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PRIMARY JURISDICTION AND THE ROYALTY OWNER: A MISAPPLIED DOCTRINE

by

Robert O. Lewers*

I. INTRODUCTION: THE ROYALTY OWNER AND THE LAW

THE FALLOUT from the decision in Phillips Petroleum Co. v. Wisconsin by the Supreme Court in 1954 (sometimes referred to herein as Phillips I) holding that the independent producer who transports or sells oil or gas in interstate commerce is subject to the Natural Gas Act, continues to plague the oil and gas industry. The area pricing method, established as a result of that decision, for controlling the price at which natural gas is sold by the producer has, in recent years, come in conflict with claims of royalty owners who assert that they are entitled to their royalty share on the basis of the current contemporary market price of gas. This price is generally somewhat higher than that established by the Commission under the area pricing approach. This claim raises the legal question of whether royalty gas is subject to the Natural Gas Act, as is the working interest gas. The problem has not been helped by the position of the Federal Power Commission which, historically, has not attempted to exercise jurisdiction over royalty gas. In recent litigation the courts have attempted to approach the solution to the problem by employing the primary jurisdiction doctrine, disregarding the possibility that if jurisdiction exists at all, it is exclusive jurisdiction under the Natural Gas Act as enacted by Congress.

This Article will examine the principles of the doctrine of primary jurisdiction, as well as the "exclusive jurisdiction" principles. Their applicability to the question of jurisdiction over gas royalty payments by the Federal Power Commission will be considered, together with the Natural Gas Act. A review of the pertinent cases will be included, with particular emphasis on the effect of primary and exclusive jurisdiction doctrines on gas royalty payments. The Article will close with a summary of conclusions drawn, and an analysis of what the correct law ought to be on the question of jurisdiction. It should be recognized that some of the problems here discussed are of far reaching significance and that the applicable basic law is only now being established. Accordingly, this Article should be viewed as an analysis of the legal treatment and implications of a controversy of relatively recent origin. Essentially it is a controversy which arose from the payment of royalty by producers on the basis of gas sales contract prices rather than on the basis of current contemporary "market price," a basis desired by the royalty owners.

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1 347 U.S. 672 (1954).
A. Usual Production and Marketing Practices for Natural Gas

In the analysis of the rights of the royalty owner to payment of his share of gas production based on "market value" as specified in the lease, a review of the usual and customary industry practices involved in the production and marketing of natural gas from the standpoint of the lessor and the lessee is necessary.

The basic approach must be the realization that "gas" is not an interchangeable word with "oil" and that physical differences between the two substances require different treatment in the lease itself. Both substances have a common origin, are frequently associated in a common reservoir, and are often produced from a common well bore and used as fuel by the ultimate consumer. A major difference between "oil" which commonly exists as a liquid at normal atmospheric pressures and temperatures and "gas," is the relative facility with which liquids may be stored, packaged, transported and marketed in comparison with gases. To date, no practical method has been devised for the economical storage of gas in large volumes above ground. Only by pipeline can natural gas be successfully transported overland to distance markets.\(^8\)

Once the discovery of gas has been made, it is incumbent on the producer to obtain a market for it as early as reasonably possible. The proximity of an existing pipeline system or processing plant near the producer's outlet will be a key factor in the timing of the sale and delivery of gas to a buyer. When the buyer owns a pipeline system or a plant facility located near the producer's outlet, the buyer may contract to make connection within a short period of time, governed by the distance the buyer's lines must be extended, the availability of pipe, acquisition of rights of way needed, and the buyer's capacity and requirements for a market. The producer's lease expiration or marketing obligations may well be reflected in the time allowed for connection. If no possible market is presently available the typical standard lease form will authorize the lessee to continue the lease by the payment of a specified sum or an amount equal to the annual delay rental, generally payable either at the end of the shut-in year or within a specified period of days after the well has been shut-in.

Under the usual lease royalty provision the contract selling price of the gas provided the proper basis for royalty payments, not so much because it was the actual selling price, but rather because the contract selling price also happened to represent the "market price" of the gas at the time the gas reserves under the lease were committed to a long-term sales contract. Stated otherwise, the price was not tied to each day's delivery of gas based on the "daily market value," with a separate sale taking place daily or whenever a new and independent "market price" occurred. From a practical standpoint, it has never been feasible for gas producers to conduct business with gas sales based on a price which may

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\(^8\) It should also be pointed out that the very nature of gas usually prevents it from being taken in kind as royalty by the lessor as in the case of oil, other than as fuel for domestic or irrigation uses.
fluctuate at frequent intervals, or with sales which are subject to a "daily sales price" or "daily price quotation," varying from day to day.

While many of the earliest gas sales contracts were for a term coexistent with "the life of the lease," it later became common for gas sales contracts to be in effect for a fixed term of twenty years or more. Understandably a transmission company that purchased gas had to be assured of a long-term supply before it could risk the capital expenditure required to build a pipeline. The buyer, therefore, generally required a contract which would extend for at least twenty years.

Since the lessee is under an implied obligation to market, it had never been seriously questioned, until recently, that so long as he uses reasonable diligence in securing the best sales contract possible, his obligation to the lessor is fulfilled if the lessor receives one-eighth (or other lease royalty fraction) of the proceeds derived from such contract.

The early form of lease royalty clause to which much of the present trouble can be attributed with respect to "market price" simply provided that: "In consideration of the premises the said lessee covenants and agrees: . . . 2nd. To pay to lessor, as royalty for gas from each well where gas only is found, while the same is being sold or used off of the premises, one-eighth of the market price at the wells of the amount so sold or used . . . ."

This language has, in recent years, been expanded to provide that the lessor is entitled to one-eighth (or some other specified fraction) of the "market value" of the gas at the well where the gas is sold or used off the lease premises, provided that on gas sold at the wells the royalty will be one-eighth of the amount realized from the sale.

B. The Controversy over "Market Price"

Over a period of many years the petroleum industry uniformly conducted its business of selling gas on the premise that the point in time at which "market price" was established for the purpose of royalty payments was, in the case of a prudent long-term gas sale, when the gas was committed, disposed of and dedicated to sale by virtue of the long-term contract. The value was not based on the market price in effect when the gas was delivered with a price determined and redetermined periodically in accordance with contemporary prices paid in other gas sales.

A recent controversy over determination of market price has arisen in significant litigation occurring in the state courts of Texas, as well as in the federal courts. *Texas Oil & Gas Corp. v. Vela*, involving the construction of the gas royalty clause of an old oil and gas lease, has recently been decided by the Supreme Court of Texas in favor of the royalty owners. In *Vela* the royalty owners sought to recover alleged deficiencies in royalty payments from their lessee, as well as cancellation of the lease for breach of the implied covenant to develop. The lease, granted in

*429 S.W.2d 866 (Tex. 1968).*
1933, covered some 1500 acres in Zapata County, Texas, and provided as a gas royalty, one-eighth of the market price at the wells of the amount so sold or used.

The primary issue in the case was just what was the "market price" at the wells. The gas purchase contract, constituting an intrastate sale, was entered into in 1935 and was to continue in force for the life of the lease. The trial court held that the "market price" upon which the lessee was obligated to pay royalty was the current prevailing price in the field. This was affirmed by the court of civil appeals which held that the lessors were not parties to the gas sales agreement and its terms did not change the lessee's obligation under the lease to pay the "market price."

Some fifteen months after the granting of writ of error, the Supreme Court of Texas in a five-to-four ruling handed down its decision, affirming the lower courts' holding in the controversy. The court, pointing to the stipulation in the royalty clause that the lessee would pay one-eighth of the market price at the well of all gas sold or used off the premises, said: "This clearly means the prevailing market price at the time of the sale or use. The gas which was marketed under the long-term contracts in this case was not 'being sold' at the time the contracts were made but at the time of the delivery to the purchaser."

The Vela court agreeing with the court of civil appeals, that the contract price, together with the circumstances of the contract and evidence of comparable sales, should all be considered to determine market price, stated "that the contract price for which the gas was sold by the lessee is not necessarily the market price within the meaning of the lease." In this connection the parties had agreed earlier that market price is to be determined by sales of gas comparable in time, quality and availability of marketing outlets.

In response to the argument that the lease obligation may prove financially burdensome to a lessee who had made a long-term contract without protecting himself against increases in market price, Justice Walker, writing for the majority, expressed his general agreement with the conclusions in Foster v. Atlantic Refining Co., that regardless of the hardships, the lessee is bound, not only by the obligations imposed by his lease contract, but to the calculated risk he took that the gas purchase contract would produce royalties satisfactory to the terms of the lease.

It is ironic that the court in Vela, not only relied on the Foster case, but proceeded to extend the holding in Foster, in deciding that "market price" is to be determined as of the date of delivery of the gas. Foster, on the other hand, held that "market price" is to be determined as of the time of delivery of gas from the well to the pipeline, because of the peculiar language of the royalty clause in that case which provided for royal-

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6 429 S.W.2d at 871 (emphasis added), citing Martin v. Amis, 288 S.W. 431, 433 (Tex. Comm'n App. 1926).
7 405 S.W.2d at 74.
8 429 S.W.2d at 871.
9 329 F.2d 485 (5th Cir. 1964).
10 429 S.W.2d at 871.
ty payment "at the market price therefor prevailing for the field where produced when run . . ."\textsuperscript{11} But it is now established in Texas that under the usual gas sales contract the gas is not being sold at the time the contract is made but at the time the gas is delivered to the purchaser. It necessarily follows, therefore, that the "market price" mentioned in the lease must be determined as of the date of delivery of the gas, under the form of royalty clause in question.

