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### Primary Jurisdiction and the Limits of Measurement in Mass Litigation

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# Primary Jurisdiction and the Limits of Measurement in Mass Litigation

Jeff Lingwall and Nathan Leiter<sup>1</sup>

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## *Abstract*

*This Article examines the use of primary jurisdiction through the lens of institutional economics and the ongoing revolution in pre-suit, plaintiff-side testing in mass litigation. In this setting, primary jurisdiction serves a necessary pro-agency institutional role. The ability of plaintiffs' attorneys to easily*

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*generate sophisticated laboratory testing results has allowed them to create a quasi-regulatory quality-control regime for defendants' products and extract value from it through enhanced settlements. This offers defendants the burdens of regulation without the benefits of uniformity or policymakers with subject-matter expertise and capacity for public input. Primary jurisdiction enables defendants in mass litigation to move these quasi-regulatory actions back to regulatory settings, where the potential for efficient quality-control standards increases with agency expertise. Shifting decision-making in testing-based actions to agencies then preserves this value from conversion into litigation-based transaction costs. As scientific resolving power and the scope of potentially measurable harm evolve, primary jurisdiction thus functions as a central balancing mechanism allowing corresponding evolution in adjudication.*

## I. Introduction

“Something there is that doesn't love a wall . . . .”

~ Robert Frost<sup>2</sup>

A substantial literature in economics examines the tradeoffs of regulation versus litigation. This literature considers, e.g., the rise of the regulatory state,<sup>3</sup> differences in the regulatory state across countries,<sup>4</sup> the role of subversion,<sup>5</sup>

<sup>2</sup> ROBERT FROST, *Mending Wall*, in THE POETRY OF ROBERT FROST 33 (1979).

<sup>3</sup> E.g., Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401, 401–02 (2003) (discussing regulation and litigation as alternatives to securing property rights and concluding the choice between the two depends on controlling subversion of institutions); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211, 221–22 (1976) (proposing a general economic theory of regulation, including, e.g., the role of imperfect information and political affiliation of interest groups).

<sup>4</sup> E.g., Andrei Shleifer, *Understanding Regulation*, 11 EUR. FIN. MGMT. 439, 440–42 (2005) (examining central arguments against the regulatory state, such as litigation solving problems in imperfect markets and the possibility of capture of regulatory officials).

<sup>5</sup> E.g., Glaeser & Shleifer, *supra* note 3, at 401; Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q. J. ECON. 1089, 1089 (1991) (developing an economic theory of regulatory capture and finding, e.g., that the greater the informational asymmetry between the regulated industry and the regulator, the greater the possibility of capture).

capture,<sup>6</sup> trust versus corruption,<sup>7</sup> and so forth.<sup>8</sup> For ease of analysis, the models in this literature assume a “wall” between courts and the regulatory state and say little about how these interface in practice. Primary jurisdiction, a central doctrine used by courts seeking agency input or action, is unnoticed.<sup>9</sup> At the same time, a large legal literature examining primary jurisdiction exists, yet this literature is sparse on the economic structure or justifications of the doctrine.<sup>10</sup> This Article offers a bridge between these two literatures by examining primary jurisdiction in an area where economic thought is particularly

<sup>6</sup> Glaeser & Shleifer, *supra* note 3, at 408.

<sup>7</sup> PHILIPPE AGHION, ET AL., *Regulation and Distrust*, 125 Q. J. ECON. 1015, 1016 (2010) (finding that government regulation is correlated with trust across countries).

<sup>8</sup> See generally W. KIP VISCUSI, *Overview*, in REGULATION THROUGH LITIGATION 2 (W. Kip Viscusi ed., 2002) (noting regulation is superior to litigation in highly technical areas or where litigation concerns an entire product line); ANDREI SHLEIFER, *Efficient Regulation*, in REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS & LAW 27, 29 (Daniel P. Kessler ed., 2010) (finding the “case against regulation relies on well-functioning courts . . . Insofar as courts resolve disputes cheaply, predictably, and impartially, the efficiency case for regulation is difficult to make . . . But when litigation is expensive, unpredictable, or biased, the efficiency case for regulation opens up” and that “[i]n short, the case for efficient regulation rests on the failures of courts.”).

