

Tulsa Law Review

Volume 19 | Number 3

Spring 1984

Subject Matter Jurisdiction of the Oklahoma Corporation Commission: Tenneco Oil Co. v. El Paso Natural Gas Co.

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Recommended Citation

Karin J. Chatfield, *Subject Matter Jurisdiction of the Oklahoma Corporation Commission: Tenneco Oil Co. v. El Paso Natural Gas Co.*, 19 Tulsa L. J. 465 (1984).

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**SUBJECT MATTER JURISDICTION OF THE
OKLAHOMA CORPORATION COMMISSION:
*TENNECO OIL CO. v. EL PASO
NATURAL GAS CO.***

I. INTRODUCTION

In *Tenneco Oil Co. v. El Paso Natural Gas Co.*,¹ the Oklahoma Supreme Court held that the Oklahoma Corporation Commission has subject matter jurisdiction over a dispute arising from a forced pooling order of oil and gas interests.² The court also held that while the district court generally has the exclusive power to settle private contract disputes, it may not deal with private contract arrangements which attempt to supersede and modify the terms of a pooling order.³

The *Tenneco* decision indicates a somewhat new approach to determining the jurisdictional reach of the Corporation Commission. While previous decisions have vacillated on the extent of the Commission's adjudicatory powers under oil and gas conservation legislation,⁴ the *Tenneco* decision accomplishes little in clarifying these adjudica-

1. 53 OKLA. B.J. 2476 (Oct. 19, 1982). At the time of this writing, a possible rehearing of the *Tenneco* decision is pending.

2. *Id.* at 2482. Oklahoma's forced pooling law is located at OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1983). The law provides that where there are either separately owned tracts or undivided interests in an established oil or gas spacing unit, and only one owner wishes to develop the oil or gas, the tracts can be force pooled to allow development as a unit. *Id.*; see Nesbitt, *A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma*, 50 OKLA. B.J. 648 (1979). The purpose of pooling is to prevent the physical and economic waste that accompanies the drilling of unnecessary wells and to protect the correlative rights of landowners over an oil and gas reservoir. 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 901, at 3 (1983). A pooling order specifies the time within which a non-consenting owner must elect to financially participate in the proposed well by paying his proportionate share of the cost of the well, and thereby receiving a proportionate share of the working interest; or, in the alternative, the mineral owner may elect to receive a bonus payment in lieu of the right to participate in the working interest. Nesbitt, *supra*, at 649.

3. 53 OKLA. B.J. at 2482. In *Tenneco*, the dispute involved a contested election under a Commission pooling order. Tenneco Oil Company contended that it communicated to El Paso Natural Gas Company its election to participate in the well within the 15 day period specified in the pooling order. *Id.* at 2476. Tenneco argued in the alternative that it executed a joint operating agreement with El Paso that allowed Tenneco to participate in the well even if Tenneco did not elect to do so under the pooling order. *Id.* An explanation of operating agreements may be found in Nesbitt, *supra* note 2, at 652.

4. Compare *Southern Union Prod. Co. v. Corporation Comm'n*, 465 P.2d 454 (Okla. 1970) (holding that Corporation Commission could not interpret its order's effect on pooling interests) with *Cabot Carbon Co. v. Phillips Petroleum Co.*, 287 P.2d 675 (Okla. 1955) (holding that Corporation Commission could issue an order interpreting its previous orders which had set gas prices).

tory powers. The court based its decision on an interpretation of public rights,⁵ yet this decision and other recent Oklahoma Supreme Court decisions concerning the Commission's jurisdiction have alluded to the possible applicability of the doctrine of primary jurisdiction.⁶ The public rights doctrine concerns the adjudicatory powers of an agency derived from constitutional delegation,⁷ while primary jurisdiction concerns judicial deference when a court feels a dispute should be handled by an administrative agency.⁸ By rationalizing its decision on an interpretation of public rights, the *Tenneco* court utilized a complex and difficult method for ascertaining an agency's jurisdiction.

This Recent Development will attempt to clarify the reasoning of the *Tenneco* opinion and to define the jurisdictional reach of the Oklahoma Corporation Commission. It will also offer a critical analysis of the court's reasoning and will suggest an alternative means the court could have used to reach its decision.

II. *TENNECO OIL CO. v. EL PASO NATURAL GAS CO.*

A. *Statement of the Case*

Tenneco Oil Co. v. El Paso Natural Gas Co. was initiated in the District Court of Roger Mills County, Oklahoma, to quiet title to a portion of an oil and gas leasehold estate. The dispute arose out of a forced pooling order entered by the Oklahoma Corporation Commission⁹ which conferred provisional operator status upon Tenneco condi-

5. See *Tenneco*, 53 OKLA. B.J. at 2482. The court said, "In matters created by the Legislature and assigned to the Commission's adjudicative authority, the lines of demarcation between the district court and the Commission must be drawn along the public-law/private-law borderline." *Id.* (emphasis in text).

6. In *Tenneco*, the court cited *Stipe v. Theus*, 603 P.2d 347 (Okla. 1979), for the proposition that the Corporation Commission retains primary jurisdiction in cost-overflow disputes arising under pooling orders. 53 OKLA. B.J. at 2483 n.17; see *Crest Resources & Exploration Corp. v. Corporation Comm'n*, 617 P.2d 215, 218 (Okla. 1980).

7. The public rights concept was early recognized by the federal courts as directing agency adjudications of issues "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50 (1932); see *infra* notes 16-42 and accompanying text (general discussion of public rights concept).

8. The doctrine of primary jurisdiction is invoked whenever the enforcement of a claim, which is originally cognizable in the courts, requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. See 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 562-72 (1965); see also *infra* notes 43-75 and accompanying text (general discussion of doctrine of primary jurisdiction).

9. In most states the administration of the regulation of oil and gas is delegated to some administrative body. In Oklahoma, the administration has been delegated to the Corporation Commission, which also exercises authority in other areas. See OKLA. CONST. art. IX, § 18. The Commission was created by Oklahoma's constitution. *Id.* art. IX, §§ 15-18. The Corporation

tioned on the commencement of operations within ninety days. If Tenneco failed to commence operations within the specified period, El Paso would become the unit operator. In that event, Tenneco would have fifteen days to elect to participate in the drilling of the proposed well or to accept a cash bonus and royalty interest in lieu of participation. The pooling order did not specify how this election was to be communicated to El Paso and this ambiguity gave rise to the controversy. Tenneco contended that it did communicate to El Paso its intention to participate in the well, while El Paso contended there was a failure by Tenneco to elect to participate.¹⁰

Another dispute in the case concerned a joint operating agreement that Tenneco contended was executed by the parties.¹¹ Tenneco argued that this agreement allowed it to participate in the costs and proceeds of the well whether or not there was a valid election. The trial court, finding both a properly communicated election and a valid operating agreement, quieted title in favor of Tenneco. When El Paso appealed to the Oklahoma Supreme Court, that court raised the issue of jurisdiction for the first time and held the trial court lacked jurisdiction over the issues.¹²

B. *Rationale of the Oklahoma Supreme Court*

The court based its decision on a public rights rationale. It stated that the election issue arose solely in the area of public law and that pooling orders are statutory creatures, unknown at common law, and created in the public interest.¹³ Therefore, disputes arising over the

Commission is defined as having legislative, executive, and judicial powers and is both an administrative board and a judicial tribunal. *Id.* art. IX, §§ 18-19; see DeBois, *Practice and Procedure Before the Corporation Commission of the State of Oklahoma*, 7 OKLA. L. REV. 173, 173 (1954). It is vested with the authority of a court of record within its jurisdiction and with the power to enforce compliance with its orders. OKLA. CONST. art. IX, § 19; see Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 230 (1932) (Corporation Commission is a court of record when proceeding upon matters in which jurisdiction has been vested in the Commission by statute).

10. *Tenneco*, 53 OKLA. B.J. at 2476.

11. *Id.* An operating agreement is a contract which usually specifies how the costs of the well and the proceeds from the well will be distributed among those participating in production.

It is common practice for the operator to accept the written election to participate followed by execution of an operating agreement as satisfactory security, especially where the parties have engaged in joint operations before, or the pooled owner is a substantial operator of established reputation. In other cases, the operator will accept security in the form of an irrevocable letter of credit or an escrow deposit.

Nesbitt, *supra* note 2, at 652.

12. *Tenneco*, 53 OKLA. B.J. at 2482.

