. 2002) ("We emphasize that primary jurisdiction is a discretionary doctrine . . ."); *Goya Foods*, 846 F.2d at 854 (holding that the district court "applied an incorrect legal standard and thereby exceeded [its] discretion").

3. See *United States v. Henderson*, 416 F.3d 686, 691 (8th Cir. 2005) ("This court appears to review primary jurisdiction de novo."); *Access Telecomms. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (accepting the parties' invitation to review the issue of primary jurisdiction de novo).

4. See *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1155 (9th Cir. 2000) (holding that the Ninth Circuit reviews challenges "invoking the primary jurisdiction doctrine de novo"); *Int'l Bhd. of Teamsters v. Am. Delivery Serv. Co.*, 50 F.3d 770, 773 (9th Cir. 1995) (stating the standard of review in the Ninth Circuit is de novo (citing *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1406 (9th Cir. 1991))); *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (asserting in a footnote that prior Ninth Circuit precedent unequivocally states that the "application of the primary jurisdiction doctrine is a question of law, reviewed de novo" (citing *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985))). The only case in which the Ninth Circuit gives insight into its rationale is *Gen. Dynamics Corp., supra*, which expressly argued against an abuse of discretion standard and for de novo review; however, the Ninth Circuit has obfuscated what standard of review is appropriate in several cases that cannot be reconciled with de novo review. See *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (citing *Gen. Dynamics Corp.*, 307 F.3d at 1362, but stating that "the doctrine of primary jurisdiction is committed to the sound discretion of the court"). Most confusingly, the Ninth Circuit even came to the conclusion, after the cases mentioned above, that it has never discussed the standard of review for primary jurisdiction. See *United States v. Culliton*, 328 F.3d 1074, 1081 (9th Cir. 2003) ("This circuit has not yet discussed the standard of review for the application of the primary jurisdiction doctrine.").

5. The Texas Supreme Court also recently discussed the appropriate standard of review for the primary jurisdiction doctrine and held that Texas courts review the doctrine de novo. See *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (deciding whether an agency has primary jurisdiction requires statutory interpretation, which supports the idea that the doctrine of primary jurisdiction, is a question of law).

Fourth,⁷ Fifth,⁸ Tenth,⁹ and D.C. Circuits¹⁰ use an abuse of discretion standard. It is currently unclear what standard of review the First,¹¹ Sixth,¹² and Eleventh¹³ Circuits use. Therefore, defendants who appeal whether an agency should have first decided an issue in a case might face substantially different burdens in persuading the appellate court, depending on in which jurisdiction the plaintiff brought the action.

6. See *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993) (“A district court’s decision not to submit an issue for initial determination by the agency will be reversed only for an abuse of discretion.”); *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 549 (3d Cir. 1988) (“[A] district court’s decision not to submit an issue for initial determination by an agency is reversible only if it constituted an abuse of discretion.”).

7. See *Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 & n.24 (4th Cir. 1996) (holding that the standard of review for primary jurisdiction is abuse of discretion and rejecting a party’s contention that it should be de novo).

8. See *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988) (“[Primary jurisdiction] is a flexible doctrine to be applied at the discretion of the district court.” (citing *El Paso Natural Gas Co. v. Sun Oil Co.*, 708 F.2d 1011, 1020 (5th Cir. 1983))); *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) (“[Primary jurisdiction] is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process.”).

9. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (identifying the split, listing the circuits on each side, and stating that the Tenth Circuit reviews application of primary jurisdiction for abuse of discretion); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1377 (10th Cir. 1989) (stating that the Tenth Circuit reviews a district court’s application of primary jurisdiction under the abuse of discretion standard).

10. See *Nat’l Tel. Coop. Ass’n v. Exxon Mobil Corp.*, 244 F.3d 153, 156 (D.C. Cir. 2001) (“We review the district court’s decision [of whether to apply primary jurisdiction] to the contrary only for abuse of discretion.” (citing *Env’tl. Tech. Council*, 98 F.3d at 789; *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 947-48 (10th Cir. 1995))).

11. Compare *U.S. Pub. Interest Research Group v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003) (“[T]he primary jurisdiction doctrine permits and occasionally requires a court to stay its hand while allowing an agency to address issues within its ken.” (citing *Ass’n of Int’l Auto. Mfrs. v. Comm’r, Mass. Dep’t of Env’tl. Prot.*, 196 F.3d 302, 304 (1st Cir. 1999))), with *Newspaper Guild of Salem v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1283 (1st Cir. 1996) (“We review de novo the district court’s implicit jurisdictional finding that the Guild’s claims fall within the primary jurisdiction of the NLRB.” (citing *Int’l Bhd. of Teamsters v. Am. Delivery Serv., Co.*, 50 F.3d 770, 773 (9th Cir. 1995))).

12. Compare *United States v. Haun*, 124 F.3d 745, 749-50 (6th Cir. 1997) (reversing the district court’s referral to an agency under de novo review without stating the standard of review for primary jurisdiction and noting that the court should not have applied primary jurisdiction as the reason for the reversal), with *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 235 n.30 (6th Cir. 1980) (“The primary jurisdiction doctrine is a rule of judicial construction which permits a court, in exercise of its sound discretion, to defer to an administrative agency for the initial resolution of certain disputes.”).

13. See *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265-66 (11th Cir. 2000) (describing primary jurisdiction and the *Burford* abstention as the same and going on to review the *Burford* abstention under an abuse of discretion standard of review (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943))).

The discord among the circuits stems from the various courts' interpretation of the nature of the doctrine of primary jurisdiction.¹⁴ Those jurisdictions that use a de novo standard treat the application of the doctrine of primary jurisdiction as a matter of law, requiring a district court to either delay proceedings or dismiss the case and refer the issue to an agency if the doctrine is applicable.¹⁵ Alternatively, jurisdictions that use an abuse of discretion standard treat the doctrine as "a matter of judicial self-restraint,"¹⁶ and therefore, a discretionary doctrine.¹⁷

This Comment examines the circuit split over whether to use a de novo or an abuse of discretion standard of review upon an appeal from a district court's decision of whether an issue is within an agency's primary jurisdiction. Part I explains the doctrine of primary jurisdiction. Part II examines the circuit split and the different jurisdictions' reasoning behind their particular choice of the standard of review. Part III concludes that federal courts of appeals should adopt a de novo standard of review when determining whether a district court should have applied the doctrine.