The decision in Vela was, in the eyes of the petroleum industry, a drastic departure from the accepted concept of "market price" as it existed prior to the decision. From the lessee's standpoint, a decision such as this leaves him in a position where he is obliged by the implied covenants in the lease, if not by actual time limitations, to market the gas if it is reasonably possible to do so. He must enter into a long-term contract in order to make any sale. The royalty owners in turn enjoy the benefit of the sale year after year, so long as the price is satisfactory. However, if the price of the gas in the area increases the lessee is compelled to settle with the royalty owners on the basis of an ever-increasing price while his realization from the contract remains fixed.

Contemporaneously with the litigation over "market price" of gas royalty in the state courts of Texas, another royalty problem was developing in the gas industry in connection with sales subject to jurisdiction of the Federal Power Commission. Newspaper press reports of October 25, 1966,\textsuperscript{12} indicated the response of some segments of the industry to this situation. These reports announced that one of the largest natural gas producers was urging the Federal Power Commission to assume jurisdiction over the payment of royalties on natural gas production subject to FPC control.\textsuperscript{13} This development was most startling in the face of the preceding twelve years of struggle between natural gas producers and the Commission over gas regulation. If successful, the effect would be to extend federal regulation under the Natural Gas Act to a previously unregulated area.

The pleas of Mobil Oil Corporation, the producer affected, resulted from some 283 individual lawsuits filed by royalty owners against it in the state district courts in Kansas,\textsuperscript{14} seeking larger amounts allegedly due for certain past periods on the theory that royalty settlements should be based on current or contemporary "market value" or "market price." The plaintiffs contended that they, as royalty owners, were entitled to receive payments based on market value—a price above that which the FPC allowed Mobil to sell the gas. The company, attempting to explain its unprecedented resort to a federal agency it strives to avoid where possible, pointed out that it was involved with several hundred royalty owners in the Hugoton gas field over the amounts to be paid by it and stated that these state court actions left it no other course. So long as the FPC fixes prices producers receive, Mobil asserted, by abrogating price

\textsuperscript{11} 329 F.2d at 489 (emphasis added).
\textsuperscript{12} Wall Street Journal, Oct. 25, 1966, at 13, col. 3.
\textsuperscript{13} Mobil Oil Corp. v. Matzen, No. R167-114 (F.P.C., filed Oct. 24, 1966).
\textsuperscript{14} E.g., Matzen v. Mobil Oil Co., No. 4692 (D. Kan., filed June 12, 1965).
provisions of their contracts, producers' positions will be inequitable and untenable unless the price received by royalty owners is limited by similar action.  

Meanwhile, in the Panhandle Field of Texas, litigation had occurred before the Fifth Circuit Court of Appeals involving, in two separate cases, J. M. Huber Corp. v. Denman and Weymouth v. Colorado Interstate Gas Co., suits for amounts alleged to be due for failure of the lessee to pay as royalty for the gas produced, the "market value" of lessors' one-eighth share of production. In each instance the court stayed further proceedings pending a determination by the Federal Power Commission as to its jurisdiction of the accountings for lease royalties where the reserves represented were being delivered interstate. If jurisdiction were claimed, it was indicated that the Commission should rule on the extent of implementation which it deemed necessary or appropriate. Both decisions posed this problem in terms of "primary Federal Power Commission jurisdiction" over royalty payments and reached the same conclusion. The only apparent difference between the cases in regard to this matter of jurisdiction was that in Denman the lessee was the producer while in Weymouth the lessee was also an interstate pipeline company which delivered the royalty gas directly into an interstate system, without the intervening ownership of an independent lessee.

Subsequent to the Fifth Circuit decision in these two cases the Federal Power Commission on July 23, 1969 issued its opinion asserting jurisdiction over royalty owners' interests in natural gas sold for resale in interstate commerce. In doing so the Commission emphasized, however, that such jurisdiction could be implemented without undue additional administrative burdens on parties so affected or the Commission. This opinion will be discussed further in this Article.

II. THE NATURAL GAS ACT AND THE ROYALTY OWNER

A. Purpose of the Natural Gas Act

In considering the "market price" controversy in the face of price ceiling limitations resulting from federal regulation of natural gas, it is necessary to examine the background and proclaimed purpose of the Natural Gas Act.

In its persuasive 1936 Final Report, the Federal Trade Commission reached the conclusion that prices charged local distributing companies for natural gas were excessive. It recommended regulation of such sales where the states could not regulate because of constitutional barriers. Thus the legislation proposed in Congress was of a complementary nature, designed essentially to regulate the segment from the interstate pipeline

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19 367 F.2d 104 (5th Cir. 1966).
20 367 F.2d 84 (5th Cir. 1966).
23 Id. at 609, 616.
to the local distributor where, for constitutional reasons, state regulation
was not possible.21 Fundamentally, the Natural Gas Act was designed
solely to cover those companies engaged in the transportation of natural
gas in interstate commerce and their sales in interstate commerce for re-
sale.22 Thus, from the standpoint of its structure, it is truly a restricted
or limited statute, regulating natural gas companies who, by definition,
are persons engaged in these activities.23

It is also evident from the legislative history that the overriding con-
gressional purpose of this statute was to plug the “gap” in regulation of
natural gas companies, which resulted from judicial decisions prohib-
iting state regulation of many interstate aspects of the gas business.24 It
was never intended to regulate the entire natural gas field to the limit of
federal constitutional power, but only that portion which the states could
not handle because of the commerce clause of the Constitution.25

Actual judicial experience under the Natural Gas Act has been at vari-
ce with this avowed legislative intent. It has been contended that the
limited statutory scope of the Act has been subordinated to the practice
of maximizing FPC control of the natural gas industry by means of ju-
dicial interpretations which are policy-oriented rather than law-oriented.26

Expansion of FPC jurisdiction well beyond its intended limited function
has resulted from these decisions. Two writers have pointed out, after
reviewing a series of leading natural gas cases, that it is the Court’s
method “to read the act literally, with so superficial an inquiry into
its legislative history as to amount to no inquiry at all.”27 As federal con-
trol became progressively tighter in the regulation of natural gas, it was
inevitable that the royalty owner was destined to become involved in
the Commission scheme of regulatory practices.

B. Position of the Royalty Owner Under State Law

Under the typical lease royalty clause the royalty owner is paid in
cash for his share of the proceeds representing the royalty interest. He
does not have the right to take his royalty gas in kind, nor does he have
any gas to sell since this right was transferred when the lease was granted.
This is true under the non-ownership concept as well as in jurisdictions
following the ownership-in-place doctrine. Texas follows the latter, hold-

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21 "This bill takes no authority from State Commissions, and is so drawn as to complement and
in no manner usurp State regulatory authority.” H.R. Rep. No. 709, 75th Cong., 1st Ses. 2
(1937).

22 "Three things and three only Congress drew within its own regulatory power, delegated by
the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural
gas in interstate commerce; (2) its sale in interstate commerce for resale; (3) natural gas com-
panies engaged in such transportation or sale.” Panhandle E. Pipe Line Co. v. Public Serv. Comm’n,


24 Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) [hereinafter referred to as
Phillips I].


26 See Flittie & Armour, The Natural Gas Act Experience—A Study in Regulatory Aggression
and Congressional Failure To Control the Legislative Process, 19 Sw. L.J. 448 (1965), for a com-
prehensive study of the history of the Natural Gas Act, and experience under it.

27 Id. at 470.
ing that the execution and delivery of an oil and gas lease constitutes a sale by the owner, at that time, of a determinable fee to the oil and gas then in place. Under non-ownership concepts, neither the lessor nor the lessee has title to any of the gas, as a matter of local law, until such time as it has been produced and reduced to possession at the well head. At that point the physical gas acquired by the lessee belongs to him alone. In such a case the royalty owner has no gas of which to dispose and can thus make no sale, in interstate commerce or otherwise. It is clear, therefore, that in both ownership and non-ownership states, the lessee owns full title when the gas reaches the well head.

It has been contended that these property concepts are determinative of the question of FPC jurisdiction; that since no sale is or can be made by the royalty owner within the purview of the Natural Gas Act, he is free from regulation under the Act. It is vigorously asserted under this view that the receipt of money royalties by the lessor does not constitute a sale of gas in interstate commerce, and that a mere debtor-creditor relationship exists between the lessor and the owner of the working interest of all gas sold. This reasoning further asserts that nothing more exists than an agreement for the payment of money which is part of the consideration for the lease, together with the rights conveyed thereby.

The weakness of these arguments is simply that under basic oil and gas law, royalty is a reserved property interest retained by the mineral owner under his lease, entitling him to a share of the proceeds from the sale of gas. The reservation of royalty in a lease then, is something more than an agreement for the payment of money as part of the consideration for the lease and rights conveyed thereby.