13. *Id.* at 2481. The court said that although elections are not specifically provided for by statute, they are among the terms of pooling orders, and pooling orders are provided for by statute. *Id.*

terms of a pooling order are within the jurisdiction of the agency assigned to issue them, the Corporation Commission. The court said that "[i]n matters *created* by the Legislature and assigned to the Commission's adjudicative authority, the lines of demarcation between the district court and the Commission must be drawn along the public-law/private-law borderline."¹⁴ The Commission has no jurisdiction to adjudicate differences between private individuals in litigation involving "purely" private interests. On the other hand, the court explained, when the core of the dispute is a claim fashioned by the state in the public interest, the disposition of the issues lies with the Commission.¹⁵ By relying on a distinction between public and private rights, the court exposed the confusion which has plagued administrative law.

III. METHODS OF DELIMITING JURISDICTION

A. *Public Rights*

In the use of the administrative process as a tool of government an inherent tension exists between public interest and private rights. The legislative body, in determining policy and standards, delegates to administrative agencies the task of translating standards into regulations. However, as an agency carries out this legislative mandate, a question arises as to how closely the administrative process should consider the private interests that may become involved. It is unlikely that the public and private interests will ever be equally balanced; rather, it may be more likely that the administrative process will have an onerous effect on the private rights of individuals. It is often difficult to determine when an agency has impermissibly encroached upon the area of private rights.

The public rights doctrine advances the policy that Congress may create public rights and place their regulation and enforcement in public bodies or agencies set apart from the private law process. In federal law the public rights doctrine extends to those cases "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."¹⁶ Thus, congressionally created rights and the claims which arise from them may be assigned to agencies for regulation and adjudication. The public rights doctrine also

14. *Id.* at 2482.

15. *Id.*

16. *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

implies the ability to separate those matters which should be subject to agency discretion and those which should not. However, the distinction between those matters inherently judicial and those matters created and set apart from the private law process is often difficult to discern.

The United States Supreme Court first formulated the public rights concept in the seminal case of *Murray's Lessee v. Hoboken Land & Improvement Co.*,¹⁷ in which the Court stated that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts."¹⁸ The public rights concept recognizes a historical distinction between matters that can be determined conclusively by the executive and legislative branches of government and matters that are necessarily judicial.¹⁹ It draws upon the principle of separation of powers and an understanding that certain prerogatives are reserved to the political branches of government.

The degree of power that may be allocated to administrative agencies by the legislature, however, is questionable. The Supreme Court has said that the mode of determining which matters are reserved to the legislative branch is completely within congressional control.²⁰ "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to the judicial tribunals."²¹

17. 59 U.S. 272 (1855). The issue in this case was whether Treasury officials could audit accounts of customs officials. The auditing was judicial in nature, and thus, it was argued, could only be performed by article III judges. *Id.* at 275. The Court held that article III of the Constitution presented no bar to this exercise of Congress' taxing power because it was a public law controversy which did not require resolution in a court. *Id.* at 284-85. The Court held that disputes between citizens and the federal government, as opposed to suits between private parties, could be assigned to legislative courts. *Id.*

18. *Id.* at 284.

19. In *Murray's Lessee* the Court examined the law of England as it was brought to the United States to determine whether the issue presented was traditionally cognizable in the courts. *Id.* at 277-78. The Court found that where the matter was not one traditionally reserved for judicial determination, there was no bar to Congress' establishment of procedures outside of article III courts. *Id.* at 283-85. A controversy where the government is a party enforcing its constitutionally derived powers, such as tax collection, is an example of a matter not reserved for judicial determination. *Id.* at 280-81. In *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Court held that the Court of Customs Appeals had been properly constituted by Congress as a legislative tribunal. "The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." *Id.* at 458.

20. *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929).

21. *Id.* (footnote omitted). The Supreme Court has set out some examples of this congressional delegation of power: "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power

Thus, Congress may establish legislative courts that examine and determine various matters arising between the government and others that do not necessarily require judicial determination.²² When Congress creates new statutory public rights it may assign their adjudication to an administrative agency.²³ By creating and setting these public rights and remedies apart from the private law process, Congress may commit their enforcement to a special tribunal other than a judicial court.²⁴ Suits brought to such agencies are proceedings unknown at common law.²⁵

The United States Supreme Court, however, has never definitively resolved the distinction between public and private rights, nor has it resolved the extent to which Congress may create tribunals to resolve issues falling within the subject matter jurisdiction of article III of the Constitution.²⁶ The Court has indicated in some recent cases that Con-

as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (footnote omitted).

22. *See Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929).

23. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

24. *Id.* at 450. The Court defined cases in which "public rights" are being litigated as "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact." *Id.* Additionally, the Court defined public rights cases as those not involving "purely" private rights. "In cases which do involve *only* 'private rights,' this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court . . ." *Id.* at 450 n.7 (emphasis added). The Court seems to acknowledge the difficulty of defining in a "pure" sense what the "public rights" concept encompasses.

25. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). Thus, in a statutory proceeding the rights at issue are statutorily created and subject to the remedies provided by the statute. In *Tenneco*, the Oklahoma Supreme Court stated that the legislature, having created the pooling order to implement its conservation statutes in the public interest, may also assign to the Corporation Commission the adjudication of disputes arising from the same order. "Courts are constitutionally prohibited from interfering with the Commission's exercise of its adjudicative functions." 53 OKLA. B.J. at 2482.

26. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) ("The distinction between public rights and private rights has not been definitively explained in our precedents."). In the early case of *Crowell v. Benson*, 285 U.S. 22 (1932), the question was presented whether Congress could confer on a "non-Article III" court, in this case an administrative agency, jurisdiction to decide a "private right, that is, of the liability of one individual to another." *Id.* at 51. It was argued that to grant this function to an administrative agency was inconsistent with the grant of judicial power to article III courts, and that "the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved." *Id.* at 60-61. The Court's conclusion was that "[t]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.* at 51. The Court cast the agency into the mold of "adjunct" to the constitutional courts, which put the agency into a major role of factfinder in the agency's area of expertise. Professor Jaffe explains the role of the court in this scheme:

The essence rather of the judicial power is the control exercised by the court in testing

gress may at its option confer judicial authority falling within the ambit of article III upon either article I courts or legislative tribunals.²⁷ Congress may delegate fact-finding powers to executive officers or to an administrative agency as an adjunct to an article III court similar to a jury or special master, but it may not confer a broad delegation of article III decision making power to non-article III tribunals.²⁸

Congress' power to select remedies does not automatically confer power to establish legislative tribunals with broad discretionary powers.²⁹ In the recent case, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³⁰ the Court stressed that a matter of public rights must at a minimum arise "between the government and others."³¹ On the other hand, "[p]rivate right disputes lie at the core of the histori-

the "reasonableness" of the findings of fact and in determining the law. One might reply that fact finding is the crucial determinant of the overwhelming proportion of cases [however,] . . . fact finding by a judge is not a basic premise of our system of justice.

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 89 (1965). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-5 (1978) (general discussion of congressional power over court jurisdiction).

27. See, e.g., *Palmore v. United States*, 411 U.S. 389 (1973). In *Palmore*, the Supreme Court upheld the constitutionality of a reorganization of the District of Columbia court system, insofar as the reorganization conferred jurisdiction in some criminal matters upon article I courts. Congress is thus permitted to establish non-article III tribunals in "specialized areas having particularized needs and warranting distinctive treatment." *Id.* at 408. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court said:

At one time, this Court suggested a rigid distinction between those subjects that could be considered only in Art. III courts and those that could be considered only in legislative courts. See *Williams v. United States*, 289 U.S. 553 (1933). But this suggested dichotomy has not withstood analysis Our more recent cases clearly recognize that legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended.

458 U.S. at 63 n.14 (citing *Palmore v. United States*, 411 U.S. 389 (1973) and *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-51 (1962) (opinion of Harlan, J.)).

28. See *Reconstruction Fin. Corp. v. Bankers Trust Co.*, 318 U.S. 163, 170 (1943).

29. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). One author states:

It is principally in connection with claims as to the finality of administrative action that the question as to separation of powers becomes critical. So long as the legislature can effectively change the agency's rules, and the courts can effectively correct errors made in the adjudication of cases, it is of comparatively little concern that an agency's powers possess at once legislative and judicial characteristics. Indeed, it could almost be called an identifying characteristic of agencies that they combine the powers of rule making and of adjudication. The mere existence of blended powers has not been a cause of concern. It is only when the blending of functions creates a danger of unchecked power that concern arises.

I F. COOPER, *supra* note 8, at 17 (footnote omitted).