<sup>9</sup> The type of modeling used to examine regulation in the economics literature makes simplifying assumptions about the world, one of which is that regulation and litigation are two separate approaches to problem solving, without considering the real-world nuance of litigation that invokes regulation, regulation that alters in response to litigation, and so on. See generally *infra* note 15 (discussing additional ways in which courts and agencies interact in practice).

<sup>10</sup> These articles generally reference economic concepts such as efficiency but only at a very high level, relying on other arguments to attack or defend the doctrine. See, e.g., Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 544 (2017) (arguing that primary jurisdiction should be limited to its original context of rate-setting); Abby Cunningham, Comment, *Purpose, Prudence, and Path: Reevaluating the Primary Jurisdiction Doctrine in Context of Opioid Litigation*, 9 N. ILL. U. L. REV. ONLINE J. 1, 21 (2017) (noting arguments to limit primary jurisdiction to expertise issues but arguing “such a course of action overlooks the important goals of uniformity and promotion of a working relationship between court and agency”); Diana R. H. Winters, *Inappropriate Referral: The Use of Primary Jurisdiction in Food-Labeling Litigation*, 41 AM. J. L. & MED. 240, 255–56 (2015) (arguing that primary jurisdiction referrals may be dangerous to “the quality and safety of the food supply” may “interfere[] with agency resource allocation” and “diminish[] the benefits of having these cases decided in the larger context of consumer protection law by courts well-equipped to handle such matters.”).

instructive: mass actions built off product testing or other pre-suit statistical evidence.<sup>11</sup> Specifically, we show that in an institutional framework, primary jurisdiction represents a needed response to increased resolving power in pre-suit investigation. Easy access to sophisticated product testing has allowed plaintiffs' attorneys to adopt the role of quasi-regulators, using litigation and independent testing to compel quality control standards traditionally under the auspice of agency rulemaking and enforcement actions. This quasi-regulatory regime enhances settlement values for plaintiffs' attorneys, essentially allowing the lack of agency-based regulation to act as a legal subsidy to the bar.<sup>12</sup>

Primary jurisdiction is perhaps the central legal doctrine allowing defendants to move quasi-regulatory actions back to a regulatory space.<sup>13</sup> It has been criticized as causing undue delay, being amorphous in application, and as properly reserved

<sup>11</sup> The mass litigation setting offers plaintiffs and defendants uniquely asymmetrical transaction costs and incentives, lending itself particularly well to economic insight. See, e.g., Jeff Lingwall, Isaac Ison & Chris Wray, *The Imitation Game: Structural Asymmetry in Multidistrict Litigation*, 87 MISS. L.J. 131, 166 (2018) (discussing application of the Coase Theorem to asymmetric information and incentives in multidistrict litigation). This Article considers two strands of economic thought, transaction cost economics, which attempts to analyze the frictions inherent in exchange and disputes for insights into welfare-enhancing actions, and institutional economics, which looks at societal structures from an economic perspective. See also Steven G. Medema, *The Coase Theorem at Sixty*, J. ECON. LIT (forthcoming) (discussing transaction cost economics); DOUGLAS W. ALLEN, *THE INSTITUTIONAL REVOLUTION* (2012) (discussing institutional economics in general).

<sup>12</sup> See Pierre Schlag, *Coase Minus the Coase Theorem – Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 221 (2013) (“[I]t would be salutary . . . if whenever there was an inclination to tailor legal entitlements to economize on transaction costs, we viewed it as a kind of legal subsidy to particular users and uses and ask: Why are we engaged in this subsidization?”). Schlag proposes generally a change in vocabulary from “economizing on transaction costs” to “subsidization.” *Id.* (internal citation omitted).

<sup>13</sup> Courts may require the agency to have expressed prior interest in the matter. See *Astiano v. Hain Celestial Grp.*, 783 F.3d 753, 761 (2015) (“Common sense tells us that even when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation.”); *Viggiano v. Johnson & Johnson*, No. CV 14-7250-DMG (MRWx), 2016 WL 5110500, at \*1 (C.D. Cal. June 21, 2016) (“[I]t is inappropriate to apply the primary jurisdiction doctrine when an agency is aware of but has expressed no interest in the matter at hand.”).

for only special cases involving rate setting.<sup>14</sup> Our argument is generally to the contrary. In the context of testing-based mass litigation, primary jurisdiction extends and preserves a long history of legal and institutional change in response to developments in the hard sciences.<sup>15</sup> It serves as a pro-regulatory balancing mechanism allowing defendants to move litigation-based quality control regimes to policymakers who have expertise, capacity for public input, and ability to create uniform national standards.