I. THE DOCTRINE OF PRIMARY JURISDICTION

The doctrine of primary jurisdiction is a New York egg cream.¹⁸ As an egg cream is neither an egg nor cream, primary jurisdiction is neither primary nor essentially jurisdictional.¹⁹ The doctrine of primary

14. See Huntsman, *supra* note 1, at 910 (suggesting that the standard of review for the doctrine of primary jurisdiction hinges on its classification as either a prudential or jurisdictional doctrine).

15. See, e.g., *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (reasoning that the Supreme Court often uses mandatory language when discussing the doctrine of primary jurisdiction).

16. See *Ashland Oil & Ref. Co. v. Fed. Power Comm'n*, 421 F.2d 17, 20 (6th Cir. 1970) (explaining that courts, not administrative agencies, make the determination whether the doctrine applies); 73 C.J.S. *Public Administrative Law and Procedure* § 73 (2007) (distinguishing the doctrine from questions of subject matter jurisdiction).

17. See *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 n.24 (4th Cir. 1996) (rejecting a party's contention that the court should review the matter de novo because primary jurisdiction is a discretionary matter); *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983) (holding that the court could not "second guess whether the trial judge used his discretion wisely").

18. This analogy is based on Contract Law Professor Nancy Abramowitz's metaphor that parol evidence is an egg cream.

19. See *MFS Sec. Corp. v. N.Y. Stock Exch., Inc.*, 277 F.3d 613, 622 (2d Cir. 2002) (relying on *Ricci v. Chi. Mercantile Exch.*, 447 F.2d 713, 720 (7th Cir. 1971) to demonstrate that "primary jurisdiction is neither jurisdictional nor primary" and analogizing to Voltaire's statement that the Holy Roman Empire was "neither holy, nor Roman, nor an empire" (quoting FRANÇOIS MARIE AROUET DE VOLTAIRE, *ESSAI SUR LES MOEURS ET L'ESPRIT DES NATIONS* 70 (1769))); see also *Env'tl. Tech. Council*, 98 F.3d at 789 n.24 (clarifying that "despite what the term [primary jurisdiction] may imply, [it] does not speak to the jurisdictional power of the federal courts" (quoting *Bessemer & Lake Erie R.R. Co.*, 717 F.2d at 599)); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002) (distinguishing primary jurisdiction and exclusive jurisdiction by explaining that "primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional");

jurisdiction stands for the idea that courts should allow agencies to decide issues that are either within the agencies' specialized sphere of knowledge²⁰ or when there is a need for a uniform answer from a single agency rather than a multitude of answers from various courts.²¹ The doctrine of primary jurisdiction is a misnomer, however, in that the court must first have jurisdiction to invoke the doctrine.²² It is not that the agency has jurisdiction before the court does, but rather, the agency and the court share jurisdiction, and where the court applies the doctrine, it delays the case pending a decision by the agency or dismisses and refers the case to the agency.²³

The doctrine of primary jurisdiction is a judge-made rule that allocates power between courts and agencies.²⁴ This is necessary because when the Legislative Branch creates a new agency with powers to adjudicate, courts do not lose any of their own power,²⁵ which in effect means that two bodies

Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH. ADMIN. L.J. 288, 331 (2006) ("Primary jurisdiction is not really jurisdictional at all—it is prudential."). *But see* Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038 (1964) (describing primary jurisdiction as "*pro tanto* exclusive jurisdiction; insofar as the agency has jurisdiction it excludes the courts").

20. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) (explaining that, originally, uniformity of answers was the important factor, but currently there is importance attached to the specialized knowledge of the relevant agency (citing Far E. Conference v. United States, 342 U.S. 570, 574 (1952))); 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 13.23[1] (2d ed. 1997) (discussing the origins of the primary jurisdiction doctrine).

21. *See* W. Pac. R.R. Co., 352 U.S. at 64 (explaining that the Court had earlier emphasized that primary jurisdiction promotes uniformity through courts deferring certain questions to the relevant agency); Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907) (creating the doctrine of primary jurisdiction to promote uniformity).

22. *See* W. Pac. R.R. Co., 352 U.S. at 63-64 (distinguishing exhaustion of remedies and primary jurisdiction by stating that primary jurisdiction is applicable "where a claim is originally cognizable in the courts").

23. *See id.* at 64 (explaining that where primary jurisdiction is applicable, courts must suspend the judicial process and refer the issue to the agency).

24. *See id.* at 63 (addressing the nature of primary jurisdiction in that it "is concerned with promoting proper relationships between the courts and administrative agencies"); United States v. Radio Corp. of Am., 358 U.S. 334, 346 n.14 (1959) (explaining that the doctrine of primary jurisdiction promotes proper relationships between the courts and agencies charged with regulatory duties (citing W. Pac. R.R. Co., 352 U.S. at 63-64)); Gerald E. Berendt & Walter J. Kendall III, *Administrative Law: Judicial Review—Reflections on the Proper Relationship Between Courts and Agencies*, 58 CHI.-KENT L. REV. 215, 238 (1982) ("When faced with the issue of primary jurisdiction, a court is essentially concerned with the proper allocation of power between the court and the agency."); Greg Goelzhauser, Comment, *Price Squeeze in a Deregulated Electric Power Industry*, 32 FLA. ST. U. L. REV. 225, 249 (2004) (explaining the doctrine of primary jurisdiction). *But see* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 199 n.29 (1978) (quoting 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01, at 3 (1958)) ("The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue.").