The federal decisions have refused to accept the no-title concept as controlling. One of the earliest manifestations of this occurred in a case involving depletion allowance. It is recognized for tax purposes that the royalty owner has an interest in produced gas upon which he can claim the depletion allowance. The depletion allowance accrues only to persons having an "economic interest" in the mineral as produced. In order to qualify as an economic interest the source of the income to the taxpayer must be the extraction and sale of the mineral, and not the sale of the mineral in the ground. The Supreme Court, in the landmark case of Palmer v. Bender, swept away all technicalities of title in upholding the royalty owner's claim to depletion allowance and stated that:

30 See Burnet v. Harmel, 287 U.S. 103 (1932), holding that both the bonus paid and the royalties to be paid under a lease constitute part of the consideration for the lease, and that this is true whether the lease is located in a state that accepts or one that rejects the doctrine of ownership in place.
31 Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788 (1935); Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562 (Tex. Civ. App. 1959), error ref. n.r.e.; Sheppard v. Stanolind Oil & Gas Co., 125 S.W.2d 643 (Tex. Civ. App. 1939), error ref.; Sheffield v. Hogg, 124 Tex. 290, 77 S.W.2d 1021 (1934); Everett, The Executive Right To Lease, 3 ROCKY MT. LAW INST. 509, 510 (1957); Masterson, A Survey of Basic Oil and Gas Law, 4TH OIL & GAS INST. 219 (Southwestern Legal Foundation 1953).
32 287 U.S. 551 (1933).
The lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough if by virtue of the leasing transaction he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from lessor upon the execution of the lease.3

The view that local concepts of property law are not controlling for tax depletion purposes is equally true in the application of the Natural Gas Act. In United Gas Improvement Co. v. Continental Oil Co.4 (hereinafter referred to as the Rayne Field case) the Supreme Court rejected, as controlling, technical concepts of local law where they have the effect of crippling or disabling the purpose of a regulatory statute. The Rayne Field case involved a sale of leasehold interests in a substantially proven and developed gas field. The lease-sale transaction was consummated while the gas was in the ground and before a cubic foot thereof had moved in interstate commerce. The consideration for such sale of leases was measured by a lump-sum price as distinguished from a price per MCF payable on production. In essence, the transaction was that commonly referred to in the gas industry as "a sale of gas reserves in place." The Supreme Court had no difficulty in determining that such transaction constituted a "sale" of natural gas "for resale in interstate commerce" under the Natural Gas Act.5 The attitude of the Court was made apparent when it stated: "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.6 In discussing the transaction in the Rayne Field case the Supreme Court went on to state:

But it is perfectly clear that the sales of these leases in Rayne Field, a proven and substantially developed field, accomplished the transfer of large amounts of natural gas to an interstate pipeline company for resale in other States. That is the significant and determinative economic fact. To ignore it would be to undercut Phillips, and because of it the Commission . . . acted properly in treating these sales of leasehold interests as sales of natural gas within the meaning of the Natural Gas Act.7

Thus it is abundantly clear that for a substantial period of time the Supreme Court frequently has disregarded local concepts of property law in decisions affecting federal regulatory statutes.

C. The Royalty Owner as a Natural Gas Company

From a standpoint of literal statutory construction it is somewhat difficult and incongruous to characterize a gas royalty owner as a natural

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3 Id. at 557.
5 The Court pointed out that despite the form of the transaction, "[t]he sales of leases here involved were, in most respects, equivalent to conventional sales of natural gas which unquestionably would be subject to Commission jurisdiction under Phillips Petroleum v. Wisconsin, 347 U.S. 672."
6 Id. at 401.
7 Id. at 400.
8 Id. at 401.
gas company, or as a person engaged in the sale of natural gas in interstate commerce for resale. In this connection, it can be stated with certainty that the legislative history of the Natural Gas Act reveals that no consideration was given at any time to the matter of regulating the royalty owner by virtue of the sale of his share of gas produced.

In reaching the ultimate determination of whether or not the Federal Power Commission has jurisdiction over gas royalty payments, it seems clear that there must first be a judicial finding that the transaction of the royalty owner does or does not constitute a "sale for resale" or interstate transportation and that the royalty owner is or is not, in fact, classified as a natural gas company within the meaning of the Act. Just as the oil industry in general as well as those learned in the field of natural gas regulation could not visualize that it was ever the intention of Congress to regulate arms length sales by independent producers of natural gas, neither was it suspected that Congress intended, in passing the Natural Gas Act, to exercise control over the payment of gas royalty. It would be naive, nevertheless, to ignore the fact that statutory interpretation and legislative intent are always matters over which the minds of men differ.

It is ironic indeed that sixteen years elapsed after the enactment of the Natural Gas Act before the judicial determination in Phillips I that the independent natural gas producer was a "natural gas company" within the meaning of the Act. It will very likely require something in excess of thirty years before there is a final judicial determination as to whether the Federal Power Commission can, in its administration of the Natural Gas Act, regulate royalty payments on gas sold for resale in interstate commerce. If an affirmative determination of jurisdiction ever is made, one can be sure that reliance on neither the recorded legislative history of the Act nor the intent of Congress will be a critical factor in arriving at the result.

The royalty owner's interest for the most part, has never been included in the wide and ever-expanding range of regulatory activities carried on by the Federal Power Commission. As pointed out in Denman, the historical fact is that the FPC has not as a matter of policy asserted jurisdiction over gas royalty payments and as a consequence its own administrative regulations and practices provide no machinery for passing on the question of payments of royalty made by the producer to its lessor.

40 See text accompanying notes 41-60 infra.
41 For a striking example of this see the differing views expressed by Justices Frankfurter and Douglas in Phillips I, over the same statutory language contained in the Natural Gas Act. It was Douglas' view that the Act was not intended to regulate producer sales to pipelines and that this was manifested in the language of section 1(b) of the Act, exempting the production and gathering of natural gas from regulation. 347 U.S. 672, 688 (1954). Frankfurter, on the other hand, maintained that the basic purpose of the Natural Gas Act was to occupy the field in which the states could not act. In his separate opinion concurring with the majority, Frankfurter emphasized that section 1(b) must not be construed on its face, but as though Congress had added language to take care of producer sales since they were constitutionally not subject to state regulation. Id. at 685-86.
42 367 F.2d at 118.
On the rare occasions where "in kind" royalty owners have been permitted to make rate filings in connection with sales to an interstate pipeline company, the Commission has acknowledged that such gas is subject to its jurisdiction. This was vigorously protested by Commissioner Digby, on the ground that royalty interests are non-jurisdictional since section 1(a) of the Natural Gas Act covers only the "business of transporting and selling natural gas...''

The mere ownership of royalty does not in itself bring a person under the Act, but produced royalty gas could conceivably do so. Opponents of jurisdiction forcefully argue that the land owner holding a royalty interest does not engage in any activities subject to or even mentioned in the Natural Gas Act, in that he neither produces, transports, nor sells any part of the production. It is clear that the typical royalty owner is not actively engaged in the producing, gathering or transporting of the gas. It is somewhat less than certain, however, that the royalty owner is not, at least indirectly, engaged in the sale of gas production. Assuming the royalty owner is subject to the Natural Gas Act, then the correct procedure is for the Federal Power Commission to assume jurisdiction over matters relating to royalty on production subject to the Act.

The present unsettled controversy of FPC jurisdiction over the royalty owner is somewhat similar to the situation which once existed with respect to the independent producer, who, until the 1954 decision in Phillips I, was exempt from regulation under the Natural Gas Act. At this stage the royalty owner indeed finds himself in the same challenged position as the producer once did.

It is clear that the Natural Gas Act makes no distinction between "natural gas companies" which are independent producers, those which are royalty owners, and those which are interstate pipelines. At the same time under the authority given it under section 16 of the Act, the Commission "may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters." The Commission did so after Phillips I, in its Order 174, defining an "Independent Producer." The Supreme Court in that case made the sweeping statement that:

We believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company. There can be no dispute that the overriding congressional purpose was to plug the "gap" in regulation of natural gas companies re-

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47 J.M. Huber Corp. v. Denman, 367 F.2d 104, 113 (5th Cir. 1966).
49 18 C.F.R. § 154.91 (1954): "'Independent Producer' Defined.—An 'Independent Producer' as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas by pipeline in interstate commerce."
sulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural gas business.\(^4\)

The Court, with reasoning that astounded the oil and gas industry, held that a sale in interstate commerce of natural gas for resale was not such a part of "production or gathering" as to fall within the "production or gathering" exemption contained in section 1(b) of the Act.\(^8\)

Under the compulsion of this high court decision the Commission had no alternative but to proceed to discharge its statutory duties and issued the first of its orders in the "174 series."\(^3\) This series of orders recognized and regulated the independent producer who sells natural gas which moves out of the state in which it is produced, regardless of whether the sale takes place at the well head, in the course of gathering, or at the outlet of a processing plant.\(^5\)

On the current question of jurisdiction over royalty due under a lease, however, the Commission is now actively seeking a basis for jurisdiction instead of having it thrust on it by the courts. Such a shift is occurring in spite of the fact that for many years the FPC has made no effort to regulate royalty owner gas. The first indication of a possible change in the long-standing posture of the Commission on this question was reflected in the amicus curiae brief\(^5\) filed in Denman and Weymouth, in which a majority of the Commission expressed the cautious but tentative view that it is "arguable" that the Commission does have jurisdiction over such royalties. Subsequently, the FPC staff filed a brief in connection with hearings before the Commission on the question, arguing vigorously in support of such jurisdiction.\(^5\)

In July of 1968 the Commission's presiding examiner rendered his initial decision,\(^4\) holding that the royalty owners were natural gas companies as defined in the Act and that no additional filing requirements were required for the present, other than the filing of an application by a royalty owner seeking an increase in his royalty payment over and above the existing rate in force. In effect, the examiner found that the provisions of the Act apply to persons entitled to royalty payments for sales of gas which is under FPC jurisdiction and that such royalty payments are subject to jurisdiction of the Commission under the Act.\(^5\)

The main thrust of the royalty owners' opposition to Commission jurisdiction was simply that the royalty owner is not the owner of any of the gas produced and therefore has nothing to sell. In disposing of

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\(^5\) Id. at 677.
this argument the examiner concluded that the issue of jurisdiction must be determined under the provisions of the Act, regardless of the parties' rights and obligations under state law. Relying on United Gas Improvement Co. v. Continental Oil Co., he further emphasized that an "attractive gap" in Commission jurisdiction cannot be created by framing contractual arrangements, designed to exclude jurisdictional gas from regulation. The royalty owners, the examiner noted, made no attempt to claim, nor could they claim, that the gas itself was not in interstate commerce. He then reasoned:

By the terms of the lease the royalty owner has a continuing interest in production as the payment flows from acquisition by interstate pipeline of gas for resale for ultimate public consumption. The lessee must account to the lessor for his share of the volumes of gas produced and compensate the lessor for his retained fraction of the production. The effect is the same as a conventional sale of gas by the lessor to the lessee. To hold that the Commission does not have jurisdiction would defeat the purpose of the Act by a failure to plug a "gap" in the regulation of natural gas.