Consider how increased resolving power has created the following common scenario in recent mass litigation.<sup>16</sup> Often, a

<sup>14</sup> See Winters, *supra* note 10, at 544.

<sup>15</sup> Primary jurisdiction is, of course, not the only method by which courts and agencies interface. For example, another way courts and agencies interface is through repeated, or serial, litigation. See Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1723–24 (2011) (discussing dialogue between courts and agencies through serial litigation, in which the findings of court and agencies interplay over years of repeated litigation and agency action). This situation provides another opportunity for dialogue that applies in the special circumstances of litigation that repeatedly returns to courts after agency action. A further option for dialogue between agencies and courts is when agency action *changes* in response to court interpretation. See *In re J-H-J*, 26 I. & N. Dec. 563, 564 (BIA 2015) (“Given the overwhelming circuit court authority in disagreement with [a prior case] . . . on the basis of the plain language of the statute, we will now accede to the clear majority view of these nine circuits.”). This second type of dialogue again depends on the special case of repeated appellate-level disagreement with prior regulatory decisions. Finally, the “ordinary remand rule” allows courts to remand an issue to an agency. See Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1555–57 (2014) (discussing agency remand in the immigration context). In contrast to these methods, primary jurisdiction allows courts to allow parties to seek agency action without repeated litigation over the same issue, appellate disagreement, or prior contrary agency action being reviewed by courts. It thus represents a crucial starting point for dialogue between courts and agencies.

<sup>16</sup> See Jeff Lingwall, *Food Forensics in Class Actions: The Race Between Pleading Standards and Technology*, 52 TULSA L. REV. 213, 218–23 (2017) (describing and categorizing product testing litigation in the food labeling context). Although multiple techniques exist to find adulteration in food, this is not to say that policing food adulteration has become a uniformly easy task. Particularly in a globalized world, this remains a significant challenge. See Mahnaz Esteki, Jorge Regueiro & Jesus Simal-Gandara, *Tackling Fraudsters with Global Strategies to Expose Fraud in the Food Chain*, 18 COMPREHENSIVE REV. IN FOOD SCI. & FOOD SAFETY 425, 427 (2019) (listing multiple modern sources of food fraud). At the same time, technological advances are quickly progressing this science. See, e.g., Tomasz Majchrzak, Wojciech Wojnowski & Justyna Plotka-Wasyłka, *Classification of Polish Wines by Application of Ultra-Fast Gas Chromatography*, 244 EUR. FOOD RES. & TECH. 1463 (2018)

plaintiff will purchase a consumer item, presumably under the direction of an attorney with a litigation theory on hand, have it tested by a laboratory using sophisticated sensing equipment, and find the trace presence of an unlabeled substance, such as a pesticide. The level is not one illegal under the current regulatory scheme, but is one that potentially contradicts other claims on the label, claims which many other potential defendants have also made. The court then faces the task of adjudicating the claim, such as deciding whether a reasonable person would consider this a harm based on the pleadings, whether the court has the expertise to adjudicate based on the technicalities of statistical product testing output, what constitutes reasonable industry quality control practices, and how the court's decision relates to those made by numerous other courts considering similar issues.<sup>17</sup>

In this situation, multiple adjudicators within and between states face an identical problem: what level of contamination of the pesticide, if any, should reasonably be considered in violation of label claims? These adjudicators must answer this question while transaction costs and the structure of typical litigation make coordinating between cases in the short to medium term impossible.<sup>18</sup> For example, coordinating between state-level adjudicators handling similar claims is difficult, even if some particular classes of claims are assembled pre-trial in MDL form. States have widely varying consumer protection laws, varying standards for common law claims, and different procedural rules for handling the reasonableness of pre-suit investigation.<sup>19</sup> Judges facing these types of claims have

(using machine learning techniques to classify wine origins); Kristian Pastor, Marijana Ačanski & Djura Vujić, *Gas Chromatography in Food Authentication*, in GAS CHROMATOGRAPHY - DERIVATIZATION, SAMPLE PREPARATION, APPLICATION (Peter Kusch ed., 2019) (describing, e.g., chromatographic techniques for food authentication, including statistical methodology).