25. *See* United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1365 (9th Cir. 1987) ("Typically, the creation of a new agency means the addition to the legal system of a new

share jurisdiction over certain areas of law. Therefore, primary jurisdiction is applicable when a court and an agency have concurrent jurisdiction over a case or over a particular issue within a case.²⁶ The court must then decide either to hear the case or to dismiss or delay it and send the issue to the agency for a determination. One commentator explained that primary jurisdiction concerns “when” a court will decide an issue, rather than “whether it may” do so.²⁷

A. Objectives of the Doctrine of Primary Jurisdiction

There are two objectives of primary jurisdiction: uniformity and expertise.²⁸ The Supreme Court first invoked the doctrine where there was a need for uniform answers to an issue involving the legality of a tariff.²⁹ One hundred years ago, in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*,³⁰ a case involving whether a rate tariff was legal, the Court held that the district court *must* allow the Interstate Commerce Commission to make an initial determination of whether a rate schedule was legal.³¹ The Court was concerned that if both the Commission and the courts had the power to rule on the schedules, their determinations might not be uniform.³²

lawmaking and law applying authority, with no explicit subtraction from the previously-existing power of the courts.” (quoting 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 22:1, at 81 (2d ed. 1983))).

26. See *W. Pac. R.R. Co.*, 352 U.S. at 63-64 (clarifying that primary jurisdiction is applicable “where a claim is originally cognizable in the courts”); *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (explaining that primary jurisdiction requires a court “to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling,” but noting that the referral does not prevent the court from retaining jurisdiction).

27. 4 DAVIS, *supra* note 25, § 22.1, at 82.

28. See *W. Pac. R.R. Co.*, 352 U.S. at 64 (explaining the two reasons for primary jurisdiction are uniformity among courts and agencies, and the expertise of the agency); *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 751 (10th Cir. 2005) (“These two concerns—regulatory uniformity and agency expertise—drive the primary jurisdiction analysis.”).

29. See generally *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (holding that the shipper could not continue an action for unreasonable shipping rates, which were set according to the Interstate Commerce Act, unless the Interstate Commerce Commission determined that the rates were unreasonable).

30. *Id.*

31. *Id.* at 448 (determining that it did not need to decide whether the lower court would have had jurisdiction because a congressional act required the Interstate Commerce Commission to first entertain such disputes).

32. See *id.* at 440-41 (arguing that if the agency did not have the power to set rates, they would vary depending on different judicial decisions preventing equality in the market).

To promote this uniformity, the Court ruled that the agency should first reach a decision on the issue to avoid various courts creating a multitude of answers to a specific question.³³

More recently, the Court has based the doctrine of primary jurisdiction on the reasoning that where an agency may better resolve a complex issue through its experience in a certain area, courts should allow the agency to make an initial determination.³⁴ Courts base this reasoning on the fact that they tend to be generalist in nature and do not have the specific expertise of an agency.³⁵ One exception to this rule is that there is no need for the court to defer to the agency where the court has traditionally had competence in the particular area.³⁶

The nature of primary jurisdiction might be under controversy in part because there is no fixed rule for where to apply the doctrine.³⁷ Some circuits have provided factors to determine whether the courts in the circuit should apply the doctrine,³⁸ and others have held that a part of the determination is that the court must also balance the benefits of the agency's decision with the costs of delaying the proceedings.³⁹ However,

33. *Id.* at 440-41, 448 (noting that if the rates were determined by courts, the protections that the statute was intended to create would be nullified).

34. *See* *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64-65 (1956) (explaining that it makes sense to allow agencies to make preliminary determinations because of their "specialization," "insight gained through experience," and "more flexible procedure" (quoting *Far E. Conference v. United States*, 342 U.S. 570, 574-75 (1952))).

35. *See* 4 DAVIS, *supra* note 25, § 22:1, at 82 ("[T]he most common reason for a court to hold that the agency has primary jurisdiction is that the judges, who usually deem themselves to be relatively the generalists, should not act on a question until the administrators, who may be relatively the specialists, have acted on it.").

36. *See Far E. Conference*, 342 U.S. at 574 (recognizing that the Court has applied primary jurisdiction "in cases raising issues of fact not within the conventional experience of judges"); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) (holding that primary jurisdiction was not applicable in part because the courts had experience in the particular issue at bar).

37. *See W. Pac. R.R. Co.*, 352 U.S. at 64 (holding that there is no fixed rule for applying the doctrine of primary jurisdiction).

38. *See United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987) (listing four factors that are present where the doctrine is invoked: "(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"); *Nat'l Commc'ns Ass'n v. AT&T*, 46 F.3d 220, 222-23 (2d Cir. 1995) (agreeing with a lower court that four factors have "generally been the focus of the analysis"). The Second Circuit's factors were:

(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.

Nat'l Commc'ns Ass'n, 46 F.3d at 222-23.

39. *See Nat'l Commc'ns Ass'n*, 46 F.3d at 223, 225 (holding that the delay in deferring to the agency outweighed its advantages (citing *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 321 (1973))); *Ricci*, 409 U.S. at 321 (Marshall, J., dissenting) ("Wise use of the

“[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”⁴⁰ In all cases, the court needs to look to the relevant agency-enabling legislation to ascertain whether the agency has concurrent jurisdiction with the reviewing court.⁴¹ The analysis of whether primary jurisdiction applies thus contains an element of statutory interpretation.

B. Application of the Doctrine of Primary Jurisdiction

The most frequent context where primary jurisdiction arises is with regard to regulated industries.⁴² In particular, courts have applied primary jurisdiction to issues involving questions of fact and issues involving administrative discretion and referred the issues to, among other agencies, the Interstate Commerce Commission, the Commodity Exchange Commission, and the National Labor Relations Board.⁴³ One early example where the Court found the doctrine applicable is *Texas & Pacific Railway Co. v. American Tie & Timber Co.*,⁴⁴ which is the first case where the Court applied primary jurisdiction to a question of interpretation of a tariff.⁴⁵ In this case, a shipper wanted to ship wooden railroad ties as

doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay.”); see also Section of Admin. Law & Regulatory Practice of the Am. Bar Ass’n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 49 (2002) (stating one of the considerations to which courts look when deciding to invoke primary jurisdiction is “whether the referral to the administrative agency will impose undue delays or costs on the litigants”); Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 362-63 (1996) (“[T]he courts have remained sensitive to the effect of agency delay upon private litigants—specifically, the fear that the agency may not act quickly . . .”).