The examiner, pointing out that the market price for gas in the unregulated market is higher than allowed under regulation by the Commission, noted that the consumer has a real interest in royalty owner attempts to force higher royalty rates than those filed in producer rate schedules. In view, therefore, of the uncertainty of the price to be paid for the royalty interest on the large volumes of gas moving in interstate commerce and its direct effect on the price paid by the ultimate consumer, he concluded that, "the Commission must now exercise its jurisdiction to insure the reasonableness of price for gas to the consumer."

Regardless of any assertion of jurisdiction by the FPC, it is to be expected that the Supreme Court will ultimately be called upon to dispose of this matter. Whether a result similar to that reached in Phillips I by the Supreme Court in extending jurisdiction over the producer will result is difficult to say with any degree of assurance. It is by no means inconceivable that a similar outcome will occur, with history repeating itself, in view of the Supreme Court's consistent record of expanding FPC jurisdiction under the Natural Gas Act at every opportunity. The numerous judicial decisions relating to FPC jurisdiction over the natural gas business since Phillips I indicate that while the Natural Gas Act does not always specifically cover every particular transaction, the courts have frequently and liberally interpreted the Commission's implied powers to deal with so called "utility action inimical to the consumer interest." The decisions have encouraged the Commission to decide cases more in the light of claimed practical realities of regulation in the consumer interest, instead of letting itself be guided by the strict literal meaning of statutory language.

58 Id. at 17 (emphasis added), citing Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).
59 Id. at 19.
60 Public Serv. Comm'n v. FPC, 127 F.2d 893, 897 (D.C. Cir. 1964).
III. THE DOCTRINE OF PRIMARY JURISDICTION

A. The Basic Doctrine

Even though a claim is properly before a court in a matter within its power to adjudicate, the doctrine of primary jurisdiction determines whether the court or the agency should first pass on some question or some aspect of a question arising in the proceeding before the court. A determination by a court that an agency has primary jurisdiction does not mean that the court will decline to decide a case within its jurisdiction. It does mean that the court will postpone its action until after the agency has made a designated determination. The original proceeding before the court may be continued after the agency has acted. The Supreme Court has said of the doctrine of primary jurisdiction: "Court jurisdiction is not thereby ousted but only postponed."1

The doctrine of primary jurisdiction differs from the exclusive jurisdiction doctrine in that the latter rule applies where a claim is cognizable for trial by an administrative tribunal exclusively by virtue of the legislative selection or creation of the agency to promulgate and enforce some declared policy of the legislature. The Supreme Court has concisely summarized the objective of these respective doctrines:

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings.2

The principal reason behind the primary jurisdiction doctrine is recognition that there is a need for an orderly and sensible coordination of the work of the agencies and of the courts. Whether the agency happens to be expert or not, it is plain that a court should not act on a matter that is within the agency’s particular field without due consideration of what the agency can contribute toward the court’s adjudication of the controversy. Otherwise parties that are subject to the agency’s continuous regulation may become the victims of uncoordinated and conflicting requirements.3

In a 1958 decision4 the Supreme Court, in a sound application of the rule, held that an agency had primary jurisdiction to determine the legality of practices, but this did not imply that the agency’s determination was final. Instead, said the Court:

The holding that the Board had primary jurisdiction, in short, was a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances.5

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3 J. K. Davis, Administrative Law Treatise § 19.01, at 5 (1938).
5 Id. at 498-99.
B. Basis and Development of the Doctrine

Essentially, the primary jurisdiction doctrine is one which allocates the decisional process affecting issues in a lawsuit between the jurisdiction of the particular administrative agency involved and that of the court. It transfers from court to agency the power to determine some of the incidents of such relations. This is a doctrine that is concerned with promoting proper relationships between the courts and administrative agencies entrusted by Congress with particular regulatory duties. It is distinguished from the rule which requires exhaustion of administrative remedies before resort to the courts, in that “exhaustion” applies where a claim is cognizable in the first instance by an administrative agency alone, while “primary jurisdiction” applies where a claim is originally cognizable in the courts, but certainly not on an exclusive basis. In reality, primary jurisdiction 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. Its precise function is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has resolved some question or an aspect of some question arising in the proceeding before the court. Thus the basic reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of the courts.

Development of the doctrine of primary jurisdiction has been almost exclusively judicial rather than legislative. It began early in the twentieth century as a creation of the Supreme Court in a case where, ironically enough, the parties had not relied upon it and where considerations involving the construction of statutes would ordinarily have dictated a conclusion different from that arrived at by the Court. In the landmark case of Texas & Pacific Ry. v. Abilene Cotton Oil Co. the cotton oil shipper sued the carrier in a state court to recover excess charges. The Interstate Commerce Act permitted a person claiming to be damaged by a common carrier to either make a complaint to the Commission or to bring suit for the recovery of damages in any district or circuit court of the United States. The Act further provided that nothing in the Act abridged or altered the remedies existing at common law or by statute, but the provisions of the Act were in addition to such remedies. In
spite of the fact that these provisions of the Interstate Commerce Act unquestionably seemed to provide for a choice of remedies in the shipper, either to proceed in the courts or seek reparation in the Interstate Commerce Commission, the Court said that the Commission was invested with power originally to entertain proceedings for the alteration of an established schedule. The Court then asserted that if an agency was effectively to exercise the regulatory functions which the Congress had conferred upon it, it must have primary jurisdiction, even in the face of statutory provisions preserving the judicial remedy. Any other result would destroy the uniformity which is essential to the effective operation of a regulatory scheme. It is to be noted that the rationale of the Supreme Court in its unanimous determination, in this piece of judicial legislation to prevent discordant court and agency conclusions from destroying the objectives of the regulatory statutes, clearly did not place any explicit reliance on expertness as the controlling consideration.

In the year immediately following there was a series of decisions involving rates and services which applied Abilene in terms of the statutory requirement of uniform treatment. Thus, the earlier cases laid emphasis on the desirable uniformity which would prevail if a specialized agency initially passed on certain types of administrative questions.

Subsequently the doctrine took on a more elaborate dimension and justification. This is demonstrated in later decisions which particularly stressed, as a basis for primary jurisdiction, the expert and specialized knowledge of the agencies involved. The rationale is that the courts will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the administrative tribunal where (1) the question demands the exercise of administrative discretion requiring the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact, or where (2) a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered. These two factors are basically parts of the same principle:

[T]hat 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. This is so even though the facts, after they have been appraised by specialized competence, serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted

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76 204 U.S. at 448.
77 Id. at 440.
80 United States v. Radio Corp. of America, 358 U.S. 334 (1919); United States v. Western Pac. R.R., 352 U.S. 59 (1956); Far E. Conference v. United States, 342 U.S. 170 (1912); Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946); Kavanaugh v. Underwriters Life Ins. Co., 231 S.W.2d 753 (Tex. Civ. App. 1950), error ref. (the Board of Insurance Commissioners with its actuaries, auditors, and other experts possessed of technical knowledge is eminently qualified to determine the issues herein involved and is clothed with ample authority to grant to the plaintiffs all of the relief which they seek).
81 Annot., 1 L. Ed. 2d 1596 (1917).
to a particular agency are secured, and the limited functions of review by
the judiciary are more rationally exercised, by preliminary resort for ascen-
taining and interpreting the circumstances underlying legal issues to agencies
that are better equipped than courts by specialization, by insight gained
through experience and by more flexible procedure.\footnote{Far E. Conference v. United States, 342 U.S. 170, 574-75 (1952).}

The courts, mindful of the continuing evolution and expansion of this
relatively young doctrine, have not attempted to fix a precise formula
for its application: "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."\footnote{United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956).}

C. A Comparison of Primary Jurisdiction with the Doctrine
of Abstention

The primary jurisdiction doctrine finds an interesting parallel in an-
other established legal rule generally referred to as the doctrine of "ab-
stention" from the exercise of jurisdiction. There are interesting similari-
ties in the two doctrines despite the completely different purpose that
each serves. To better understand the working of the doctrine of pri-
mary jurisdiction, it is necessary to examine the doctrine of abstention.