<sup>17</sup> See Lingwall, *supra* note 16, at 227–39 (discussing approaches courts might consider when responding to product testing litigation).

<sup>18</sup> In the long-term, it is possible that courts could build a body of consistent precedent amounting to de-facto national standards. For food labeling claims at least, this appears difficult due to fundamental disagreement between courts on foundational issues such as the scope of federal preemption.

<sup>19</sup> See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 175 (2011) (noting differences among state consumer protection laws); Kenneth J. Meier, *The*

historically come to widely varying conclusions,<sup>20</sup> which means either the regulatory scheme becomes a confusing patchwork of standards or the most extreme adjudicator sets a de facto national standard without input from stakeholders other than the parties before their particular court.<sup>21</sup>

Primary jurisdiction offers a potentially attractive alternative in this situation. When referred to an agency, the possibility of collective national action is invoked, avoiding patchwork or “race to the bottom” judicial standards for satisfying label claims.<sup>22</sup> Agency decision making is designed to take the views of multiple stakeholders into consideration, whether through lobbying or participation in notice-and-comment rulemaking.<sup>23</sup> Although the rulemaking process may

*Political Economy of Consumer Protection: An Examination of State Legislation*, 40 POL. RES. Q. 343, 343 (1987) (examining state-by-state variation in consumer protection laws from a political science perspective).

<sup>20</sup> See Lingwall, *supra* note 16, at 227 (discussing responses by various courts to product-testing based pleadings).

<sup>21</sup> Producers facing varying state requirements yet wishing to market products nationally must comply with the strictest state standard in order to comply with them all. If three state-level adjudicators set standards of 0.3, 0.2, and 0.1 parts per million for the level of contamination of a substance that violates a label claim, then producers must enhance quality control standards to comply with the 0.1 parts per million standard to avoid liability in each location. This is similar to the classic “race to the bottom” problem in state-level policymaking, except that each judge faced with a regulatory question becomes a new potential policymaker. See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 217, 280-83 (1997) (describing history of the phrase “race to the bottom” in policymaking).

<sup>22</sup> Cf. Edward J. Janger, *Predicting When the Uniform Law Process Will Fal: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 578-80 (1998) (discussing “race to the bottom” problems in enacting uniform state legislation).

<sup>23</sup> See Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343-46 (2011) (summarizing literature on the pro-democratic aspects of notice-and-comment rulemaking while offering concerns, such as agency discounting of value-laden comments); Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 402 (2011):

In announcing the final rule, agencies must demonstrate that they have actually reviewed the public comments by responding to criticisms, discussing alternatives, and otherwise acknowledging relevant and substantial comments. And federal courts have clearly demonstrated their willingness to enforce these obligations. As a result, in



be dominated by a limited number of large stakeholders, it allows those stakeholders to participate in a public process in ways which are difficult in litigation.<sup>24</sup> Multiple consumer groups (potential plaintiffs) and producers (potential defendants) can offer input, allowing agency expertise to consider these views in creating standards for label claims.<sup>25</sup> While this is perhaps an idealized version of the regulatory process, the process is designed, and has the capacity, to allow input from multiple stakeholders.<sup>26</sup> Other than the possibility of amicus briefs, litigation generally allows the input of the parties alone, unless producer-defendants coordinate litigation strategies.<sup>27</sup> In this way, referral to an agency allows many potential plaintiffs and defendants to contribute when creating national standards, something the structure of litigation and its inherent transaction costs otherwise prohibit.<sup>28</sup>

terms of its formal legal structure, rulemaking is probably the most transparent and participatory decision-making process used in any branch of the federal government.

<sup>24</sup> See, e.g., Farina, *supra* note 23, at 402 n.30; Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 951 (2006) (noting empirical findings on domination of the rule-making process by industry, including the number and sophistication of comments). In litigation, the use of amicus briefs offers the same opportunity for multiple parties to weigh in on a dispute, but heavy use of amicus briefs is typically limited to jurisdiction of appellate courts.

<sup>25</sup> See, e.g., U.S. Food & Drug Admin., THE DECLARATION OF ADDED SUGARS ON HONEY, MAPLE SYRUP, & CERTAIN CRANBERRY PRODUCTS: GUIDANCE FOR INDUSTRY: DRAFT GUIDANCE (2018) (noting FDA has “heard concerns regarding the declaration of added sugars” and that it “received comments from . . . industry” about a variety of related aspects of the rule).