30. 458 U.S. 50 (1982).

31. *Id.* at 69. However, the Court also said that "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.' And it is also clear that even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Id.* at 69 n.23.

cally recognized judicial power,"³² and are defined as "the liability of one individual to another."³³ Adhering to this distinction, Congress could avoid conferring article III court jurisdiction merely by altering the party structure in a dispute, as by replacing the private plaintiff with a government prosecutor.³⁴ However, there are limits to classifying actions as disputes involving public rights, and the classification, no doubt, must rest on specific statutory policy, "the enforcement of which is committed to public authorities."³⁵ Thus, even a suit involving a private right may be subject to decision making by an agency, provided that a judicial court determines the law on appeal, and provided that the matter is not one entitled to a jury trial at common law.³⁶

32. *Id.* at 70.

33. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). In *Northern Pipeline* the major issue was whether the federal district court or the Bankruptcy Court had jurisdiction. 458 U.S. at 71. Northern Pipeline Construction Company filed a petition for reorganization under Chapter 11 of the Bankruptcy Act in the United States Bankruptcy Court. Northern subsequently filed a suit in the Bankruptcy Court against Marathon Pipe Line Company seeking damages for an alleged breach of contract and warranty, misrepresentation, coercion, and duress. The question of whether the Bankruptcy Court had jurisdiction turned on whether the dispute was a "private rights" or a "public rights" controversy. The Court held that the subject of the suit involved a "private rights" controversy between Northern and Marathon, and that jurisdiction resided not in the Bankruptcy Court, but in a federal district court. *Id.*

[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not.

Id.

Both the appellee's brief in support of petition for rehearing and an amici curiae brief filed in support of the petition for rehearing in *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 53 OKLA. B.J. 2476 (Oct. 19, 1982), used the Supreme Court's decision in *Northern Pipeline* to support their argument that the controversy did not arise between Oklahoma and the parties to the action, but rather was a controversy strictly involving private rights between Tenneco and El Paso. *See* Brief in Support of Petition for Rehearing at 13-15, *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 53 OKLA. B.J. 2476 (Oct. 19, 1982); Brief of Amici Curiae in Support of Petition for Rehearing at 10-11, *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 53 OKLA. B.J. 2476 (Oct. 19, 1982).

34. One author notes that "the National Labor Relations Board can constitutionally be given power to order an employer to pay back wages to an employee whom he has discharged in violation of the statute." L. JAFFE, *supra* note 26, at 90. By adjudicating the dispute in a Board proceeding, the right vindicated is not the employee's, but rather the public's. *Id.* (discussing *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940)).

35. L. JAFFE, *supra* note 26, at 90. In *Northern Pipeline* the Court found that the Bankruptcy Courts established by Congress threatened to supplant the independence of the judicial system by granting broad judicial power to non-article III bankruptcy judges. 458 U.S. at 73. However, the Court recognized that it had previously sustained the use of administrative agencies and magistrates as adjuncts to Art. III courts. *Id.* at 77-79.

36. L. JAFFE, *supra* note 26, at 91; *see, e.g.*, *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (no seventh amendment right to jury trial in government initiated penalty proceeding paralleling common law private litigation remedies). The Court in *Crowell v. Benson*, 285 U.S. 22 (1932) seemingly was prepared to allow administrative adjudication of almost any issue so long as judicial review was retained and no other constitutional rights were infringed. *See* L. TRIBE, *supra* note 26, at 43. *Crowell* involved the adjudication

Thus, in creating public rights, Congress creates new causes of action and remedies, and places their enforcement in a tribunal which will supply expert and quick resolution of the issues.³⁷ Statutorily derived causes of action are cases where the government, in its sovereign capacity, is wholly involved in enforcing public rights. "Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated."³⁸ This is not to say, however, that private rights are not inherently a part of or involved in congressionally created public rights.³⁹

In many states the law is similar to that of the federal public rights concept.⁴⁰ The same difficulty exists in drawing a distinction between public and private rights to define agency jurisdiction. In one state, a court held that an award of workmen's compensation was a judicial function of a court by virtue of the fact that it involved a determination of the rights and liabilities between individuals.⁴¹ Another state's court held that the power to award reparations based on an unreasonable rate must be given to a court because a determination of whether one person was entitled to recover damages from another was involved.⁴² Such decisions demonstrate the inadequacy of the public rights doctrine for determining an agency's jurisdiction on an issue involving a public or private right. Since many so-called "publicly created rights"

of congressionally-created rights. The Supreme Court, however, has sustained the use of adjunct factfinders even in the adjudication of constitutional rights, as long as those adjuncts were subject to sufficient control by an article III court. *See United States v. Raddatz*, 447 U.S. 667 (1980). The Court stated: "Congress focused on the potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions The legislative history discloses that Congress purposefully used the word *determination* rather than *hearing*, believing that Art. III was satisfied if the ultimate adjudicatory determination was reserved to the [judicial process]." *Id.* at 676 (emphasis in original).

37. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461 (1977).

38. *Id.* at 458.

39. *See, e.g., Reconstruction Fin. Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943) (SEC determined amounts owed to lawyers and managers in a reorganization); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (action to compel the payment of lost wages to an employee discharged in violation of a statute).

40. *See Stehle v. State Dep't of Motor Vehicles*, 229 Ore. 543, 368 P.2d 386 (1962). *See generally* L. JAFFE, *supra* note 26, at 94-98 (discussion of judicial power of state agencies).

41. *See State v. Mechem*, 63 N.M. 250, —, 316 P.2d 1069, 1070 (1957). The court said that "[t]his is not to say that the legislature, in the exercise of its police powers, may not confer 'quasi-judicial' power on administrative boards for the protection of the rights and interest of the public," but not "to a determination of rights and liabilities between individuals." *Id.*

42. *State ex rel. Missouri Pac. R.R. v. Public Serv. Comm'n*, 303 Mo. 212, 259 S.W. 445 (1924). In a suit for reparations for unreasonable freight charges the Missouri Public Service Commission entered an order awarding the reparations. The Missouri Supreme Court held the suit was a claim for damages which the Public Service Commission could not hear and determine. *Id.* at 218, 259 S.W. at 447.

inherently encompass private rights, applying the public rights doctrine to individual cases may be difficult, if not impossible.

B. *Primary Jurisdiction*

Primary jurisdiction is a court-created doctrine of judicial deference to an administrative agency to which a legislature has delegated certain of its powers.⁴³ Public rights inquiries usually arise when the legislature has arguably overstepped its constitutional bounds in delegating powers to another entity. In contrast, questions of primary jurisdiction usually arise when the jurisdiction of an agency already rests on a well-developed statutory policy and the court finds an accepted mechanism exists for solving the issues.

The "outstanding feature" of the doctrine of primary jurisdiction is "its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies."⁴⁴ The doctrine is "an attempt to resolve both the procedural and substantive conflicts inevitably created when there is carved out for an agency an area of original jurisdiction . . . of the courts."⁴⁵ The function of primary jurisdiction is "to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court."⁴⁶

The United States Supreme Court has offered one explanation for primary jurisdiction: "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."⁴⁷

43. F. COOPER, *supra* note 8, at 562-72.

44. See *CAB v. Modern Air Transp., Inc.*, 179 F.2d 622, 625 (2d Cir. 1950) (citations omitted).

45. L. JAFFE, *supra* note 26, at 121.

46. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 19.01, at 373 (3d ed. 1972); see S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 992-1012 (1979) (discussion of primary jurisdiction).

The doctrine of primary jurisdiction must be distinguished from the doctrine of exhaustion of administrative remedies, which is primarily concerned with the time and stage of the proceedings, and is based upon the general principle that administrative remedies must be exhausted before resorting to the courts. Primary jurisdiction is the principle which determines whether the court or the agency should make the initial decision on the matter at issue. Further explanation of the differentiation between the two doctrines may be found in L. JAFFE, *supra* note 26, at 121; see S. BREYER & R. STEWART, *supra*, at 960-92.