Essentially "abstention" contemplates that legal controversies involving
unsettled questions of state law may be decided in state tribunals before
a federal court's consideration of certain underlying federal questions.
Usually these are questions of a constitutional nature,\footnote{City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 619, 640 (1959).} but not always is
this the case.\footnote{As to "abstention" in non-constitutional questions, see, e.g., Paul Revere Life Ins. Co. v. First Nat'l Bank, 328 F.2d 483 (5th Cir.), cert. denied, 377 U.S. 935 (1964), where the court
of appeals en banc invoked the abstention doctrine in a diversity case. See also Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940); Green v. Phillips Petroleum Co., 119 F.2d 466 (8th Cir.), cert. denied, 314 U.S. 637 (1941); Lauderdale Co. v. Foster, 23 F. 516 (C.C. Tenn. 1885).} Under this rule the decision of a federal court is deferred
until a potentially controlling state law issue has been put to rest in the
state court.\footnote{United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135-36 (1962).}

Just as primary jurisdiction is appropriately applied when a court gen-
unely thinks it is not in a position to evaluate a relevant issue in a claim
properly before it, abstention recognizes that federal courts do not decide
certain federal questions on the basis of preliminary guesses or conjectures
regarding local law.\footnote{Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).}

The leading case first establishing the abstention doctrine was Railroad
Comm'n v. Pullman Co.\footnote{312 U.S. 496 (1941).} This was an action to enjoin the enforcement
of a regulation of the Texas Railroad Commission requiring railroads
within the state to have an employee with the rank of conductor in
charge of each Pullman sleeping car.\footnote{The regulation was attacked as an undue discrimination against Negroes, who were classed
as porters rather than conductors. In addition to the federal constitutional question which the case presented, there was here a substantial
question of state law as to whether the Texas statute gave the Commission}
power to make the order in question. The Court ordered the trial court to abstain from deciding the case but to retain jurisdiction until the parties had an opportunity to obtain from the state court a decision on the state issues involved. In this way, the state questions were left for the state courts to decide and the federal court avoided deciding a federal constitutional question prematurely or unnecessarily. If the state tribunal were to hold the Commission order invalid as a matter of state law, there would be no need for the federal court to pass on the federal question. The Court recognized:

In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication . . . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.  

Ever since the Pullman doctrine was announced, the Supreme Court on many occasions has ordered abstention where state courts were thought to be more appropriate for resolution of complex or unsettled questions of local law. The Court "has increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law."

The doctrine of abstention involves a discretionary exercise of a court's equity powers and is not an automatic rule applied in every case where the federal court is faced with a doubtful issue of state law. When properly invoked it does not, in any sense, involve a withdrawal of federal jurisdiction but only a deferral of its exercise. In complying with the rule in Erie v. Tompkins, which held that the law to be applied in any case dealing with questions of general law is the law of the state, abstention, if the "special circumstances" prerequisite to its application exist, needs only to be invoked once, pro hac vice. Once exercised, it is up to the state courts to decide, or refuse to decide," unsettled questions of state law before the federal courts will proceed to settle the controversy.

Abstention has been described as a "judge fashioned vehicle for according appropriate deference to the respective competence of the state and federal court systems." Similarly primary jurisdiction is concerned with ensuring that a court, confronted with problems within an agency's specialized field, have the benefit of whatever contributions the agency, in its competence, can make to the solution of the controversy.

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90 312 U.S. at 500.
93 304 U.S. 64 (1938).
94 377 U.S. at 375.
95 It should be noted at this point that there is a lack of accord among the courts as to their jurisdiction to determine an unsettled question of state law after remission of a case by the federal court under the abstention doctrine. One state, Louisiana, has given an advisory opinion to the United States Supreme Court as a matter of courtesy. See Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961). A Florida statute empowers the supreme court of that state to adopt rules for answering questions of state law certified to it by federal appellate courts. See Fla. Stat. Ann. § 25.031 (1961). However, the Texas supreme court has refused to decide an issue remitted to it on the ground that it has no jurisdiction to render an "Advisory Opinion." United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965).
A characteristic feature of the cases invoking the abstention doctrine is that the federal court, in remitting the state issue to the state courts, retains jurisdiction over the federal action and does not dismiss it. The federal court does not preclude itself from deciding a question of state law; it merely postpones its decision until the parties have had a reasonable opportunity to have questions of state law adjudicated in the state tribunals.

As the Court has said on several occasions in applying the abstention doctrine, "this principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication." It is readily apparent that the doctrine of abstention is grounded on the need for due regard for the respective competence of the state and federal court systems. Similarly under primary jurisdiction, a like regard for the specialized field of an agency designated by the legislature is equally important in maintaining a proper relationship between the court and the agency. On this basis the courts will not decide a controversy within its jurisdiction prior to the decision of the agency where the question demands the exercise of administrative expertise.

D. Questions of Pure Law and Primary Jurisdiction

Most of the early cases established the principle that the primary jurisdiction doctrine had no application to a question which, while properly determinable by an administrative tribunal, did not involve a question of fact, but one of pure law determinable apart from the exercise of administrative discretion, and where the required uniformity of determination was attainable otherwise than by confining determination of the question to the administrative tribunal.

One of the early significant developments of this aspect of the doctrine took place in 1922 in *Great Northern R.R. v. Merchants Elevator Co.* where a shipper billed corn from points in Iowa and Nebraska to a point in Minnesota at which it was inspected and then rebilled to its ultimate destination. The tariff rate from the points of origin via the point of inspection to the ultimate destination was the same as to the point of inspection alone. Under a railroad rule there was a charge of five dollars per car for reconsignment but the charge was not applicable to grain held for inspection and disposition orders incident thereto at the billed destination. The question presented was whether an order for recon-

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signment after inspection was a "disposition order incident" to consignment. The Supreme Court held that a preliminary resort to the Interstate Commerce Commission for its decision is not essential where only a question of law is presented and no fact is in controversy. The Court reasoned that there was no occasion for the exercise of administrative discretion since the task to be performed was only to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. It was the view of the Court that Abilene did not apply because the construction of a writing when "the words of a written instrument are used in their ordinary meaning" presented solely a question of law, and that indeed every question of the construction of a tariff is deemed a question of law. In the instant case, Mr. Justice Brandeis concluded: "Here no fact, evidentiary or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion."102

Probably the best judicial statement of the primary jurisdiction doctrine and its applicability is found in the opinion of Mr. Justice Harlan in the case of United States v. Western Pacific R.R. The controversy in that case arose over the rates to be applied to shipments of steel aerial bomb cases filled with napalm gel, an inflammable but not self-igniting mixture. The railroads contended that the rates established for "incendiary bombs" should be applied. The Government argued that a different tariff rate should apply and that even if this tariff classification were held to govern, the tariff would be unreasonable as applied to the shipments. As to this issue it urged that the court proceeding should be suspended and the matter referred to the Interstate Commerce Commission. The Court of Claims entered summary judgment for the railroads, holding that the incendiary bomb rate applied. The Supreme Court, however, on its own motion, decided that insofar as the initial construction of a tariff may rest on cost or other "transportation" factors, the question was for the Commission. The Court concluded here that the question of tariff construction, as well as that of the reasonableness of the tariff as applied, were initially matters for the Commission's determination. The majority opinion by Justice Harlan explained that the primary jurisdiction doctrine is applicable, particularly where litigation presents issues of fact not within the conventional experience of judges and requires the exercise of administrative discretion. In such cases "agencies created by Congress for regulating the subject matter should not be passed over."103

There has been criticism of the manner in which the doctrine of primary jurisdiction was expanded in Western Pacific and its companion case, United States v. Chesapeake & Ohio Ry. One noted authority

102 Id. at 291.
101 Id. at 290.
100 Id. at 294.
103 352 U.S. 59 (1956).
104 Id. at 69.
105 Id. at 64.
106 352 U.S. 77 (1956).
argues that the courts "for years have been deciding cases of this sort without any sense of strain and without any complaint from the Commission and suddenly there is an urge for the perfect answer." He points out that the "function of interpreting specific tariffs is not central to carrier regulation, while the Commission is overwhelmed with many more far-reaching and important tasks." This authority further asserts that the expense and frustration of conducting two proceedings is an unfortunate consequence of the Western Pacific and Chesapeake & Ohio decisions. The trend toward expanding the primary jurisdiction doctrine nevertheless continues at a steady pace, with the courts emphasizing the flexibility of the doctrine.

The primary jurisdiction doctrine, correctly utilized, should not apply where only a question of pure law is involved and determinable apart from the exercise of administrative discretion. It is apparent, however, that some "questions of law," in the sense of questions which a court will consider on judicial review of agency action, come within the matters which a court will remit to agency determination under the primary jurisdiction rule. In at least one instance this manner of enlarging the doctrine to embrace questions of law has been expressly approved by the Supreme Court. This case involved an action against a water carrier to recover for loss occasioned by the sinking of a barge and cargo which was towed and berthed by the carrier. The carrier contended that an exculpatory clause in the contract for towage service and bill of lading covering the barge movement released it from liability. The court of appeals ruled that the clause was not invalid as a matter of law and should not be held void until the parties had proceeded administratively to have it set aside by the Interstate Commerce Commission. The Supreme Court upheld this ruling. The Court rightly assumed that the question whether the exculpatory provisions of a tariff filed by a carrier with the ICC offend against public policy is appropriate for judicial rather than administrative resolution, but "that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially to evaluate."