<sup>26</sup> See *Tran v. Sioux Honey Ass’n Coop.*, No. 8:17-cv-00110-JLS-SS, 2017 WL 5587276, at \*1, \*3 (C.D. Calif. Oct. 11, 2017) (noting that “[n]ot only does the FDA have experience defining such terms for food labeling . . . but it has the capacity to gather facts and comments from the wider public to help define the term.”).

<sup>27</sup> See Paul M. Collins, Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55, 65 (2007) (finding that amicus briefing empirically results in shaping the Supreme Court’s policy output).

<sup>28</sup> Then, just as settlements may help provide clarity to future litigants and deter bad behavior, so does regulatory guidance. “[W]ithout the involvement of an expert government agency in the course of litigation, the risk of erroneous decisions in private actions may increase, as courts must decide difficult issues

As part of its capacity to generate multi-party input, primary jurisdiction acts as a regulatory counterweight to the imposition of plaintiff-created quality control standards based on analytical results.<sup>29</sup> Imposing quality control standards on minute food adulteration or contamination has traditionally occurred through a regulatory enforcement process, not through ad hoc litigation.<sup>30</sup> This regulatory process was the result of the input of multiple interest and political groups, and imposed quality control standards as the outcome of a non-litigation process. The reordering of analytical quality control to plaintiffs' use of independent laboratory testing and resulting litigation represents an enormous institutional shift, particularly as plaintiffs' attorneys are able to yield testing results together with the threat of class action litigation to drive up settlement values and capture the value of this quasi-regulatory regime in the form of higher attorneys' fees. For these reasons, primary jurisdiction for small claims in mass actions, and testing-based claims in particular, gives efficiency-enhancing institutional flexibility in the face of increased measurement power by plaintiffs in pre-suit investigation.

without the benefit of an administrative record or the agency's expert opinion." Matthew C. Stephenson, *Public Regulation of Private Enforcement, The Case For Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 116 (2007) (citing Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 2 (1996); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1293 (1982)).

<sup>29</sup> In our analysis, the analytical quality-control aspect of these cases sets them apart from other garden-variety label claims over which primary jurisdiction may be less appropriate. See *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1035 (N.D. Cal. 2009) (finding in labeling case that "this is not a technical area in which the FDA has greater technical expertise than the courts—every day courts decide whether conduct is misleading.").

<sup>30</sup> Of course, for larger adulteration that consumers are likely to notice, the civil court system provides a variety of frequently used remedies, such as the implied warranty of merchantability and so on. See Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WISC. L. REV. 1405, 1449-1450 (1985) (discussing consumer perception of potential warranty claims). Smaller potential harms, perhaps undiscoverable to the ordinary consumer, have traditionally been the realm of regulation. See, e.g., *infra* Section IV(D) (discussing this history in the context of food regulation).

A final aim of this Article is to place this use of primary jurisdiction in the long context of social responses to changes in the sciences. Institutions, whether social structures, adjudicatory bodies, or legal doctrines, have historically evolved in response to technological change.<sup>31</sup> In particular, institutions evolve as societal ability to measure increases, such as how the ability to measure an individual's DNA has changed criminal law.<sup>32</sup> By providing a path for dialogue between courts and regulators at early stages of testing-based litigation, primary jurisdiction allows interplay and evolution in adjudication in response to technological change in measurement power. As scientific resolving power pushes the limits of measurement forward, allowing creation of extractive, private, quality-control regimes, restricting flexibility in adjudication would be an institutional step backwards, cutting off litigation-based access to counterbalancing regulatory processes.<sup>33</sup>

The following sections first provide background information on institutional evolution in response to changes to

<sup>31</sup> E.g., Cristiano Antonelli, *Localized Technological Change and the Evolution of Standards as Economic Institutions*, 6 INFO. ECON. & POL'Y 195 (1994).