47. *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 767 (1947). The *Hirsch* case

The doctrine most often arises when a party has begun an action in court and the court withholds relief because an issue might more appropriately be decided by an administrative agency.⁴⁸ In such a case the court will usually retain the case on its own docket and refer the party to the agency for initial determination. However, if the court decides that the agency's jurisdiction is not only primary, but also exclusive, it may remove the case from its own docket and refer it to the agency for its sole determination.⁴⁹

Primary jurisdiction situations often arise from the specific context of statutory arrangements. "It is undoubtedly an implied aspect of the statutory purpose that a specialized administrative tribunal has been created to deal with problems in a certain area; statutes setting up agencies may be assumed to focus the solution of the problem in terms of the development of special competence."⁵⁰ The Supreme Court has stated that in certain types of litigation, practical considerations compel a division of functions between court and agency in that the agency makes a preliminary and comprehensive investigation of all the facts, analyzes them, and applies the appropriate statutory scheme.⁵¹ Thus, primary jurisdiction is a device to prepare the way, if the litigation

involved an attempt to obtain on-the-merits judicial review of administrative action before the administrative review was complete. The Supreme Court held that the district court could not grant relief because Congress "clearly . . . intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place. . . ." *Id.* at 771.

48. See Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 *RUTGERS L. REV.* 867, 878-90 (1976) (discussion of appropriateness of judicial or agency action).

49. *Id.* Professor Botein breaks the doctrine of primary jurisdiction down into at least four major individual doctrines, two of which are relevant here: exclusive jurisdiction and true primary jurisdiction. Under exclusive jurisdiction a court loses all power over a case except the limited ability to review any agency action which ensues. *Id.* at 868-71; see *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). With true primary jurisdiction the agency has the initial opportunity to consider a legal issue or to find facts, but the court reserves the ultimate power to render judgment. Botein, *supra* note 48, at 868. True primary jurisdiction reflects the idea of concurrent jurisdiction between agencies and courts. *Id.* at 876-77; see *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940). Some scholars decline to categorize primary jurisdiction in the manner Botein has. Instead they regard primary jurisdiction as essentially applying where exclusive jurisdiction rests with an agency, and they regard true primary jurisdiction as only an aberration. Jaffe, *Primary Jurisdiction*, 77 *HARV. L. REV.* 1037, 1054-59 (1964).

Primary jurisdiction is ordinarily pro tanto exclusive jurisdiction; insofar as the agency has jurisdiction it excludes the courts. But a court, though not competent to decide one of the issues, may still have jurisdiction over the cause of action to which decision of the issue is relevant. The jurisdiction of the court will extend to the remaining issues and to the relief to be granted.

L. JAFFE, *supra* note 26, at 121.

50. L. JAFFE, *supra* note 26, at 124.

51. See *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958).

should take a judicial course, for a more informed and accurate determination by the court of the scope and meaning of the underlying statute as applied to the particular issues at hand.⁵²

The development of the doctrine of primary jurisdiction in the federal courts coincides with the development of the federal administrative agencies.⁵³ As increased powers were delegated to agencies by Congress, controversies calling for administrative discretion had to be determined by administrative tribunals rather than courts. It follows that certain questions are primarily within the jurisdiction of the administrative commission charged with that particular field of regulation. This is particularly true with regard to regulated industries.⁵⁴ The degree of regulation of some industries is so broad and systematic that it "tends to choke out the normal jurisdiction of the courts."⁵⁵

Since statutory purposes are seldom so explicit that it is possible to determine in all situations where primary jurisdiction may lie, the courts have created guidelines.⁵⁶ Often the principal criterion in determining whether the doctrine is applicable is not legislative intent as expressed in a statute, but judicial appraisal of the need for deference to an administrative agency.

One of the first major cases to address the doctrine of primary jurisdiction was *Texas & Pacific Railway v. Abilene Cotton Oil Co.*,⁵⁷ in which an oil company sued a railroad to recover rate charges it believed it had overpaid to the railroad. The Supreme Court, while acknowledging that the action could very well be maintained at common law, held that a shipper was initially required to bring his claim for an overcharge before the Interstate Commerce Commission (ICC).⁵⁸ The Court rationalized its holding on the need for uniformity and equality of rates. If the determination of fair rates were made by the courts

52. *Id.*

53. See Botein, *supra* note 48, at 868.

54. One authority states:

When no such pervasive regulation is provided for, as is the case with the Labor Board and the Trade Commission, and when Congress has seen fit explicitly to confer concurrent jurisdiction on the courts as to practices within the agency's field, the courts generally have exercised that jurisdiction without prior recourse [to the agency].

L. JAFFE, *supra* note 26, at 124 (footnote omitted).

55. *Id.*

56. See *infra* notes 72-75 and accompanying text.

57. 204 U.S. 426 (1907).

58. *Id.* at 448. The Interstate Commerce Act, while giving the ICC the power to hear a shipper's claim that a particular rate was unreasonable, also provided that "[n]othing in this act . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." *Id.* at 446.

instead of the ICC, a uniform standard of rates would be impossible unless all courts reached an identical conclusion.⁵⁹ Thus, the Court's opinion suggested that the Interstate Commerce Act abolished a preexisting common law remedy and created a new remedy that the ICC would enforce.⁶⁰

While the *Abilene* opinion was very broad in its analysis of the ICC's jurisdiction, it is not clear if the jurisdiction granted the ICC was exclusive or primary. However, subsequent ICC cases have largely limited the primary jurisdiction doctrine to questions of fact and questions which require agency expertise.⁶¹ In the *Abilene* decision, the Court was in all likelihood attempting to structure some broad standards to protect the newly formed ICC from judicial encroachment,⁶² but out of these standards have emerged some basic rationales for applying primary jurisdiction.

The Court in *Abilene* addressed the need for uniformity and equality of rates.⁶³ Likewise, the Court in *Far East Conference v. United States*⁶⁴ raised the issue of the necessity of uniformity and consistency in the regulation of businesses entrusted to agency regulation.⁶⁵ Primary jurisdiction is a recognition of the need for orderly and sensible coordination of the work of agencies and courts. Such coordination serves to reduce conflicting regulatory requirements and thereby makes agencies more responsive to the problems they were created to resolve.

59. See *id.* at 440-41. If left to court determination, the rate standard would fluctuate depending on the divergent conclusions reached by the various courts that would consider the subject as an original question.

60. See *id.* at 446.

61. See, e.g., *Great N.R.R. v. Merchants Elevator Co.*, 259 U.S. 285 (1922). The Court in *Merchants Elevator* stated:

Preliminary resort to the Commission is required . . . [where] the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.

Id. at 291. In *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956), the Court stated that "[n]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.* at 64; see also K. DAVIS, *supra* note 46, at 375 (limitation of primary jurisdiction doctrine).

62. See Botein, *supra* note 48, at 879.

63. See 204 U.S. at 440-41.

64. 342 U.S. 570 (1952).

65. See *id.* at 574-75. However, it has been said that questions of law may still be determined in the first instance by courts and uniformity could be secured through review by the Supreme Court. L. JAFFE, *supra* note 26, at 127.

Another major justification for judicial deference is administrative expertise.⁶⁶ This justification operates on the premise that agencies develop special expertise in their area of administration which judges are unable to develop. The Court in *Far East Conference* said that cases raising issues of fact not within the realm of judges' experience or cases requiring the discretion of the administrative agency should be left to that agency's administrative process.⁶⁷ This is so even though the facts, after they have been appraised by the specialized competence of an administrative agency, serve as a premise for judicially defined legal consequences.

Primary jurisdiction is justifiable on the basis of the more expeditious action administrative agencies often afford, as well as the competency of agencies to fashion relief for broad classes.⁶⁸ Underlying many of these rationales for primary jurisdiction is the understanding that whether an agency is expert or not, a court normally should not act upon subject matter that is specifically, or even tangentially, within an agency's area of regulation without first taking into consideration what the agency has to offer in the resolution of the issues presented.⁶⁹

Many of the states follow the federal rules of primary jurisdiction when determining the jurisdiction of their administrative agencies.⁷⁰

66. Professor Botein calls this a questionable justification for judicial deference. He writes that agency members rarely are with an agency long enough to develop specialized knowledge, that high level staffers are rarely competent, and that agencies really do not develop a fund of knowledge and information that is sufficiently specialized to make the agency highly expert in its delegated field. Botein, *supra* note 48, at 879.

67. See 342 U.S. at 574. In *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958), the Court stated that "in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed." *Id.* at 498.

Professor Jaffe writes that it is not the presence of agency expertise, but the pervasive and systematic character of some agencies' regulation which tends to check the normal jurisdiction of the courts. Jaffe, *supra* note 49, at 1040-41. Jaffe states: "Primary jurisdiction situations thus arise, in each instance, in a specific context of statutory and, in some cases, common law arrangements and cannot be resolved by the single abstraction of administrative expertness." *Id.* at 1041.