Another controversial extension of the primary jurisdiction rule arose

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107 Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1046 (1964).
108 Id. at 1044.
109 Id. at 1045.
110 "The doctrine of primary jurisdiction is flexible, and we should shape it and, if necessary, strain it to fit the peculiar posture of this case in order to reach a practical accommodation of court and agency." United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 883 (S.D.N.Y. 1965). "The outstanding feature of the doctrine is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies." Civil Aeronautics Bd. v. Modern Air Transp., Inc., 179 F.2d 622, 625 (2d Cir. 1950). The flexibility of the rule of primary jurisdiction is its chief distinction from the rule of exclusive jurisdiction. See McAllister, Statutory Roads to Review of Federal Administrative Orders, 28 Calif. L. Rev. 129, 150 (1940).
112 River Terminals Corp. v. Southwestern Sugar & Molasses Co., 253 F.2d 922 (1st Cir. 1958).
113 360 U.S. at 420.
114 Id. at 421.
in Carter v. American Tel. & Tel. Co.\textsuperscript{115} where the rule was invoked with respect to a serious antitrust question. This was a civil antitrust action by Carter against certain telephone companies for triple damages and injunctive relief based on the telephone companies' requirement prohibiting their subscribers from dealing with the Carter phone unit. The plaintiff charged that some twenty-eight telephone companies,\textsuperscript{116} as part of a common design or scheme, uniformly published a regulatory tariff permitting the companies to suspend or terminate service if the device was connected with the telephone company facilities. The plaintiff argued that this was a wrongful use of such tariff to accomplish a violation of the antitrust laws. The federal district court held that primary jurisdiction of the matter was vested in the FCC to resolve all questions relating to the justness, reasonableness, validity and effect of the tariff and practices complained of, and stayed the proceedings pending conclusion of appropriate administrative proceedings.\textsuperscript{117} The Fifth Circuit affirmed this, ruling that the question whether the practice required by the tariff in effect is lawful is a matter for the FCC to decide since the range of its power over regulated companies extends to "charges and practices" and is not limited to rates and services.\textsuperscript{118} This case furnishes a very questionable application of primary jurisdiction to pass on the issue of an antitrust violation, in spite of the fact that a closely regulated industry is involved.

Although a so-called "pervasive regulatory scheme" is in force here in that the Communications Act of 1934\textsuperscript{119} has established extensive controls, including the regulation of rates and practices over telephone and telegraph companies, the undeniable fact remains that the exemption and immunity from the antitrust law provided by the legislature in the Act is limited to consolidations and mergers.\textsuperscript{120} Other than this narrow exception, the Act neither confers antitrust immunity on such companies nor commits the determination of antitrust issues to the Federal Communication Commission. The Supreme Court affirmed this in United States v. Radio Corp. of America,\textsuperscript{121} with the following statement: "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts."\textsuperscript{122}

Nevertheless, the Fifth Circuit in Carter approached the matter complained about as simply presenting a tariff construction problem involving "largely technological consideration as to the equipment, apparatus, etc., reasonably within the tariff's description."\textsuperscript{123} In the court's view the sanctity of the tariff and its lawfulness were the crucial issue.

\textsuperscript{115} 365 F.2d 486 (5th Cir. 1966).
\textsuperscript{116} Id. at 489-90.
\textsuperscript{118} 365 F.2d at 499 n.25.
\textsuperscript{120} 47 U.S.C. §§ 221(a), 222(c)(1) (1964).
\textsuperscript{121} 358 U.S. 334 (1959).
\textsuperscript{122} Id. at 346.
\textsuperscript{123} 365 F.2d at 498.
In view of the particulars of this case where numerous telephone companies published and enforced a tariff preventing the use of a device such as the Carter phone, the paramount and decisive issue is not, as the appellate court ruled, merely whether the practice permitted by the tariff was lawful, but whether or not a conspiracy existed in violation of the anti-trust laws.

Under such circumstances, as the Court stated in *United States v. Radio Corp. of America*, it is equally clear that courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action. The FCC, therefore, has no authority to examine the legality of such a conspiracy and in permitting it to do so the antitrust laws were, for all practical purposes, superseded because of a mistaken fear that otherwise the tariff structure might be thrown out of balance and sporadic action by federal courts might work mischief.

The problem in indiscriminate use of the primary jurisdiction doctrine in antitrust matters is that it exaggerates the competency of the agency in matters where the courts should retain jurisdiction to pass on alleged antitrust violations. Continued extension of the doctrine in such cases has the effect of "shifting the controlling standards of legality away from court-administered antitrust emphasis on competition to wide-open administrative discretion to give up competition whenever such action is deemed consistent with the public interest."

A recent sobering measure of restraint, however, on the indiscriminate extension of the doctrine of primary jurisdiction occurred in the Supreme Court's decision in the case of *Meat Cutters Local 189 v. Jewel Tea Co.* In this case the local unions representing virtually all the butchers in the Chicago area agreed with a trade association of Chicago food retailers that food store meat departments would be open only from 9 A.M. to 6 P.M., Monday through Saturday. Faced with a strike unless it agreed to these terms Jewel Tea signed the contract and then sued the union and the trade association, seeking invalidation under the Sherman Act of the marketing hours provision. The Court took the position that the union did not violate the antitrust laws, inasmuch as the marketing hours restriction was so intimately related to wages, hours and working conditions that the bona fide, arms length bargaining for such a provision, not in combination with a non-labor group, was exempt from the Sherman Act. In so holding Justice White stated that the doctrine of primary jurisdiction, which if applicable would require resort to the NLRB for determination of the issue whether an operating hours restriction is a "term or condition of employment," was inapplicable. Justice White pointed out that the courts are not without experience in classifying bargaining subjects as terms or conditions of employment. Further, admonished the Court, "the doctrine of primary jurisdiction is not a doctrine

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124 358 U.S. at 343-44.
125 365 F.2d at 499.
127 381 U.S. 676 (1965).
of futility; it does not require resort to an expensive and merely delaying administrative proceeding when the case must be eventually decided on a controlling legal issue wholly unrelated to determination of the ascertain-ment of which the proceeding was sent to the agency."

E. Summary

The primary jurisdiction rule can be a valuable tool in a proper case. When not used to advantage, however, to obtain and appraise factual information and other background through the appropriate regulatory body, a decision by judges who are unequipped for making an evaluation of the data may lead to a result by the court entirely different from that of the agency on the same fact situation. Thus a case might well have two different outcomes depending on whether handled by the agency or by the court.

The possibility of this is most strikingly pointed out in the majority opinion written by Justice Frankfurter in the Standard Stations case. The case involved a question of whether exclusive supply contracts made by Standard Oil Company of California with independent dealers in petroleum products and auto accessories violated the Clayton Act. Section 3 of the Clayton Act prohibits such contracts where their effect may be to substantially lessen competition.

The Supreme Court, in concluding that this practice violated the Clayton Act, ruled that all that was necessary in the way of a showing of the actual or potential lessening of competition was proof that the contracts covered a substantial number of outlets and a substantial number of products, whether considered on a comparative basis or not. The case turned on the point that competition had been foreclosed in a substantial share of the market.

What is revealing about this case is the Court's awareness that various tests of the economic usefulness or restrictive effect of these exclusive supply contracts could be relevant in determining whether the effects of this arrangement "may be to substantially lessen competition." Among these tests would be evidence that competition flourished despite the use of the contracts, the determination of the status of the seller as a newcomer or an established competitor, and probably most important, the degree of market control.

In declining to apply these tests the Court acknowledged that any judicial determination of the economic effect of the contracts would be pure speculation on its part. It was cognizant that this type of data was ill-suited for ascertainment by the courts and might result in an appraisal of economic issues entirely different from that of the designated agency. In this connection Justice Frankfurter made the following observation:

The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the

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129 Id. at 686.
129 Id. at 314.
130 Id. at 308.
130 Id. at 310.
courts as well as by the Federal Trade Commission and other designated agencies. . . . Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance.\textsuperscript{103}

The dissenting opinion of Justice Jackson in \textit{Standard Stations} viewed it as unfortunate that the Clayton Act submits such economic issues to judicial determination, noting that the "judicial process is not well adapted to exploration of such industry-wide, and even nation-wide, questions."\textsuperscript{104}

In effect it can be seen that the violation of the Clayton Act is based solely on the Court's determination that the contracts in question covered a substantial number of outlets and a substantial number of products and that this automatically caused a lessening of competition. The proof required by the Court, therefore, was one of quantity and not of quality. A fair determination as to whether the "forbidden quality" was present in violation of the Act required a hearing of all relevant evidence from both sides and a weighing of that evidence as to the effects of the device.

What is important about \textit{Standard Stations} is the realization that the outcome of the case might well have been the opposite had the FTC been assigned the task of determining, on a comparative basis, the practical effect of such exclusive supply contracts on competition. The trial court would not allow the defendant to show that such detrimental effects did not flow from this arrangement, and the evidence that was admitted on this subject was not considered in reaching the decision that the contracts were illegal. The FTC by virtue of its specialization in this area was particularly well qualified to conduct such an investigation to determine, for example, whether the number of Standard's competitors had increased or decreased since its utilization of the requirements—contract system, whether the number of its dealers had increased or decreased, as well as other matters which would have shed light on the comparative status of Standard and its competitors before and after the inauguration of that system. The Court confronted with such economic issues should have had the advantage of the contributions which this agency could make under the circumstances.

By way of summarizing the doctrine of primary jurisdiction as it has developed and exists at this time, the following principles appear to control:

(1) The claim must be originally capable of adjudication in the courts rather than in the administrative forum, but at the same time the enforcement of the claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of the administrative agency.

(2) Courts should not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the administrative tribunal where (a) the

\textsuperscript{103} \textit{Id. at 322.} 
\textsuperscript{104} \textit{Id.}
question demands the exercise of administrative judgment requiring the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact, or (b) a uniformity and consistency of ruling is essential to comply with the purposes of the regulatory statute administered.

(3) In applying the doctrine of primary jurisdiction 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. The doctrine applies particularly where litigation presents issues of fact not within the conventional experience of judges or in cases requiring the exercise of administrative discretion. This is so even though the facts, after they have been appraised by an administrative agency having special competence, serve as a premise for legal consequences to be judicially defined.

(4) The primary jurisdiction doctrine is not designed to divide or allocate law-making powers between the courts and agencies, but only to determine which tribunal shall take initial action and not which shall act finally.

(5) Where an issue of law only is involved, application of the doctrine generally can be characterized in contemporary terms as a "one shot proposition," and once a ruling has been established there is no need to repeat it in each succeeding situation. Where, however, a mixed fact and law situation exists, or a fact issue only, it may well be necessary to repeat it.