<sup>32</sup> Both inside and outside of the courtroom, advancements in DNA technology have radically altered the ways in which law enforcement procedures are conducted. Improvements that have been made during the past quarter century, in particular, have changed the playing field for making and overturning criminal convictions. Today's popular American crime scene investigation shows frequently depict law enforcement personnel running DNA evidence through powerful computers to settle cold or seemingly impossible cases. This is not necessarily far from the truth, provided that acquired samples remain uncompromised and are utilized in a sufficiently timely manner. Given ideal circumstances, and preferably with additional pieces of evidence or eyewitness testimony, modern DNA technology can lead to a rapid and potent conviction (or to the overturning of a wrongful conviction). In cases where DNA evidence is incomplete or has been notably tainted in some way, the value of the DNA for usage as court evidence lessens drastically. Michael Bobelian, *DNA's Dirty Little Secret: A Forensic Tool Renowned for Exonerating the Innocent May Actually Be Putting Them in Prison*, WASH. MONTHLY (Mar. 1, 2010) <https://washingtonmonthly.com/2010/03/01/dnas-dirty-little-secret-2/>.

<sup>33</sup> This is not to say that parties cannot attempt to influence the regulatory process outside litigation. Litigation does not preclude standard lobbying channels. Yet, even if actively lobbying for rulemaking, defendants may still find value in moving to stay or dismiss ongoing litigation through primary jurisdiction referrals.

measure and then discuss the evolution of the primary jurisdiction doctrine over time. The fourth section examines primary jurisdiction as institutional evolution, examining the economic structure of primary jurisdiction through the lens of transaction costs and institutional economics. It also considers the counterargument that primary jurisdiction referrals essentially are transaction costs. The conclusion returns to the analogy by Frost: limiting the primary jurisdiction doctrine risks “walling out” statistical-based claims from agencies, preserving the creation of extractive quality-control regimes through litigation.<sup>34</sup>

## II. Scientific Resolving Power and Institutional Revolutions

### A. Measurement Revolutions

One major theme of legal and economic history is that institutions evolve in response to our ability to measure. For example, meritocracy as a method of selecting one’s agents can only exist when it is possible to measure merit.<sup>35</sup> As many outcomes depend on both individual effort and randomness, the ability to measure when results are due to effort, rather than chance, is critical for institutions. Many historical institutions that we find perplexing, quaint, or antiquated often existed to solve problems with measuring outcomes. For instance, the existence of aristocracy might be explained by the need for the Crown to resolve trust issues relating to measurement problems. In a pre-industrialized era in which the natural world played an enormous role in the variability of outcomes (from storms disrupting shipping to messengers’ horses laming), the aristocracy served as a social condition “designed to allow the

<sup>34</sup> Frost, *supra* note 2.

<sup>35</sup> ALLEN, *supra* note 11, at 4 (“Ours is a society based on a concept of merit, and those who work hard and produce much expect to be rewarded. The race may not always be to the swift, but the laborer is worthy of his hire, and we believe that, with effort and a little luck, anyone can reach the top of the social ladder.”). See DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* xii-xiv (2019) (discussing a counterpoint to merits of meritocracy and how meritocracy preserves social divides and results in miserable lives for the “winners” of the meritocratic system).

members to credibly commit to being honest in their dealings with the Crown and each other.”<sup>36</sup> The aristocracy’s land served as a kind of illiquid “hostage capital” insuring against difficult-to-measure bad behavior as the nobility carried out the wishes of the monarch.<sup>37</sup> The need for powerful aristocracy declined as:

increased standardization, brought about by the many innovations of the Industrial Revolution, caused a significant fall in the variance of production outcomes. This fall in variance allowed workers to be monitored directly through observation, measurement of hours, or performance . . . These effects were felt deeply in the offices of state. By 1871, the civil service began staffing based on exam performance, professional standards, and input monitoring which were too costly before the age of detailed measurement . . . As a result, the role of trust as the foundational building block of public service was eroded. The removal of trust as the basis of appointment meant that the social institution designed to generate that trust was no longer needed.<sup>38</sup>

Similar stories can be told across social history in a variety of circumstances. For example, consider dueling, private lighthouses, and public policing. Dueling by aristocrats was a natural extension of the need to be trusted—one’s Honor meant one was trustworthy in an environment in which it is difficult to measure trust.<sup>39</sup> Private lighthouse provision declined as ships were able to measure their locations more precisely and no longer needed lighthouses as guides.<sup>40</sup> A public policing system emerged as measurement capability increased and industrial

<sup>36</sup> ALLEN, *supra* note 11, at 56.