68. See Botein, *supra* note 48, at 880-83. Professor Botein says that "one of the traditional reasons for creating agencies has been to expedite proceedings." *Id.* at 880 (footnote omitted). However, he also says that "any major adjudication is likely to proceed as tortuously before an agency as before a court." *Id.* Regarding competency to fashion broad relief, a complaint before an agency may receive more adequate relief on the basis that the agency can frame its order to develop future rules to govern similar situations, while the court is primarily concerned with past conduct and is restricted to the facts of a particular case. Note, *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts*, 51 HARV. L. REV. 1251, 1253 (1938).

69. See *supra* notes 63-68 and accompanying text.

70. See *Superior Oil Co. v. Humble Oil & Ref. Co.*, 257 La. 207, 241 So. 2d 911 (1970); *Arnstad v. Industrial Comm'n*, 122 N.W.2d 857 (N.D. 1963); *Oklahoma Natural Gas Co. v. White Eagle Oil Co.*, 312 P.2d 879 (Okla. 1957); *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 29, 344

However, the state courts appear to more strictly adhere to the limitations of its applicability.⁷¹ Thus, state courts frequently operate with a greater amount of discretion in applying primary jurisdiction, and the doctrine is not viewed as an inflexible mandate to resort to administrative agencies.⁷² Primary jurisdiction is generally applied when the court believes that considerations of policy recommend the issue be left to the administrative agency for initial determination.⁷³ State courts more frequently require the doctrine's usage when public utility commissions are involved in a controversy, probably because of the technical complexities often involved in such cases.⁷⁴ However, a major principle remains that when an issue is inherently judicial, the court should retain its jurisdiction unless exclusive jurisdiction has been specifically granted to an administrative agency.⁷⁵

S.W.2d 411, 414 (1961); *Public Utils. Bd. v. Central Power & Light*, 587 S.W.2d 782, 787 (Tex. Civ. App. 1979); *Kavanaugh v. Underwriters Life Ins. Co.*, 231 S.W.2d 753 (Tex. Civ. App. 1950); see also F. COOPER, *supra* note 8, at 563 (Cooper says state and federal courts are in agreement that primary jurisdiction should apply when there is reason to take advantage of administrative expertness and to attain uniformity of application of regulatory laws.).

71. Cooper says that in federal courts the use of primary jurisdiction has outgrown the limitations suggested by the reasons originally given for its existence:

It has become a requirement of general applicability, enforced even in cases in which the considerations that led to its announcement do not apply. It has been applied to issues of jurisdictional fact, issues as to the unreasonableness of administrative regulations, and to cases in which the administrative agency could give only part of the relief that plaintiff sought. Such extensions of the rule have been criticized by Professor Louis Jaffe, who suggested in a penetrating study: "The doctrine of primary jurisdiction is a valid one so far as necessary to avoid contradiction, confusion, and wastefulness. Beyond that, its use should be sparing."

F. COOPER, *supra* note 8, at 564 (citations omitted) (quoting Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 604 (1954)).

72. See, e.g., *Miller Bros. Co. v. State*, 201 Md. 535, 540, 95 A.2d 286, 288 (1953), *rev'd on other grounds*, 347 U.S. 340 (1954) ("[W]here a constitutional issue is raised, and there is no danger of by-passing administrative action, the question may properly be decided in a suit for injunction or declaratory decree. . . ." *Id.*); *Southern Bell Tel. & Tel. Co. v. State ex rel. Transradio Press Serv.*, 53 So. 2d 863, 866 (Fla. 1951). In a suit to compel a telephone company to install teletypewriter service the *Southern Bell* court accepted initial jurisdiction and stated: "[W]hile we think [the suit] should have been brought before the Commission the question is here and squarely presented, so we are disposing of it rather than imposing the burden on litigants of litigating the cause in another forum." *Id.*

73. See, e.g., *Jacob Goodman & Co. v. New York Tel. Co.*, 309 N.Y. 258, 128 N.E.2d 406 (1955). In *Jacob*, the court declined to issue a declaratory judgment determining whether a telephone company was illegally charging a tax on tax-free calls. The court emphasized that the relief sought by the plaintiff was so drastic that it would better serve the public interest if the public service commission first considered the matter. *Id.* at 266-67, 128 N.E.2d at 408-09.

74. See *Marion Trucking Co. v. McDaniel Freight Lines*, 231 Ind. 519, 108 N.E.2d 884 (1952); *State ex rel. Taylor v. Nangle*, 360 Mo. 122, 227 S.W.2d 655 (1950); *Central Hudson Gas & Elec. Corp. v. Napolitano*, 227 A.D. 441, 101 N.Y.S.2d 57 (1950); see also F. COOPER, *supra* note 8, at 566-68 ("The state courts frequently require prior resort to public utilities commissions, evincing a belief that in this field there are involved technical and complex questions, and that therefore the classic reasons for requiring prior resort are fulfilled." *Id.* at 566-67).

75. See 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 70.4, at 317 (1978).

IV. DEVELOPMENT OF THE CORPORATION COMMISSION'S AUTHORITY

A. *The Oklahoma Corporation Commission*

The framers of the Oklahoma Constitution believed in a strict separation of the legislative, executive, and judicial powers. To the explicit prohibition of the mixture of powers they added the qualification "properly."⁷⁶ However, the Oklahoma Supreme Court has stated with reference to this exception that "[t]he makers of the Constitution recognized the difficulty in separating by hard and fast rule the functions of the three branches of government."⁷⁷ The constitutional separation of powers was qualified further by the statement that it should not apply to those exceptions "provided in this Constitution."⁷⁸ A major exception was the establishment of the Oklahoma Corporation Commission with extensive powers over the rates, services, and public duties of agencies of transportation and communication.⁷⁹ In addition to rulemaking and regulatory authority, the Commission was expressly given "the powers and authority of a court of record."⁸⁰ Thus, because it is an agency created by the Oklahoma Constitution, the Commission is not governed by provisions of the constitution relating to the separation of powers. As a result, the Commission not only has power to make legislative orders, but it has certain judicial powers including the authority to adjudicate and to punish violations of its orders by citation for contempt and by the levy of fines.⁸¹ Additionally, the constitution

76. "[T]he Legislative, Executive and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others." OKLA. CONST. art. IV, § 1.

77. *State Bar v. McGhee*, 148 Okla. 219, 225, 298 P. 580, 586 (1931).

78. OKLA. CONST. art. IV, § 1.

79. *Id.* art. IX, §§ 15-19, 25, 27-34.

80. *Id.* § 19.

81. *Id.* § 19; OKLA. STAT. tit. 17, § 2 (1981); see *Williams v. Oklahoma Natural Gas Corp.*, 89 F.2d 416, 421 (10th Cir. 1937) (the Commission is defined as having legislative, executive and judicial powers). See generally DeBois, *Practice and Procedure Before the Corporation Commission of the State of Oklahoma*, 7 OKLA. L. REV. 173 (1954) (discussion of jurisdiction and powers of Corporation Commission).

The United States Supreme Court has dealt with the powers of a state to delegate authority among its three branches of government. In *Dreyer v. Illinois*, 187 U.S. 71 (1902), the Court stated:

Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.

Id. at 84. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), the Court stated: "[W]hen . . . a state constitution sees fit to unite legislative and judicial powers in a single hand, there is

allows the Oklahoma Legislature to give the Commission new powers of rulemaking and adjudication in subjects within its constitutional purview or in new areas of regulation.⁸²

The Oklahoma Legislature placed custody over enforcement of the Oklahoma Oil and Gas Conservation Act of 1933 in the Corporation Commission⁸³ "as part of an express public-law framework for the protection of public interest in natural resources."⁸⁴ The Oklahoma Supreme Court interpreted the statute as being a legislative delegation to the Commission to fashion the terms of pooling orders and to subsequently enforce them.⁸⁵ Additionally, when disputes arise regarding these legislatively created public rights, the Commission has the authority to adjudicate them, subject to review by the Oklahoma Supreme Court.⁸⁶

The Corporation Commission has only the jurisdiction and authority which is expressly or by necessary implication conferred on it by the state constitution and by statute.⁸⁷ However, the Commission's authority is fairly far reaching⁸⁸ and its jurisdiction, while limited, does extend to enforcing, interpreting, and clarifying its orders.⁸⁹ Undenia-

nothing to hinder so far as the Constitution of the United States is concerned." *Id.* at 225 (citations omitted).