IV. THE CONFUSION OF PRIMARY WITH EXCLUSIVE JURISDICTION
UNDER THE NATURAL GAS ACT

As an outgrowth of the litigation over royalty payments, the primary jurisdiction question became the subject of a prolonged full-scale hearing before the Federal Power Commission. Regrettably, however, the courts as well as the Commission have apparently confused the primary jurisdiction rule with that of exclusive jurisdiction. It is apparent that there has been a failure under recent royalty claims to recognize that if jurisdiction exists in the Commission at all under the Natural Gas Act, it is exclusive not primary.

A. Assertion of Primary Jurisdiction in Royalty Litigation

Primary administrative jurisdiction as an issue in gas royalty litigation was first injected by the defendant-lessee in the trial court in Denman as a defense to the claim made by the lessors for damages resulting from the lessee's failure to pay for the royalty gas at the alleged market price instead of the lesser price actually paid. The defendant contended that the federal district court lacked jurisdiction over the subject matter because primary administrative jurisdiction was vested in the Federal Power Commission under the Natural Gas Act and thus the plaintiff's royalty gas and defendant's working interest gas were subject to the

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Natural Gas Act. The district court denied the lessee's claim that the FPC had jurisdiction. On appeal the Fifth Circuit affirmed the lower court's judgment as to all but the FPC primary jurisdiction point. Finding that it was at least arguable that primary jurisdiction under the Natural Gas Act is in the Federal Power Commission, it held that the parties must first proceed in the Commission for determination of the jurisdictional question.\(^\text{136}\)

It is interesting to note that at no time in the course of this litigation was the question of whether the Federal Power Commission had exclusive jurisdiction over gas royalty, rather than primary jurisdiction, ever decided by the court, despite the fact that in the lower court the defendant claimed, among other points, that, "(3) plaintiff's royalty gas and defendant's working interest gas were and are subject to the Natural Gas Act, and plaintiffs were and are not entitled to more than the price their gas sales have on the only market for such gas permitted under the Natural Gas Act."\(^\text{137}\)

It is apparent that no party in Denman was willing to fully argue the fundamental law on this issue. The FPC was seemingly content to argue primary jurisdiction, but the real issue, that is whether the power of the FPC to regulate the price paid for royalty gas transported and sold for resale in interstate commerce is exclusive, has never been decided by the court. This is a significant issue because rate-making by the agency is an inherent function entrusted to it by Congress under the Natural Gas Act. The assumption of jurisdiction is the assumption of rate-making and someone must take on this responsibility of jurisdiction. It is simply not possible for both the courts and the agency to act as rate-makers. It is because of this fact that recognition of the true nature of the Federal Power Commission's jurisdiction of the matter is of such critical importance.

The FPC memorandum filed in Denman demonstrates a distinct historical reluctance by the Commission to exercise jurisdiction over the royalty gas, even in the face of its tentative views that jurisdiction arguably exists.\(^\text{138}\) This reluctance by the Commission to assume the rate-making responsibility, coupled with the courts' failure to make a determination that jurisdiction is in the FPC, has needlessly held up and delayed the litigation in Denman and Weymouth, as well as in the other pending suits much longer than necessary under the circumstances. It would have been far better had the court in these cases made its own determination as to whether jurisdiction was in the Commission, rather than requiring the Commission to carry on an extensive and time consuming investigation and evaluation of this issue. The consequences of the court's approach to reaching a solution will necessarily involve proceedings that are inordinately protracted and costly to the litigants. It is most disturbing, therefore, that the Fifth Circuit, in remanding Denman to the trial court,

\(^{136}\) J.M. Huber Corp. v. Denman, 367 F.2d 104, 120 (5th Cir. 1966).

\(^{137}\) 251 F. Supp. at 748 (emphasis added).

directed it to defer further action pending a ruling from the FPC on the question of its jurisdiction and the status of the royalty owner's transaction under the Natural Gas Act.\footnote{367 F.2d at 121.}

In Denman and Weymouth, the court of appeals was undoubtedly persuaded by the view of the Federal Power Commission which urged, albeit hesitantly, that since it is "arguable" that the matter of power over royalty payments is within its jurisdiction, both the question of jurisdiction, and if that exists, the appropriateness of the exercise of such power, are matters for primary jurisdiction referral to the FPC for initial decision. In doing so in Denman it relied on several National Labor Board cases\footnote{Id. at 112.} where it was held that the courts must yield to the Board's jurisdiction whenever a labor dispute is arguably subject to the jurisdiction of the NLRB.\footnote{4229 U.S.C. § 151-634 (1964).} Just what constitutes the test for an arguable case has never been judicially established. The concept is unquestionably vague and seems to require the mere presence of some broad basis for contending or asserting, without the necessity of actual proof, that jurisdiction exists. What is more important to note here, however, is that the "arguably" cases cited by the FPC in its amicus curiae brief and relied upon by the court were not primary jurisdiction cases at all but exclusive jurisdiction situations arising under the National Labor Relations Act.\footnote{559 U.S. 236 (1959).} The cases cited applied San Diego Building Trades Council v. Garmon\footnote{Id. at 245.} which had held earlier that the proper administration of the federal labor law requires the state courts to relinquish jurisdiction not only over those controversies actually found to be within the jurisdiction of the NLRB, but also over litigation arising from activities which might arguably be subject to that agency's power to determine. The Court in Garmon concluded that only such a rule will obviate the danger of state interference with national policy.\footnote{367 F.2d at 111.}

Unlike the labor cases cited by the Fifth Circuit in which it was the court and not the agency that decided the Labor Board had jurisdiction or at least arguably had jurisdiction, the court in both Denman and Weymouth chose to send the whole fundamental question to the FPC and let it determine if it had jurisdiction over gas royalties. This indeed was a different and, as the court understated in Denman, "a new application of the doctrine of primary jurisdiction."\footnote{367 F.2d at 111.}

The court in Denman and Weymouth requested the FPC to file an amicus brief on the question of its jurisdiction and, in response, received a formal memorandum that expressed the views not merely of its legal staff, but those of the Commission itself. Thereafter, in order to get the fullest possible exposure of views on the issue, the court invited all parties to submit unlimited comments, replies and rejoinders. In response to this, at least

\footnote{See J.M. Huber Corp. v. Denman, 367 F.2d 104, 112 n.25 (5th Cir. 1966).}
fourteen memorandum briefs were filed.\textsuperscript{146} Even though it was armed with such an array of advocatory arguments and views, the court in handing down its decision was unwilling to do more than “set forth the respective contentions of the protagonists and illumine the problem by factors, pro and con, which might, or might not, have some relevance.”\textsuperscript{147}

Once it had mistakenly accepted the “arguable basis for jurisdiction” concept urged by the FPC in its amicus brief, the court then reasoned that it was in a position where it should not, on its own initiative, resolve the issue of whether Commission jurisdiction did or did not exist. The court was simply content to set forth what it characterized as the “powerful arguments” of the parties for and against jurisdiction, directing that the FPC rule on the coverage of the statute since it was at least arguable that jurisdiction existed. In doing this the court abdicated its judicial role over the determination of a basic question of law and as a consequence the litigation will be needlessly long and drawn out. The fact is that Denman was never an “arguably” problem as were the labor cases cited by the court.\textsuperscript{148} The special rule for preserving for the Labor Board its congressionally delegated function of deciding what is and what is not within its domain should never have been applied to a fundamental question of law as to basic jurisdiction under the Natural Gas Act, which the court is equally well equipped to answer.

It is troubling to see that, after having the benefit of the views of the Commission upon which to render a decision, the court still felt compelled to obtain an administrative ruling by this same Commission as to its jurisdiction. Such a duplication of effort required by the court of the agency makes for a most expensive and delaying administrative proceeding. When employed in this manner, primary jurisdiction tends to become ineffectual and useless. The Supreme Court indicated its opposition to such application when it stated in \textit{Meat Cutters Local 189 v. Jewel Tea Co.} that “the doctrine of primary jurisdiction is not a doctrine of futility; . . .”.\textsuperscript{149}

\textbf{B. The Mechanics of Applying Primary Jurisdiction in the Denman Case}

In view of the court’s conclusion in \textit{Denman} that the FPC “arguably” has primary jurisdiction over gas royalty payments where the producer is involved in a jurisdictional sale, it seems desirable to describe or at least endeavor to describe the mechanics of what may be expected to develop in this aspect of the litigation.

In its decision the court directed the trial court to obtain a ruling by the FPC as to the agency’s jurisdiction and the status of the royalty interest owner’s transaction as a sale under the Natural Gas Act. If answered

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} The NLRB decisions relied on in the instant case, 367 F.2d at 112 n.25, are distinguishable from \textit{Denman} in their holding that the proper administration of the federal labor laws requires that labor disputes arising from activities which might arguably be subject to that agency’s cognizance, as well as those actually found to be within the jurisdiction of the NLRB, are within the exclusive jurisdiction of the Board. \textit{Denman}, on the other hand, involves the resolution of a far reaching question of statutory power to exercise jurisdiction. Here is simply a question of law, as to whether or not jurisdiction does in fact exist in the designated agency to regulate the royalty interest.
\textsuperscript{149} 381 U.S. 676, 686 (1965).
in the affirmative, the Commission should then indicate how such jurisdiction should be implemented to insure Commission control over such payments; that is, what method should be used in computing gas royalty payments and what additional filing requirements, if any, should be imposed.

The Commission's recent assertion of jurisdiction over the payment of royalties on jurisdictional gas was hardly unexpected, particularly in the face of the FPC's historical disposition to follow the longstanding position of the Supreme Court in rejecting anything that would tend to create an "attractive gap" in Commission jurisdiction under the Natural Gas Act.  