<sup>37</sup> *Id.*, at 57 (“The threat of punishment was effective in binding the interests between the Crown and its servants, most notable the aristocrats . . . Aristocrats converted much of their wealth into forms that were costly to convert back, or, more likely, became worthless if they fell out of favor.”).

<sup>38</sup> *Id.* at 77.

<sup>39</sup> *Id.* at 81.

<sup>40</sup> *Id.* at 178.

processes became more precise, creating standardized goods which made it inefficient for victims to prosecute theft.<sup>41</sup>

## B. Institutions and Jurisprudence

The influence of measurement error on historical institutions is closely tied to its influence on modern jurisprudence. Courts have difficulty awarding damages they cannot measure. This basic point pervades the law, from the doctrine of standing,<sup>42</sup> to the limits of remedies in contract law,<sup>43</sup> to the appropriate scope of tort law.<sup>44</sup> It also links law

<sup>41</sup> *Id.* at 197-99.

<sup>42</sup> Without an ability to at least theoretically measure harm, finding an injury-in-fact or a redressable problem is problematic. This is tied to the idea of a “concrete” injury and whether an injury is too “attenuated” for standing purposes. *See, e.g.*, *United States v. Perry*, 360 F.3d 519, 531 (6th Cir. 2004) (“Standing *measures* the distance between the Intervenor’s demand and the problem’s source.”) (emphasis added). *See generally* *Hutton v. Nat’l Bd. of Exam’rs in Optometry, Inc.*, 892 F.3d 613, 618–19 (4th Cir. 2018); *In re Sony Gaming Networks & Customer Data Sec. Breach Litigation*, 903 F. Supp. 2d 942, 955 (S.D. Cal. 2012); *Gulf Restoration Network, Inc. v. Nat’l Marine Fisheries, Serv.*, 730 F. Supp. 2d 157, 165 (D.D.C. 2010).

<sup>43</sup> If a court has no basis of calculating the benefit of one’s bargain, it cannot award the benefit. For example, this is the basis of the foreseeability condition precedent to expectation damages. Two classic cases are *Rombola v. Cosindas*, 351 Mass. 382, 385-86 (1966) (court awarded expectation damages to party aggrieved by loss of race horse based on the ability to calculate probable damages from past winnings) and *Freund v. Wash. Square Press*, 34 N.Y.2d 379, 381 (1974) (court declined to award expectation damages based on no prior publishing history of plaintiff). *See* DANIEL MARKOVITS, *CONTRACT LAW AND LEGAL METHODS* 41 (2014).

<sup>44</sup> Tort law is defined generally as a set of civil remedies for wrongs, or injuries. *E.g.*, JENNY STEELE, *TORT LAW: TEXT, CASES, & MATERIALS* 3 (2017) (defining torts generally). Generally speaking, the notion of justly redressing a wrong entails that the amount of the wrong be susceptible to measurement. Logically, if one cannot measure the harm, one cannot offer a fitting remedy. Special cases like trespass to land are the exception—the act of trespass is viewed as sufficiently egregious that actual damages need not be alleged to make a prima facie case for the tort. Plaintiff’s attorneys have great incentive to move tort law more towards the latter case. For example, medical monitoring torts attempt to shirk these two standards by allowing purportedly measurable damages for the mere prospect of injury, and are thus controversial. *See, e.g.*, Victor E. Schwartz & Cary Silverman, *The Rise of “Empty Suit” Litigation: Where Should Tort Law*

inextricably with the sciences: law is not a discipline with expertise in measurement, and so both hard and social sciences have their days in court.<sup>45</sup> Yet, even for a relationship made amicable by consulting fees, this interdisciplinary alliance is unsteady—the scope of what can potentially be measured is constantly moving, the expertise required to perform and understand those measurements changes, and law often finds itself playing catch-up.<sup>46</sup> The overlap between what the sciences make possible and what courts find reliable evolves. The result is a steady stream of decisions forming the cutting edge of modern litigation.

For example, consider the effect of two related, refined types of measurements on litigation, first from the perspective of physical science and then from social science: the use of modern laboratory equipment to measure food labeling claims in consumer class actions and the rise of sophisticated economic modeling to measure indirect harms in a variety of litigation settings.<sup>47</sup> For food labeling claims, scientific advancements have opened an enormous range of testing for food adulteration.<sup>48</sup> These include molecular techniques,

*Draw the Line?*, 80 BROOK. L. REV. 599, 601 (2014) quoting a plaintiff's attorney as noting:

If there were liability for every physical injury or actual economic harm that occurs in America, I still would be limited in my practice. There are only so many injuries. But if I were allowed to recover damages and attorneys' fees when there is no injury, my potential return is unlimited.