82. OKLA. CONST. art. IX, § 35; *see, e.g.*, *Croxton v. State*, 186 Okla. 249, 97 P.2d 11 (1939) (Corporation Commission could make adjustments of contributions to cost of well by owners of interests included in drilling unit); *Russell v. Walker*, 160 Okla. 145, 15 P.2d 114 (1932) (regulation of oil production vested in Corporation Commission); *see also* Merrill, *The Administrative Law of Oklahoma*, 4 OKLA. L. REV. 286, 289-90 (1951) (legislature is authorized to confer various powers and duties on the Commission, and to amend or repeal sections of the constitution relating to the Commission).

83. *See* OKLA. STAT. tit. 52, §§ 81-287.15 (1981 & Supp. 1983). The Corporation Commission's authority to force pooling of oil and gas interests in an established spacing unit derives from OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1983).

84. *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 53 OKLA. B.J. 2476, 2481 (Oct. 19, 1982).

85. *Id.* at 2481.

86. OKLA. CONST. art. IX, § 20 (provides that "[n]o court of this State, except the Supreme Court, shall . . . enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties. . . ."); *see* OKLA. STAT. tit. 52, § 111 (1981).

87. *Merritt v. Corporation Comm'n*, 438 P.2d 495, 497 (Okla. 1968). The court said that the "Corporation Commission is a tribunal of limited jurisdiction, and that it has only such jurisdiction and authority as is expressly or by necessary implication conferred upon it by the Constitution and statutes of this state." *Id.*

88. *See* Merrill, *supra* note 82, at 298-99.

89. *See* *Constantin v. Martin*, 216 F.2d 312, 317 (10th Cir. 1954) The court stated: "Martin and others should have resorted first to the Commission for an administrative remedy, namely, an interpretation, and . . . a clarification of the provisions relating to allocation and disposition of Unit production. Not having exhausted their administrative remedies, Martin and others are not entitled to judicial relief." *Id.*; *see also* Williams, *Nature and Effect of Conservation Orders: Their Finality, Modification, Restriction on Production and Consequences of Violation—Duty of Lessees*, 8 ROCKY MTN. MIN. L. INST. 433, 446 (1963). Williams states:

The practice of interpreting or clarifying its orders is quite prevalent with the Oklahoma

bly, one method for strengthening the administrative order is to grant the agency summary powers.⁹⁰ Granting such powers puts the agency in a position to give its orders the proper effect, and is a reasonable exercise of its police power.⁹¹

In *Tenneco*, the court upheld the adjudicatory powers of the Corporation Commission by holding that the Commission, rather than the district court, retains adjudicative authority over Commission orders.⁹² Although couching its decision in terms of a vague federal constitutional distinction between private and public rights,⁹³ the court was actually laying the foundation for application of the doctrine of primary jurisdiction. Under this doctrine relief must be sought in the administrative agency with cognizance over the issue before judicial relief may be sought.

B. *Administrative Jurisdiction in Oklahoma*

Administrative jurisdiction in Oklahoma has been narrowly circumscribed. In *Central States Power & Light Corp. v. Thompson*,⁹⁴ the Oklahoma Supreme Court held that the Corporation Commission could not determine whether a purchaser of natural gas was to be charged under the industrial or domestic rate, even though the Oklahoma Corporation Commission established the rates. The court held that when a matter is of purely private concern between a public utility and one of its patrons, the courts have jurisdiction over the con-

Corporation Commission. In some instances, the courts have withheld action in determining the rights of parties litigant under a conservation order until the parties could apply to the Corporation Commission for an order clarifying such action. This is on the ground that the Commission is best qualified to interpret its own orders.

Id. (footnote deleted).

90. See E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 153 (1928).

91. See *Helmerich & Payne, Inc. v. Corporation Comm'n*, 532 P.2d 419, 422 (Okla. 1975); see also E. KUNTZ, *supra* note 75, at 314 (1978) (jurisdiction of state oil and gas regulatory commissions).

92. 53 OKLA. B.J. at 2482.

93. This confusion is evident in the briefs submitted on petition for rehearing in *Tenneco*. Both the appellee's brief in support of petition for rehearing and an amici curiae brief filed in support for rehearing rely on a private rights argument in support of their thesis that the Corporation Commission should have no jurisdiction over an operating agreement. See Brief in Support of Petition for Rehearing at 9-19, *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 53 OKLA. B.J. 2476 (Oct. 19, 1982); Brief of Amici Curiae in Support of Petition for Rehearing at 2-13, *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 53 OKLA. B.J. 2476 (Oct. 19, 1982). Such a distinction between private and public rights can raise countless similar arguments because it is a vague and often imperceivable distinction. Rather, jurisdiction should be based on a clearcut statutory basis that leads to judicial reliance on regulatory agencies when an issue is raised in their administrative province.

94. 177 Okla. 310, 58 P.2d 868 (1936).

trover. ⁹⁵ This strict demarcation between public concerns and private disputes extends through a long line of Oklahoma cases, ⁹⁶ with one case even stating that a statute purporting to convey administrative jurisdiction over a private matter is unconstitutional. ⁹⁷

The *Central States Power* decision has been criticized for disrupting the uniformity of a rate structure by allowing controversies surrounding rates to be decided by courts lacking the expertise of an administrative agency. ⁹⁸ A major problem with basing primary jurisdiction on a public/private interest distinction is that most problems affected by primary jurisdiction have both public and private aspects. ⁹⁹ Additionally, unwarranted emphasis on the private concerns, as opposed to the public interests, could diminish the effectiveness of administrative control in situations where the public interest may be affected indirectly, but substantially. ¹⁰⁰ The public/private interest distinction

95. *Id.* at 312, 58 P.2d at 869.

96. *E.g.*, *Burmah Oil & Gas Co. v. Corporation Comm'n*, 541 P.2d 834, 835 (Okla. 1975) (While the Commission has general supervision over public utilities and common carriers, and a power to prescribe rates, requirements, and other regulations affecting the services of public utilities and common carriers, it does not have jurisdiction to enforce a statute requiring a pipeline company to connect a premises with a pipeline.); *Gibson v. Elmore City Tel. Co.*, 411 P.2d 551, 553 (Okla. 1966) ("The Corporation Commission has no jurisdiction over a controversy between two private concerns."); *Southwestern Light & Power Co. v. Elk City*, 188 Okla. 540, 541-42, 111 P.2d 820, 821 (1940) ("While the Corporation Commission has complete authority and jurisdiction in rate-making cases to fix utility rates, and in proper cases may order refund of excessive rate collections over the legal rate, there is no authority to construe contractual rights and to decree a right to a reduction by contract . . . and thereupon to render judgment for a refund calculated on such a reduction."); *Smith v. Corporation Comm'n*, 101 Okla. 254, 256, 225 P. 708, 709 (1924). The *Smith* court held with regard to the authority of the Commission: "Its jurisdiction is limited to those controversies wherein the rights of a public utility and the patrons thereof are involved. It has no power or jurisdiction to adjudicate differences between private litigants of purely private matters between a utility and a citizen." *Id.*

97. *St. Louis-San Francisco Ry. v. State*, 268 P.2d 845, 851 (Okla. 1953). However, Professor Merrill says that the constitutional theory of this case is vague and rests on the premise that the Corporation Commission was created by the Oklahoma Constitution solely to enforce "public duties." Merrill, *Compulsory Unitization and Individual Interests: Judicial or Administrative Jurisdiction?*, 8 OKLA. L. REV. 389, 405 n.85 (1955).

98. Note, *supra* note 68, at 1259.

99. While particular matters may be regulated by an administrative agency, private concerns still lie at the core of the regulation. In *Tenneco*, because a pooling order had been entered by the Corporation Commission, the Oklahoma Supreme Court held that the dispute came within the public-interest purview of the Commission. *Tenneco*, 53 OKLA. B.J. at 2483. However, private concerns were included and the claim brought to the district court was couched in terms of equity and private rights.