40. *W. Pac. R.R. Co.*, 352 U.S. at 64.

41. See *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) (determining that the legislative history of the relevant act did not give the agency the power to decide antitrust issues); *Gen. Dynamics Corp.*, 828 F.2d at 1363 n.13 (“[A] court must not employ the doctrine [of primary jurisdiction] unless the particular division of power was intended by Congress.”); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (“[W]hether an agency has primary jurisdiction requires statutory construction.”).

42. See Jaffe, *supra* note 19, at 1050 (discussing the application of primary jurisdiction outside traditionally regulated industries).

43. See E.H. Schopler, Annotation, *The Doctrine of Primary Administrative Jurisdiction as Defined and Applied by the Supreme Court*, 38 L. Ed. 2d 796, 804-14 (1974) (providing summaries of cases where courts have referred issues to particular agencies under the primary jurisdiction doctrine).

44. 234 U.S. 138 (1914).

45. See Louis L. Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws.*, 102 U. PA. L. REV. 577, 584 (1954) [hereinafter *Primary Jurisdiction Reconsidered*] (discussing the problem the Court has had applying the primary jurisdiction doctrine to questions of interpretation).

“lumber,” but the carrier rejected them under that category and argued the ties required a new rate.⁴⁶ The Court found that only the Interstate Commerce Committee could settle the issue.⁴⁷

In contradistinction to the application of primary jurisdiction in *American Tie & Timber Co.*, the Court in *Great Northern Railway Co. v. Merchants Elevator Co.* refused to apply the doctrine, explaining that the issue before them was to interpret the meaning of words “in their ordinary sense.”⁴⁸ The dispute in *Great Northern Railway* involved whether a charge for reconsignment of a shipment of corn should have been excluded under a rule that the fee was not applicable to grain held for inspection.⁴⁹ The Court differentiated *American Tie & Timber Co.* by explaining that in previous cases the Court required primary jurisdiction “because the enquiry [was] essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the [relevant agency].”⁵⁰

As agencies outsource more functions, primary jurisdiction may play an increasingly important role in litigation. Plaintiffs who seek redress from a private company that works for an agency will most likely want to have their cases heard by a court rather than the agency, which some scholars have described as having a possible bias in favor of the regulated industry, or in this case, the contracting company.⁵¹ Therefore, in the prototypical case, the plaintiff will initially file suit with a court, and the contracting company or the regulated industry will most likely petition the court to invoke primary jurisdiction.⁵² A court’s decision to apply the doctrine and

46. *Am. Tie & Timber Co.*, 234 U.S. at 142-43.

47. *See id.* at 146 (holding that the Interstate Commerce Commission’s power to regulate tariffs necessitated the referral of the issue to the agency).

48. *See* *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 294 (1922) (determining that there was no reason to allow the exercise of administrative discretion because no evidential or ultimate facts were in question).

49. *See id.* at 289-90 (rejecting a claim that the court did not have proper jurisdiction until the agency acted).

50. *Id.* at 291, 294-95.

51. *See* Daniel Keating, Comment, *Employee Injury Cases: Should Courts or Boards Decide Whether Workers’ Compensation Laws Apply?*, 53 U. CHI. L. REV. 258, 263 (1986) (explaining that a plaintiff in a worker compensation suit would prefer a potentially more sympathetic jury, whereas employers would prefer the fact finder to be an agency that frequently deals with injured workers); Nagareda, *supra* note 39, at 364 (concluding that “commentators have long expressed the fear that the highly concentrated interests typified by regulated industries might wield inordinate political influence”); Jerome Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 35 (1976) (stating that a “built-in bias for regulated industries” may influence an agency’s factual determinations).

52. *See, e.g.*, Keating, *supra* note 51, at 263 (citing *Sewell v. Clearing Mach. Corp.*, 347 N.W.2d 447 (Mich. 1984) and *Scott v. Indus. Accident Comm’n*, 293 P.2d 18 (Cal. 1956) for support of the proposition that injured employees typically file actions in a court, and “just as typically, the employer seeks to dismiss the court action by arguing that the issue of jurisdiction should properly be resolved by the [agency]”).

require parties to present the issue to an agency will increase the time and, consequently, the costs of litigation for the plaintiff.⁵³ If the agency does have bias towards the regulated industry, it may ultimately lead to a more favorable decision for the regulated industry.

*C. Primary Jurisdiction Distinguished from Exclusive Jurisdiction
and Exhaustion of Remedies*

Primary jurisdiction is not the same as exclusive jurisdiction,⁵⁴ although both doctrines may result in the court dismissing a case.⁵⁵ Unlike primary jurisdiction, exclusive jurisdiction is a jurisdictional issue and requires the court to dismiss the case so that it can go before an agency because the court does not have the power to hear the case.⁵⁶ In cases where the court applies primary jurisdiction, the court has jurisdiction to decide the issue. One court succinctly summarized the difference: “[d]espite similar terminology, primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional.”⁵⁷

Exhaustion of remedies is “conceptually analogous” to primary jurisdiction.⁵⁸ One commentator described the similarities of the doctrines by stating that “[b]oth are prudential doctrines created by the courts to allocate between courts and agencies the initial responsibility for resolving issues and disputes in a manner that recognizes the differing responsibilities and comparative advantages of agencies and courts.”⁵⁹ Exhaustion of remedies mandates that no party “is entitled to judicial relief for a[n] . . . injury until [the party exhausts] the prescribed administrative remedy”⁶⁰ By contrast, where primary jurisdiction is applicable, the

53. See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §14:1, at 271-72 (3d ed. 1994) (explaining that the court may have to wait for the agency to make a ruling if the issue referred to the agency is critical to the litigation).