While the Commission does not foresee any additional administrative burden resulting from its assertion of gas royalty jurisdiction, it will have to decide whether any additional regulations are needed. Even though the lessor-lessee sale is jurisdictional, it may, nevertheless, not be necessary for the royalty owners to make any filings with the Commission. A workable precedent for this position is found in section 154.91(d) of the regulations under the Natural Gas Act applicable to producers, which provides that a non-signatory co-owner to a jurisdictional gas sales contract is not permitted to file a certificate application or rate schedules in the absence of a waiver for good cause.

The royalty interest is similar in many respects to a percentage interest held by an independent producer in a lease who is not a signatory to a gas sales contract. The Commission's regulations do not presently provide for separate filings by royalty owners who are not themselves signatory parties to the gas sales contract.

The regulations cited above are typical of the Commission's practical efforts to minimize the administrative burdens on the agency with respect to its regulatory practices. It can be expected that the Commission will continue its efforts to avoid the imposition of any additional filing requirements wherever feasible. It may well be that only in those instances where the royalty owner seeks a higher price for his share of the gas over that which the producer is authorized to receive will it be necessary for the agency's processes to be invoked. The adoption by the Commission of a regulation making a set proceeding applicable to all royalty owners would seem to be appropriate for dealing with such situations.

V. CONCLUSION

It is submitted that the attempted application of a rule such as the primary jurisdiction doctrine, which provides for the allocation of jurisdic-

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101 A similar approach is taken by the Commission under section 154.91(e) of the regulations in connection with percentage sales contracts between a producer and the operator of a processing plant where the producer sells its gas to the plant operator at a price that is determined on the basis of a percentage of the proceeds from the jurisdictional resale of the residue gas by the plant operator. Under this regulation the producer is not permitted to make such filings. They are made by the plant operator who must list the producers and their respective share of proceeds.
tion over the substantive question of federal regulation over interstate gas royalty payments, is erroneous in settling the fundamental question of whether the Federal Power Commission has been granted jurisdiction by Congress in the Natural Gas Act over royalties due under a lease where the production has been sold in interstate commerce for resale. The fact is that either the Commission has by statute the exclusive jurisdiction in such cases, or it has no jurisdiction whatsoever, primary or otherwise.

In unmistakable terms, the Supreme Court in Phillips I held in 1954 that "the legislative history indicates a Congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce . . . ."

The bill on which the hearings were held leading to the passage of the Natural Gas Act as introduced in Congress provided in section 1(b) for Commission jurisdiction over the sale of natural gas in interstate commerce "for resale to the public." Similarly, a "natural gas company" was defined in section 2(5) as including a person engaged in the sale of natural gas in interstate commerce "for resale to the public." The Natural Gas Act itself in plain and clear language manifestly sets forth the power of the Commission to perform all acts and prescribe the orders, rules and regulations that it may find necessary or appropriate to carry out the provisions of the Act. It reposes exclusive jurisdiction in the Federal Power Commission through federal regulation in all matters relating to the transportation and sale of natural gas in interstate commerce, with a built-in statutory procedure for judicial review of a claim of an aggrieved party. This statutory road to judicial review in the Natural Gas Act demonstrates the congressional intent that the Federal Power Commission was to have original, paramount and exclusive jurisdiction with respect to those matters over which it had power, subject only to the right of judicial review as prescribed in the statute.

In the field of banking regulation the Supreme Court has made this same principle clear in its decision in Whitney National Bank v. Bank of New Orleans. This case involved a national bank which, in order to avoid the restrictions of the federal banking laws as to branch banking, resorted to a plan under which a holding company would organize a new national bank. The existing bank would merge into that bank and the holding company would also organize a new national bank. After the plan was approved by the Federal Reserve Board, Louisiana enacted a statute making it unlawful for a bank holding company to establish any new banks. The plaintiffs, three state-chartered banks, filed a suit in the district court of the District of Columbia seeking a declaratory judgment and injunctive relief to prevent the Comptroller of Currency from issuing a certificate of authority for the new bank. The Supreme Court ordered dismissal of the complaint, holding that the district court had no

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135 Id. at 141-43.
jurisdiction to pass on the merits of the holding company proposal and that appropriate disposition of the controversy could not be made without further consideration of the effect of the Louisiana statute by the Federal Reserve Board where original exclusive jurisdiction rested. The Court held that where Congress has provided statutory review procedures designed to permit administrative agency expertise to be brought to bear on particular problems, "those procedures are to be exclusive. . . . [T]o permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design." 129

If the foregoing, then, represents the applicable law existing today, the only question remaining in the instant cases with respect to the royalty gas is whether the royalty owner can be correctly classified as a natural gas company making a sale in interstate commerce for resale, within the meaning of the Natural Gas Act.

It is submitted that the function of the Commission and the statutory scheme for judicial review laid out by Congress in the Natural Gas Act will sustain a major defeat if the courts erroneously rule that the Federal Power Commission merely has primary jurisdiction over this question. Under such an umbrella of concurrent jurisdiction both the courts and the agency would be attempting to adjudicate and dispose of claims for royalty due.

With the question of "market value" of gas royalty payments pending not only before the federal courts but the state courts as well under entirely independent claims, it is not difficult to foresee that such a diluted form of overlapping jurisdiction will almost certainly have the effect of establishing bad law. The effectiveness of that portion of the Natural Gas Act which vests in the Commission the power to perform all acts and prescribe orders, rules and regulations that it finds necessary to carry out the provisions of the Act, will be substantially decreased. On the other hand, if exclusive and paramount jurisdiction is established in the Commission, "market value" will no longer be a consideration, but area rates based on cost of service will fix the value of the gas through area pricing. It is recognized, of course, that if the agency has no jurisdiction in any form over gas royalty payments, the question of primary versus exclusive jurisdiction will become moot and of no consequence.

It is submitted that the judicial importance of the doctrine of exclusive jurisdiction has been underestimated, with the courts failing to give sufficient attention to its application. There are matters which are committed to administrative agencies which in the first instance are not within the limits of the judicial power, 160 just as there are matters which are within the jurisdiction of the courts but not within the province of agencies. Also, statutes may create rights which are enforceable only in the administrative and not in the judicial forum. 161 The administrative agencies

129 Id. at 420 (emphasis added).
161 E.g., Where Congress has created a special administrative procedure for the determination of the status of persons or companies under a regulatory act, and has prescribed a procedure which
have, not infrequently, been held to have exclusive jurisdiction of original matters which precludes the institution of an original action in court with regard to those matters.\textsuperscript{163} This is particularly so where the legislation enacted by Congress provides for “final and conclusive” action by the agency.\textsuperscript{164}

Certainly those matters which are properly within the jurisdiction of the administrative tribunals may and should be determined by administrative process. In this connection, if the legislature provides a remedy before an administrative agency which meets the demands of due process of law and does not invade the constitutional jurisdiction of a court, then in the absence of a clear indication of a contrary legislative intent, a court may be deemed to have no jurisdiction in the premises.\textsuperscript{164} The inevitable impairment of the power granted to the agency which will result from permitting suits in the courts initially is both a practical and justifiable basis for prohibiting such judicial jurisdiction in the first instance.

The issue of agency jurisdiction over royalties arising in Denman and Weymouth has brought into sharp focus the need to recognize that a clear cut distinction does exist between the doctrines of primary and exclusive jurisdiction. All too frequently the courts have been disposed to treat these doctrines as synonymous, without any attempt to differentiate between them.

It is indeed unfortunate that in Denman and Weymouth the court chose to direct the Federal Power Commission to hold hearings and a lengthy investigation and make a legal determination on whether or not the Natural Gas Act covers royalty payments, all for the purpose of aiding the court in the final disposition of the claims before it. This unprecedented approach is a far cry and departure from the basic holding in Great Northern that questions of interpretation are for the court itself, with prior recourse to the designated agency only to resolve questions of fact. Rather than pass the instant royalty matter to the FPC for a full scale inquiry and study, it would have been far better had the Fifth Circuit in Denman and Weymouth either proceeded to order the trial court to fix the actual market price of the gas, or held that the trial court had no jurisdiction of the controversy by reason of the paramount and exclusive jurisdiction of the FPC over such royalty payments. It is interesting that Judge Brown in Denman did entertain this latter choice when he recognized that if "the amounts paid for royalty constitute a 'rate,' . . . then primary jurisdiction is not only a matter of initial determination by the administrative agency. Rather it then becomes the exclusive role of the agency."\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{164} Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).
\item \textsuperscript{165} First Moon v. White Tail, 270 U.S. 243 (1926).
\item \textsuperscript{166} Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).
\item \textsuperscript{167} 367 F.2d at 120.
\end{itemize}
Manifestly, the court was cognizant of the real consequences of a determination that royalty constitutes a "rate" within the meaning of the Natural Gas Act, but because of reservations and doubt on its own disposition of the matter, the court would commit itself only to the submission to the agency, for initial decision, the question of agency jurisdiction as a primary reference matter.

In conclusion it is submitted that the court appears to have incorrectly handed over to the FPC, for initial determination and interpretation, the question of jurisdiction, rather than deciding itself the fundamental legal question as to whether administrative jurisdiction did in fact exist. The novel application of the primary jurisdiction doctrine by the court is one more step in the contemporary trend to make an otherwise good rule a panacea in judicial-agency relationships. The courts would render a true service in restricting the application of this useful tool to those situations that properly call for it, and assume themselves, their proper judicial responsibilities when agency reference is not appropriate.