100. Merrill, *supra* note 97, at 405. Professor Merrill expresses doubt that *Central States Power* reflects the true doctrine in Oklahoma. "There is authority for the entertainment of a private dispute by the Corporation Commission where public interests might be affected by the outcome." *Id.* at 405-06 (citing *Western Union Tel. Co. v. Carter*, 93 Okla. 269, 220 P. 635 (1923)). In a more recent case, which expresses a broader perspective of the Commission's jurisdiction, the court stated that the "Commission exercises legislative, judicial and executive powers limited only by the Constitution and Statutes." *Continental Tel. Co. v. Hunter*, 590 P.2d 667, 668

has also been criticized because it may unfairly confer jurisdiction in favor of the agency "by an unwarranted disposition to treat administrative actions . . . as manifestations of some abstract 'public interest' quite divorced from private claims and pressure.¹⁰¹ Agency and court may be equally representative of public policy.¹⁰²

The Oklahoma Supreme Court again raised the public interest/private rights dichotomy in *Southern Union Production Co. v. Corporation Commission*.¹⁰³ The court held that the Corporation Commission could not construe or interpret an order it had entered, unless the act of interpretation constituted the exercise of a power entrusted to the Commission by statute.¹⁰⁴ *Southern Union* concerned a Commission order that purported to interpret the legal effect of a previous pooling order. Under the first pooling order, Eason Oil Company elected to accept bonus monies from Southern Union rather than join in the drilling of a well in the unit. Although Southern Union drilled and abandoned a well that did not produce, Eason continued to make delay rental payments under the leases.¹⁰⁵ Eason regarded Southern Union's rights under the terms of the pooling order to have terminated, and filed an application with the Commission to have the previous spacing unit deleted. Southern Union disputed the loss of its rights under the pooling order, and Eason subsequently requested the Commission to interpret the order and determine the remaining interests. The Commission complied with the request and entered an order interpreting its pooling order in a manner consistent with Eason's position. The Oklahoma Supreme Court held that the Commission did not have jurisdiction to issue such an interpretation. The court construed the dispute as involving private rights over which the Commission had no jurisdiction.¹⁰⁶

(Okla. 1979). In a special concurrence, Justice Opala said that the state constitution reposes in the Commission "exclusive original jurisdiction over rate-making. . . . This conclusion, which appears on its face somewhat unreasonable and overly restrictive (in that it deprives consumers of access to the ordinary courts . . .), is essential to preserve inviolate the commission's constitutional responsibility to protect the rate-paying public as a whole." *Id.* at 669-70 (emphasis in original).

101. Jaffe, *supra* note 49, at 1041.

102. *Id.*

103. 465 P.2d 454 (Okla. 1970). A critique of this case may be found in Hart, *Interpreting Corporation Commission Orders—Should the Commission be a Spectator or a Player?*, 48 OKLA. B.J. 1343 (1977).

104. 465 P.2d at 458.

105. *Id.* at 456-57.

106. *Id.* at 458. The court stated:

We are unable to see where such an order is properly within the statutory power of the Commission "to prevent or to assist in preventing the various types of waste of oil or gas

However, in *Cabot Carbon Co. v. Phillips Petroleum Co.*,¹⁰⁷ the court clearly recognized the power of the Commission to clarify its previous orders without encroaching on the exclusive province of the courts.¹⁰⁸ The Oklahoma Supreme Court recently distinguished *Cabot Carbon* and *Southern Union* by noting that the Commission's order in *Southern Union* represented the Commission's opinion as to the *legal effect* upon Southern Union's rights when that company drilled its test well and subsequently plugged it.¹⁰⁹ The court said since such an order was not expressly or impliedly authorized by either the Oklahoma Constitution or statute, it was beyond the power of the Commission to enter.¹¹⁰ However, the court appears to be stretching the facts in concluding the Commission's order adjudicates private issue of title. If an interpretive or clarifying order does not disturb rights vested by a prior order, there would appear to be no encroachment on the province of

prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, . . ." [OKLA. STAT. tit. 52, § 87.1(a) (1961)] as amended effective June 3, 1963. It is expressly stated in the order appealed from . . . that it is "limited to the interpretation of the pooling order and has no effect upon the spacing orders under which such pooling order was entered." In other words, the only "effect" of [the order] was to find that as between Eason Oil Company and Southern Union Production Company, the latter had no more rights in the horizons involved than it had before the Commission entered its first order

Id. at 457. Following citation of authority saying the Corporation Commission is a tribunal of limited jurisdiction, the court held:

We think, from even a casual reading of the Commission's [order], that it represents that body's option [sic] as to the legal effect upon the rights of Southern Union of that company's acts when it drilled its well into and tested the affected horizons and then subsequently plugged the well as a dry or an unprofitable well. While such an order could perhaps be valid if it was necessarily incident to the exercise of the statutory powers of the Corporation Commission to "prevent or assist in preventing (waste)," or, to protect the correlative rights of interested parties in a common source of oil and/or gas, such was not the intended, nor was it in fact, the effect of the [order].

Id. at 458.

107. 287 P.2d 675 (Okla. 1955).

108. *Id.* at 679. The appeal from a Commission order concerned whether gas taken from the Guymon-Hugoton Field should be paid for at the price specified in the parties' contract or at a price fixed by the Commission. Phillips Petroleum Company filed an application with the Commission for an order clarifying its previous orders, which had set the gas prices, and for an order in respect to overriding royalty payments which by private contract were payable at a fixed rate. *Id.* at 677. The Commission entered an order stating that the producer was not required to pay any royalty or overriding royalty in a sum in excess of that required in its contract. The Commission said its previous orders were intended to be interpreted and applied as a regulation of the production of gas from the field, by requiring that the producer realize a prescribed minimum price for the gas and that the royalty or overriding royalty owners be entitled to payment based on the minimum price the producer was required to realize. *Id.* Thus, the order appealed from was a clarification of previous orders. The court stated: "Nor can the Commission's power to clarify its previous orders be doubted under the specific wording of [OKLA. STAT. tit. 52, § 112 (1951)]. This power, as has been done in this case, can be exercised without invading the exclusive province of the Courts." *Id.* at 679.

109. *Amarex, Inc. v. Baker*, 655 P.2d 1040, 1044 (1983).

110. *Id.*; see *Southern Union*, 465 P.2d at 458.

the courts.¹¹¹

To further complicate matters, the Oklahoma Supreme Court recently issued an interpretation of the Commission's powers¹¹² that was contrary to the interpretation in *Southern Union*. In *Amarex, Inc. v. Baker*,¹¹³ the Oklahoma Supreme Court stated that when determining the jurisdiction of an administrative agency, one is not necessarily limited by the express intent of the enabling statute.¹¹⁴ Rather, "[p]owers may be implied as reasonably and necessarily incident to those expressly granted, and . . . where the Legislature gives power to a public body to do anything of a public character, the Legislature means also, to give . . . all rights, without which the power would become wholly unavailable. . . ."¹¹⁵ In *Amarex*, the court held that the jurisdictional powers vested in the Commission¹¹⁶ carry those implied powers necessary to review and determine the Commission's true intent as expressed in its orders issued within its legislatively prescribed powers.¹¹⁷

111. In the *Southern Union* decision three members of the court dissented and one, Justice Berry, wrote a dissenting opinion. 465 P.2d at 459. Justice Berry felt that the fact that the original order constituted a proper exercise of a power entrusted to the Commission by statute was sufficient. The later order, being an interpretation or clarifying order, did not need to be shown to constitute a proper exercise of the Commission's statutory power. Justice Berry stated: "Our basic concern is only whether interpretation or clarification of a prior, unappealed order involves adjudication of vested property rights of individuals." *Id.* If the interpretive or clarifying order does not have the effect of disturbing rights vested by the prior order, then there is no invasion by the Commission of the province of the courts in entering the second order. *Id.* at 460 (citing *Cabot Carbon Co. v. Phillips Petroleum Co.*, 287 P.2d 675 (Okla. 1955)).

Philip Hart submits that the Commission's order in *Southern Union* was an exercise by the Commission of its statutory power to protect correlative rights of interested parties pursuant to OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1983). Hart, *supra* note 103, at 1346.

112. *See Amarex, Inc. v. Baker*, 655 P.2d 1040 (Okla. 1983).

113. *Id.*

114. *Id.* at 1045.

115. *Id.* (quoting *Cabell v. City of Cottage Grove*, 170 Or. 256, 130 P.2d 1013 (1943)).

116. The jurisdictional powers are vested in the Commission by OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1983).

117. *Amarex*, 655 P.2d at 1045. "[T]he jurisdictional powers vested in the Commission under § 87.1(e) to determine development costs carries with it those implied powers which are necessary to review and determine the true intent of the Commission" *Id.* In *Amarex* the Commission had been asked to determine additional developmental costs under a pooling order due to loss of a hole after the surface casing broke off in the borehold. Other participating interests owners refused to carry these additional costs. The Commission dismissed the case stating: "(a) the application is an impermissible collateral attack on a prior Commission Order, prohibited by [OKLA. STAT. tit. 52, § 111 (1981)]; (b) the Commission cannot interpret or construe its own orders; and (c) the first Order . . . 'on its face provides specifically for one well and does not, as many Commission orders do, provide for the drilling of any additional, replacement, or twin well.'" *Id.* at 1042. The petitioner then applied to the Oklahoma Supreme Court to assume original jurisdiction and petitioned for writ of mandamus authorizing the Corporation Commission to accept jurisdiction of the cause. The court reversed the order and remanded the case to the Commission, "[s]ince the determination of development costs is a matter of continuing jurisdiction of the Commission" *Id.* at 1046.