54. The Supreme Court has confusingly used the term “exclusive primary jurisdiction” when referring to primary jurisdiction. See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684 (1965) (using the terminology “exclusive primary jurisdiction”); *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956) (referring to primary jurisdiction as “exclusive primary jurisdiction”); see also *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220-21 (Tex. 2002) (explaining that Texas courts have often confused the doctrines of primary jurisdiction and exclusive jurisdiction and then distinguishing the two doctrines).

55. See *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (explaining that upon application of primary jurisdiction, a court may “dismiss the case without prejudice”).

56. See J. Bruce Bennett, *Primary Jurisdiction in Texas: Has the Texas Supreme Court Clarified or Confused It?*, 5 TEX. TECH. J. TEX. ADMIN. L. 177, 178 (2004) (explaining that “[e]xclusive original jurisdiction over a claim or issue cannot exist in both the agency and a trial court”).

57. *Subaru of Am., Inc.*, 84 S.W.3d at 220.

58. 2 DAVIS & PIERCE, *supra* note 53, § 14:1, at 271.

59. *Id.* at 271-72.

60. *Id.* §15:2, at 307 (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)).

party has a right to bring a case before a court, but because some issue of the case falls within the jurisdiction of an agency, the court delays the proceedings pending a decision on the issue from the agency. What distinguishes primary jurisdiction from exhaustion of remedies is that, in cases where primary jurisdiction applies, there is a claim “enforceable by *original* judicial action,” while exhaustion of remedies demands that parties first exhaust the prescribed administrative remedy “before seeking judicial interference.”⁶¹

II. THE CURRENT CIRCUIT SPLIT

Several commentators⁶² and at least one circuit court⁶³ have noted the discord among federal courts as to the proper standard of review for a district court’s determination of whether an agency has primary jurisdiction. Some circuits claim that a *de novo* standard of review is appropriate while other circuits use an abuse of discretion standard.

A. *The Abuse of Discretion Standard*

The Third, Fourth, Fifth, Tenth, and D.C. Circuits apply an abuse of discretion standard to the review of a district court’s determination on the doctrine of primary jurisdiction.⁶⁴ These courts emphasize that the courts and agencies have concurrent jurisdiction, and tend to view primary jurisdiction as a prudential doctrine that courts, in their discretion, may use to promote the doctrine’s twin goals of regulatory uniformity and deference to agency expertise.⁶⁵

The Third and Fourth Circuits have rejected treating primary jurisdiction as a question of law rather than a discretionary option, implying that treating it as a question of law seems to treat it more similarly to a truly jurisdictional question.⁶⁶ The courts reasoned that in primary jurisdiction

61. *Primary Jurisdiction Reconsidered*, *supra* note 45, at 579.

62. *See Current Circuit Splits*, *supra* note 1, at 521 (summarizing the jurisdictional differences in reviewing the application of the primary jurisdiction doctrine by lower courts); Huntsman, *supra* note 1, at 910 (identifying the split and concluding that the majority of courts use a *de novo* standard of review for whether a lower court should have applied the doctrine of primary jurisdiction).

63. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (identifying the split among the circuit courts and then adhering to the Tenth Circuit’s standard of review).

64. *See supra* notes 6-10.

65. *See, e.g., Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) (describing primary jurisdiction as “a discretionary tool” and a “flexible concept” that the courts use to “integrate the regulatory functions of agencies into the judicial decision making process”).

66. *See Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 & n.24 (4th Cir. 1996) (rejecting a parties invitation to review the district court’s refusal to apply primary jurisdiction and stating that primary jurisdiction “does not speak to the jurisdictional power

cases, the question is not whether the court can hear the case, but rather, whether in its discretion it can defer to an agency.⁶⁷ That is to say, the court does not give up its jurisdiction; it merely delays proceedings until an agency has had the chance to provide the court with its expertise in the resolution of an issue in the case. In this way, the doctrine is procedural and similar to the discretion that judges have in setting hearing dates and running their courtrooms, as opposed to a strict, substantive rule of law that courts must impose in certain circumstances.

B. *The De Novo Standard*

The Second, Eighth, and Ninth Circuits review a district court's determination of whether primary jurisdiction is applicable *de novo*.⁶⁸ However, the Ninth Circuit does not appear to be consistent with the standard of review it applies to primary jurisdiction.⁶⁹ Courts that use a *de novo* standard tend to view primary jurisdiction as a matter of law.

In *United States v. General Dynamics Corp.*, the Ninth Circuit reasoned that primary jurisdiction was a matter of law by stating that the Supreme Court "frequently" used language of a requisite rather than discretionary nature,⁷⁰ and then held that the standard of review for primary jurisdiction is "unequivocally" *de novo*.⁷¹ The Ninth Circuit also directly addressed the district court and the dissent's view that the doctrine was discretionary.⁷² The majority first rebuffed the district court, writing, "[t]he district court apparently thought that there is an element of discretion in the use of the primary jurisdiction doctrine."⁷³ The court then reasoned that "an issue either is within an agency's primary jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial determination."⁷⁴

of the federal courts" (quoting *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993)).

67. See *id.* at 789 n.25 (noting that the judicial discretion is designed to create an "orderly and sensible coordination" between agencies and the courts).

68. See *supra* notes 2-4.

69. Compare *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (stating the correct standard of review for primary jurisdiction is "unequivocally" *de novo*), with *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (citing *Gen. Dynamics Corp.*, 828 F.2d at 1362, but stating that "the doctrine of primary jurisdiction is committed to the sound discretion of the court . . .").

70. See *Gen. Dynamics Corp.*, 828 F.2d at 1364 n.15 ("In discussing the doctrine, the Supreme Court frequently has used language at odds with the notion of discretionary application.").

71. See *id.* (concluding that *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985), "unequivocally" states that primary jurisdiction "is a question of law, reviewed *de novo*").

72. See *id.* (admitting that some of the cases that the dissent cites have ambiguous language as to whether primary jurisdiction is discretionary or requisite but concluding that precedent mandates that the doctrine is a question of law).

73. *Id.*

74. *Id.*

The Second Circuit seemed to take a more pragmatic approach to the determination of the appropriate standard of review. It stated that “[a]lthough sometimes framed in terms of whether the district court abused its discretion, the standard of review is essentially *de novo*.”⁷⁵ The court did not shed any light on the reasoning behind its conclusory statement that *de novo* was the correct standard, but its ignoring the discretionary language of prior holdings indicates that the court was less interested in the prior usage of the label “abuse of discretion” than it was in the way the courts have treated or should treat the doctrine.

Consistent with the Second Circuit’s view, one commentator observed that in cases reviewing lower courts’ application of primary jurisdiction, the review was invasive “regardless of the label applied to the standard of review,” except where the lower court was seeking the aid of the agency and the necessity of that aid was unclear from the regulatory scheme.⁷⁶ The commentator continued that “[a]lthough the circuit court may label the review abuse of discretion review, what appears from the case is, if not *de novo* review, something very near it.”⁷⁷

III. DE NOVO REVIEW IS MORE APPROPRIATE

Although the doctrine of primary jurisdiction has prudential elements to it, *de novo* is the better standard of review for three reasons. First, primary jurisdiction is a matter of law because it requires statutory interpretation.⁷⁸ Second, the language of the Supreme Court in applying the doctrine is of a requisite nature rather than a discretionary nature.⁷⁹ Finally, appellate

75. See *Nat’l Commc’ns Ass’n, v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995) (holding that the district court “applied an incorrect legal standard and thereby exceeded [its] discretion” (citing *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 854 (2d Cir. 1988))).

76. See 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 14.08, at 14-26 to -27 (3d ed. 1999) (explaining the differing standards of review among circuit courts). Professors Childress and Davis concluded that:

The variety of reasons for application [of primary jurisdiction] leads to somewhat confusing review, the decision to turn to the agency for its wisdom as to a given issue turning more on whether the reviewing court considers the district court’s decision right or wrong than on whether the district court acted within its discretion.

Id.

77. *Id.* at 14-26.

78. See *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (holding that primary jurisdiction is a question of law and rationalizing the ruling by explaining that primary jurisdiction requires statutory construction).

79. See *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (“[Primary jurisdiction] requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.”); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202 (1978) (“The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board.”); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 353 (1963) (holding that the doctrine of primary jurisdiction “requires judicial abstention in cases where protection of the integrity of a

courts should not give the district court the amount of deference the abuse of discretion standard of review requires because the Supreme Court has held that the doctrine of primary jurisdiction does more than set the timetable of the courts,⁸⁰ which makes it more than merely procedural, and the district court has no advantage over the circuit court in applying the doctrine.

A. Statutory Interpretation

In *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, the Texas Supreme Court gave a compelling argument as to why a de novo standard is appropriate, reasoning that the determination of whether to apply the doctrine of primary jurisdiction requires the interpretation of statutes.⁸¹ Although the Texas Supreme Court was applying the primary jurisdiction doctrine to state courts and state agencies, its reasoning that primary jurisdiction requires statutory construction is also relevant to federal courts and agencies because statutory construction is also a necessary step in the way federal courts decide to apply the doctrine.⁸²

The Ninth Circuit gave insight into the need for statutory interpretation to determine whether primary jurisdiction is applicable when the court held that based on the Supreme Court's language primary jurisdiction applies where there is a need for "protection of the integrity of a regulatory

regulatory scheme dictates preliminary resort to the agency which administers the scheme"); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) ("We now reach the question whether . . . the over-all regulatory scheme of the Act requires invocation of [the] primary jurisdiction doctrine."); *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 291 (1922) ("Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."). *But see Reiter*, 507 U.S. at 268-69 ("Referral of the issue to the administrative agency 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." (emphasis added)).

80. *See United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956) (describing primary jurisdiction as "a doctrine allocating law-making power over certain aspects' of commercial relations" (quoting *Primary Jurisdiction Reconsidered*, *supra* note 45, at 583-84)); *see also Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) ("The doctrine of primary jurisdiction promotes proper relationships between the courts and administrative agencies." (citing *Nader v. Alleghany Airlines, Inc.*, 426 U.S. 290, 303 (1976))). *But see Sears, Roebuck & Co.*, 436 U.S. at 199 n.29 (stating that primary jurisdiction "governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue" (quoting 3 DAVIS, *supra* note 24, § 19.01, at 3)).

81. *See Subaru of Am., Inc.*, 84 S.W.3d at 220 (implying that statutory interpretation is a matter of law).

82. *See* Aaron J. Lockwood, Note, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 730-31 (2007) (explaining that the first steps in applying primary jurisdiction is for the court to decide the scope of its jurisdiction and the scope of the agency's jurisdiction, which involve matters of statutory interpretation).

scheme.”⁸³ The court reasoned that “it is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine.”⁸⁴ Therefore, statutory interpretation is a necessary component of the doctrine, which is a matter of law.⁸⁵

B. *Requisite Language of the Supreme Court*

As the Ninth Circuit has stated,⁸⁶ the Supreme Court has often used language that indicates a requisite nature to the doctrine rather than a discretionary nature.⁸⁷ The Ninth Circuit supported its statement by quoting language of the Supreme Court that primary jurisdiction “requires judicial abstention in cases where protection of the integrity of a regulatory scheme *dictates* preliminary resort to the agency which administers the scheme,”⁸⁸ reaching “the question whether . . . the over-all regulatory scheme of the Act *requires* invocation of the primary jurisdiction doctrine,”⁸⁹ and “[w]henver a rate rule or practice is attacked as unreasonable or unjustly discriminatory, there *must* be preliminary resort to the commission.”⁹⁰ The Supreme Court has also said, “[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the [agency], it must be presented to the [agency].”⁹¹ The Court’s use of words such as “requires”⁹² and “must”⁹³ in developing and applying the doctrine of primary jurisdiction indicates that the Court did not intend for a district court to freely use its discretion.

83. *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (quoting *Phila. Nat’l Bank*, 374 U.S. at 353).

84. *See id.* at 1362 (citing *Radio Corp. of Am.*, 358 U.S. at 339).