Interestingly, the court in *Amarex* cited dictum from another recent case, *Crest Resources & Exploration Corp. v. Corporation Commission*,¹¹⁸ stating that if a dispute arises as to the reasonableness of expenditures in the event of a cost overrun under a pooling order, the Commission retains "primary jurisdiction to adjudicate finally the liability attachable to the interest holders."¹¹⁹ Thus, the court appears to be recognizing the exclusive jurisdiction of the Commission over such disputes. However, the rationale of *Crest Resources* is inconsistent with that of *Southern Union* because in *Southern Union* a private dispute arising from a pooling order was found to involve private rights and was thus not within the purview of the Commission. In *Crest Resources*, the dispute involved a private contract dispute arising from a pooling order, but the court affirmed the Commission's decision without the jurisdictional issue being raised.¹²⁰

V. CRITICISM OF *TENNECO*

In *Tenneco* a private contract dispute arising from a pooling order was held to be within the jurisdictional purview of the Commission.¹²¹ In fact, the court stated that whether or when the rights of the parties under the pooling order vested is a matter distinctly within the determination of the Commission.¹²² "It lies within its statutory mandate to 'protect correlative rights' and within its public-law jurisdiction over its own orders."¹²³ Thus, since the *Southern Union* decision the Oklahoma Supreme Court's view of the Corporation Commission's ju-

118. 617 P.2d 215 (Okla. 1980).

119. *Amarex*, 655 P.2d at 1043 (citing *Crest Resources & Exploration Corp. v. Corporation Comm'n*, 617 P.2d 215, 218 (Okla. 1980). In *Kirkman, Inc. v. Corporation Comm'n & Funk Exploration Inc.*, 676 P.2d 283 (Okla. Ct. App. 1983), the Oklahoma Court of Appeals reversed a Commission order that stated the Commission has no power to determine whether or not decisions made by a pooled unit operator were reasonable. The court stated: "A finding that the Commission has power to adjudicate whether costs are both required and reasonable would be in harmony with other case law. The Commission itself clearly recognizes this power when it adjudicates the proper rates for public utilities." *Id.* at 287.

120. *Crest Resources*, 617 P.2d at 218. In *Crest Resources*, the court prohibited a collateral attack on a Commission pooling order. The Commission refused to vacate its prior pooling order, and refused to decide an alternative plea for modification of the pooling order. The court affirmed the Commission's decision and held that absent a vitiating infirmity, a pooling order is *res judicata*. *Id.* at 218. The court held that once a unit operator's status is created by the Commission, the operator cannot pass that status to a third party via a private contract. Terms of a Commission order stand shielded from judicial assumption of authority over a private contract altering those terms. *Id.* at 217.

121. *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 53 OKLA. B.J. 2476, 2483 (Oct. 19, 1982).

122. *Id.*

123. *Id.* (quoting *Helmerich & Payne, Inc. v. Corporation Comm'n*, 532 P.2d 419 (Okla. 1975)).

risdiction seems to have become one of broad judicial deference to that administrative agency's adjudicative process.¹²⁴ However, in *Tenneco* the court's rationale still rests on the basis of the ambiguous public-private law distinction.¹²⁵ The court points out the confusion that often arises among litigants when confronted with a "duality of jurisdiction" between the district courts and the Commission.¹²⁶ However, there is no actual duality of jurisdiction. The court recently stated: "The power of the district court over a decision of the Commission is strictly confined to a facial examination by which to determine whether that administrative agency was vested with jurisdiction to make the order."¹²⁷ Thus, the district courts have no authority to interpret or construe pooling orders.

The court could have accomplished more in the *Tenneco* opinion if it had heeded its own suggestion when it stated that "a more workable test should be fashioned for resolving the all-too-frequent jurisdictional conflict between the cognizance of the Commission and that of the district courts."¹²⁸ A more workable test could have been fashioned from the doctrine of primary jurisdiction. In formulating a decision,

124. In *Tenneco*, the court cites Philip Hart's article *supra* note 103, which strongly criticizes the *Southern Union* decision. *Tenneco*, 53 OKLA. B.J. at 2483 n.3.

125. See 53 OKLA. B.J. at 2482. The court stated: "In matters created by the Legislature and assigned to the Commission's adjudicative authority, the lines of demarcation between the district court and the Commission must be drawn along the public-law/private-law borderline." *Id.* (emphasis in original).

126. *Id.* "The zones of authority over matters saved to the special jurisdiction of the Commission and those which are within the general powers of the district court have become increasingly blurred as the Legislature and the administrative agency developed new patterns of regulation which were unknown at common law." *Id.*

In *Stipe v. Theus*, 603 P.2d 347 (Okla. 1979), a dispute did result in what can be called a duality of jurisdiction between the Commission and the district court. In an action between a unit operator under a pooling order and a mineral owner who elected to participate in the unit, the interest owner made payments for his share of costs until a dispute arose about the reasonableness of the costs. The unit operator brought an action in district court for a money judgment, while the interest owner filed an application with the Commission asking it to determine costs. *Id.* at 348. The Oklahoma Supreme Court held that the pooled mineral owner was entitled to a stay of district court proceedings until the Commission reached a decision on the owner's application. *Id.* at 350. The Commission has statutory authority to determine costs in the event of a dispute over costs under a pooling order, but the district court has jurisdiction in an action to recover on an open account. *Id.* at 348-49. There is a discussion of *Stipe* in a recent Note, which takes the position that the court could have used the doctrine of primary jurisdiction. Note, *Administrative Law: Primary Jurisdiction in Stipe v. Theus?*, 34 OKLA. L. REV. 86 (1981). However, *Stipe* does not concern primary jurisdiction, but rather involves a question of tribunal priority.

127. *McDaniel v. Moyer*, 662 P.2d 309, 312-13 (Okla. 1983). The court also stated: "Cognizance to interpret and construe pooling orders would permit the district court to exercise a significant aspect of the Commission's regulatory authority. It would place the court in charge of an integral part of regulating the conservation and production of oil and gas." *Id.* at 312.

128. *Tenneco*, 53 OKLA. B.J. at 2482.

the Oklahoma Supreme Court should have considered the two major reasons for application of the doctrine of primary jurisdiction generally recognized in state courts: "to take full advantage of administrative expertness, [and] to attain uniformity of application of regulatory laws."¹²⁹ The power to regulate in the area of conservation of oil and gas is within the Oklahoma Legislature's constitutional delegation of its police powers to the Corporation Commission.¹³⁰ In placing such powers in the Commission the legislature recognized the need for the development of special competence in a complex field of regulation. Additionally, the efficiency of the administrative regulation of oil and gas conservation rests on the ability to maintain uniformity in application of regulatory law. If private litigants try to supersede that law by private arrangement they should not be allowed to bring a dispute arising from that arrangement in a district court which may view the issues differently than the regulatory agency. There is a need for litigants to have firm rules to follow in ascertaining the appropriate tribunal. The *Tenneco* decision fails to provide such guidance.

VI. CONCLUSION

While the Oklahoma Supreme Court can be commended for attempting to grant the Corporation Commission its constitutionally and statutorily due jurisdiction, the decision in *Tenneco Oil Co. v. El Paso Natural Gas Co.* is a disappointment. There is a definite need to refine the court's decisions concerning the jurisdictional reach of the Commission, but this opinion merely clouds the question. The public/private distinction is problematic and does little to aid the litigant in determining the appropriate tribunal. The court needs to clarify its decision and to lay specific guidelines for litigants and the courts. By constructing a usable doctrine of primary jurisdiction for determining the Commission's jurisdictional reach, the court would be taking a positive step in that direction.

Karin Johnson Chatfield

129. F. COOPER, *supra* note 8, at 563.

130. *Oklahoma Natural Gas Co. v. Choctaw Gas Co.*, 205 Okla. 255, 258, 236 P.2d 970, 975 (1951) ("Laws for the conservation [and regulation] of oil and gas represent a valid exercise of the police power of the State." *Id.*); see *Wickham v. Gulf Oil Corp.*, 623 P.2d 613, 617 (Okla. 1981).