85. *See* Michael H. Ditton, *The Doctrine of Primary Jurisdiction and Federal Procurement Fraud: The Role of the Boards of Contract Appeals*, 119 MIL. L. REV. 99, 117 (1988) (“Perhaps the most that can be said is that statutory interpretation is a necessary complement to the doctrine of primary jurisdiction.”).

86. *See Gen. Dynamics Corp.*, 828 F.2d at 1364 n.15 (noting that “the Supreme Court frequently has used language at odds with the notion of discretionary application [of the doctrine of primary jurisdiction]”).

87. *See supra* note 79.

88. *Gen. Dynamics Corp.*, 828 F.2d at 1364 n.15 (quoting *Phila. Nat’l Bank*, 374 U.S. at 353).

89. *Id.* (quoting *Radio Corp. of Am.*, 358 U.S. at 346).

90. *Id.* (quoting *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 291 (1922)).

91. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202 (1978) (explaining primary jurisdiction but declining to apply it because the agency lacked jurisdiction).

92. *See, e.g., supra* notes 88-91 and accompanying text (providing examples of the Court using requisite language).

93. *See Great N. Ry. Co.*, 259 U.S. at 291 (“Whenever a rate, rule or practice is attacked as unreasonable or unjustly discriminatory, there *must* be preliminary resort to the Commission.” (emphasis added)).

In *Reiter v. Cooper*, the Supreme Court used language indicating that in addition to the doctrine's requisite nature, the doctrine also had a discretionary aspect.⁹⁴ The Court explained that, "[r]eferral of the issue to the administrative agency 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."⁹⁵ The Court's discretionary language, however, refers not to whether the referral to the agency was discretionary, but instead, whether the appropriate remedy is to delay proceedings or dismiss the case. That is to say, the remedy of delaying proceedings or dismissal is discretionary, not the doctrine itself. Further, in the sentence immediately preceding the Court's use of discretionary language, it uses requisite language and states, "[the doctrine of primary jurisdiction] requires the court to enable a 'referral' to the agency."⁹⁶ Moreover, the discussion of primary jurisdiction in *Reiter* is dicta and consequently does not carry as much weight as previous Supreme Court cases where the Court created, developed, and applied the doctrine.⁹⁷

Some courts and commentators have used the terms "flexible"⁹⁸ and "prudential"⁹⁹ to define and explain primary jurisdiction. However, these

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

95. *Id.*

96. *Id.* at 268 (emphasis added).

97. See *id.* at 268-70 (instructing respondents that the remedy they seek would be possible through exhaustion of administrative remedies, not the primary jurisdiction doctrine, and then refusing to apply either).

98. See *U.S. Pub. Interest Research Group v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003) ("Although sometimes treated as a mechanical and rigid requirement, the modern view [of primary jurisdiction] is more flexible." (citing *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956))); *Lipton v. MCI WorldCom, Inc.*, 135 F. Supp. 2d 182, 191 (D.C. Cir. 2001) ("The doctrine of primary jurisdiction is a flexible tool used to allocate 'business between court and agency', and should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution." (quoting *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984))); *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) ("[Primary jurisdiction] is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process . . ."); *Nat'l Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 821 (1st Cir. 1979) ("The doctrine of primary jurisdiction is a flexible tool for the allocation of business between court and agency and should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution." (quoting *Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334, 340 n.5 (1st Cir. 1970))).

99. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) ("Primary jurisdiction is a prudential doctrine designed to allocate authority between courts and administrative agencies."); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 18 (1st Cir. 2005) ("[P]rimary jurisdiction . . . invokes prudential doctrines, and 'does not implicate the subject matter jurisdiction of the federal court.'" (quoting *P.R. Mar. Shipping Auth. v. Fed. Mar. Comm'n*, 75 F.3d 63, 67 (1st Cir. 1996))); *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (explaining that primary jurisdiction does not implicate subject matter jurisdiction, "[r]ather it is a prudential doctrine . . ."); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 565 (2d Cir. 1993) ("The primary jurisdiction of the Board does not deprive the courts of jurisdiction, rather, it raises prudential concerns about whether to exercise it.")

terms do not necessarily imply that the court has discretion whether to apply the doctrine. “Flexible” can mean that courts may apply the doctrine in a number of circumstances, and therefore, the doctrine is flexible in that courts can invoke it in a number of contexts.¹⁰⁰ This interpretation is consistent with the idea that the doctrine has no fixed rule for application and that courts should apply it where doing so would promote the doctrine’s twin goals.¹⁰¹ Prudential means “exercising prudence, good judgment, or common sense.”¹⁰² In modifying the doctrine of primary jurisdiction, this likely means that courts created the doctrine to fill a pragmatic need. Moreover, to interpret “flexible” or “prudential” as implying discretion would directly contradict the frequent use of the Supreme Court’s requisite language in developing the doctrine.

C. Lack of a Need for a High Level of Deference

Courts that view primary jurisdiction as a discretionary doctrine liken it to a doctrine that merely sets the timetable for the proceedings.¹⁰³ These courts seem to reason that because the abuse of discretion standard is generally appropriate for a court’s determinations on its procedure,¹⁰⁴ it is also appropriate for primary jurisdiction.¹⁰⁵ However, the Supreme Court has expressly rejected this view of the doctrine, having stated,

(quoting 1 THE DEVELOPING LABOR LAW 975 (Patrick Hardin et al. eds., 3d ed. 1992)); *Nat’l Tank Truck Carriers, Inc.*, 608 F.2d at 821 (“Properly understood, the doctrine is not jurisdictional per se, but rather is a means of procuring ‘harmony, efficiency, and prudence’ in areas of overlapping judicial and administrative concern.” (quoting *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 n.1 (1st Cir. 1979))); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002) (“Despite similar terminology, primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional.”).

100. Jaffe, *supra* note 19, at 1037 (quoting *Civil Aeronautics Bd. v. Modern Air Transp., Inc.*, 179 F.2d 622, 625 (2d Cir. 1950)) (“[T]he outstanding feature of the doctrine [of primary jurisdiction] is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies.”).

101. *See W. Pac. R.R. Co.*, 352 U.S. at 64 (dismissing any fixed rule for applying the doctrine and establishing the rule that the doctrine is applicable where its application will further its goals).

102. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1412-13 (4th ed. 2000).

103. *See, e.g., United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983) (“The doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an ‘orderly and sensible coordination of the work of agencies and courts.’” (quoting *Cheyney State Coll. Faculty v. Hufstедler*, 703 F.2d 732, 736 (3d Cir. 1983))).

104. *See Kelly Kunsch, Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 34-35 (1994) (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 653-54 (1971)) (explaining the reasons for applying “abuse of discretion” review).

105. *See Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 n.24 (4th Cir. 1996) (“[Primary jurisdiction] simply structures the proceedings as a matter of judicial

The doctrine of primary jurisdiction thus does “more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects” of commercial relations. “It transfers from court to agency the power to determine” some of the incidents of such relations.¹⁰⁶

In addition to the argument that primary jurisdiction is more than merely procedural, another reason a reviewing court should not give deference to the district court’s determination is that the district court is not in a better position than the reviewing court to decide whether the doctrine applies. The abuse of discretion standard is generally applicable where lower courts are in a better position to make a certain determination than are the higher courts.¹⁰⁷ However, *de novo* review is appropriate because the district court is in no better position to determine whether the doctrine of primary jurisdiction applies than a reviewing court. The decision of whether the doctrine applies does not require factual findings or findings of credibility, for which the district court is in a better position to decide. Rather, the decision to apply the doctrine requires statutory interpretation and reasoning whether application of the doctrine will further the doctrine’s twin goals.¹⁰⁸ A district court has no advantage over a court of appeals in making these determinations. Since reviewing courts are in as good a position to make a determination, the high level of deference that the abuse of discretion standard calls for would be inappropriate.

One commentator writing on the proper standard of review for primary jurisdiction has averred that evaluation of whether the implication of the doctrine will further its twin goals and whether the implication of the doctrine will benefit the court appear to weigh against any deference to the lower court.¹⁰⁹ The commentator goes on to state that the only factor which

discretion . . .” (quoting *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993)).

106. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956) (quoting *Primary Jurisdiction Reconsidered*, *supra* note 45, at 584); *see also supra* note 80.

107. *See Kunsch*, *supra* note 104, at 35 (asserting that the abuse of discretion standard of review “is appropriate when (1) concerns of judicial economy dictate that the trial court be responsible for the decision, or (2) the trial judge is in a better position to make the decision because he or she can observe the parties” (citing *State v. Oxborrow*, 723 P.2d 1123, 1133 (Wash. 1986))).

108. *See W. Pac. R.R. Co.*, 352 U.S. at 64 (enunciating that the test to apply primary jurisdiction is “whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application . . .”); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (“[W]hether an agency has primary jurisdiction requires statutory construction.”).

109. *See Lockwood*, *supra* note 82, at 731-36 (explaining that appellate courts can determine whether there is a need for regulatory uniformity from the pleadings, that the courts using agency expertise base their decisions on what the typical judge knows—not a particular judge’s knowledge—and thus, appellate courts can determine as easily as the lower courts, and whether the court will be aided by administrative action is a mixed

may justify increased deference to the lower court is the evaluation of the burden that application of the doctrine places on the parties.¹¹⁰ He then compares the evaluation of the burden on the parties of deferral with the general equitable power of courts to “mitigate the rigidity of strict legal rules.”¹¹¹ However, the relevance of this factor in determining whether the doctrine applies is questionable as only a minority of Supreme Court justices have mentioned this factor in a dissent, and only a minority of courts of appeals have used this factor in their determinations.¹¹² Furthermore, the statement of the Court in *Western Pacific Railroad Co.*—that “[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation”—seems to preclude this type of reasoning.¹¹³ Although the need to maintain regulatory uniformity and utilization of agency expertise are both relevant to “whether the reasons for the existence of the doctrine are present,” and the factor of whether administrative action would benefit the court is relevant to “whether the purpose it serves will be aided by its application,” the burden on the parties seems to go beyond the rule and, therefore, is of questionable relevance.

CONCLUSION

Although the doctrine of primary jurisdiction is almost 100 years old, courts are currently split on whether the doctrine is discretionary or a matter of law. No doubt this split stems from the unusual nature of the doctrine, blending prudential elements as well as elements generally accepted as matters of law.¹¹⁴ However, the better standard of review for

question of law and fact over which appellate courts have not given lower courts any deference).

110. See *id.* at 731, 736-37 (describing this factor as “so unique that it may, by itself, demand trial court discretion”).

111. *Id.* at 737 n.238 (quoting Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (1997)).

112. See *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 321 (1973) (Marshall, J., dissenting) (“Wise use of the doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay.”); *Lockwood*, *supra* note 82, at 737 & n.237 (citing *Am. Auto Mfrs. Ass’n v. Mass. Dep’t of Env’tl. Prot.*, 163 F.3d 74, 81-82 (1st Cir. 1998)); *Nat’l Commc’ns Ass’n v. AT&T*, 46 F.3d 220, 223, 225 (2d Cir. 1995); *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988) (stating that a majority of the Court has not accepted the burden on the parties as a factor in the determination of whether primary jurisdiction applies but that “a number of courts of appeals have”).

113. 352 U.S. at 64.

114. See *Huntsman*, *supra* note 1, at 923 (reasoning that because there are both elements of discretion and matters of law in the doctrine of primary jurisdiction, every court of appeals must choose the standard of review to apply because the courts could not split up the doctrine and review each part under a different standard).

the doctrine is de novo because it requires statutory interpretation,¹¹⁵ the Supreme Court has developed the doctrine using requisite language,¹¹⁶ and there is no need to give the lower courts as much deference as the abuse of discretion standard requires.¹¹⁷

115. *See supra* notes 81-85 and accompanying text.

116. *See supra* notes 86-102 and accompanying text.

117. *See supra* notes 103-13 and accompanying text.