<sup>45</sup> Of course, one might call law itself a social science, which is debatable. *E.g.*, Geoffrey Samuel, *Is Law Really a Social Science? A View from Comparative Law*, 67 CAMBRIDGE L. J. 288, 288 (2008) (noting the answer is “an ambiguous one.”).

<sup>46</sup> See Lingwall, *supra* note 16 (discussing analysis along these lines in the class action setting).

<sup>47</sup> See Lingwall, *supra* note 16, at 218–23 (discussing further history and classification of plaintiff-side testing claims for food labeling).

<sup>48</sup> These include many historical advances detailed in *infra* Section IV, but also advancements in relatively recent years. See MODERN TECHNIQUES FOR FOOD AUTHENTICATION xxi (Da-Wen Sun ed., 2nd ed. 2018) (noting that since 2008, “imaging spectrometry has rapidly emerged as and matured into a powerful and fastest growing nondestructive tool for food authentication.”).

chromatography, isotopic analysis, vibrational techniques, elemental techniques, nuclear magnetic resonance, sensory methods, and non-chromatographic mass spectrometry.<sup>49</sup> Combined with easy access to laboratories willing to perform these tests, this advent of widespread food testing by consumer advocates has caused a revolution in consumer class actions.<sup>50</sup> As illustrated in the introduction, a frequent strategy is to center litigation on laboratory test results of the plaintiff's product or on reports of testing done on a product the plaintiff did not purchase.<sup>51</sup> This laboratory result then becomes the basis of the complaint, flipping the script on traditional information asymmetries in litigation. The test results become a powerful bargaining chip to induce higher settlement values, as the

<sup>49</sup> Georgios P. Danezis & Constantinos A. Georgiou, *Food Authentication by the Numbers*, in *FOOD AUTHENTICATION: MANAGEMENT, ANALYSIS, & REGULATION* 19, 21 (Constantinos A. Georgiou & Georgios P. Danezis, eds., 2017); *see also* Esteki, Regueiro & Simal-Gandara, *supra* note 16, at 430–31 (listing methods to test specific types of foods); D. Banerjee, S. Chowdhary, S. Chakraborty & R. Bhattacharyya, *Recent Advances in Detection of Food Adulteration*, in *FOOD SAFETY IN THE 21ST CENTURY: A PUBLIC HEALTH PERSPECTIVE* 129, 139–41 (Rajul Kumar Gupta, Puja Dudeja & Amarjeet Singh Minhas, eds., 2017).

<sup>50</sup> As late as 2000, one author noted of food adulteration that “at the bottom line, no one wants to test. It is amazing that the marketplace is as fair as it is.” E.C. WILHELMSSEN, *Adulteration Determination*, in *ENCYCLOPEDIA OF ANALYTICAL CHEMISTRY* 3862–3888 (R.A. Meyers ed., 2000). *See* FREDERICK ACCUM, *A TREATISE ON ADULTERATIONS OF FOOD, AND CULINARY POISONS, EXHIBITING THE FRAUDULENT SOPHISTICATIONS OF BREAD, BEER, WINE, SPIRITUOUS LIQUORS, TEA, COFFEE, CREAM, CONFECTIONARY, VINEGAR, MUSTARD, PEPPER, CHEESE, OLIVE OIL, PICKLES, AND OTHER ARTICLES EMPLOYED IN DOMESTIC ECONOMY AND METHODS OF DETECTING THEM* (1820) (discussing further history and classification of plaintiff-side testing claims for food labeling). As might be expected, Accum's scholarship has not aged well. *See, e.g.*, JAMES SUMNER, *Retailing Scandal: The Disappearance of Friedrich Accum*, in *(RE)CREATING SCIENCE IN NINETEENTH-CENTURY BRITAIN* 32 (Amanda Mordavsky Caleb, ed., 2007); P.J. Atkins, *Social History of the Science of Food Analysis and the Control of Adulteration*, in *THE HANDBOOK OF FOOD RESEARCH* 97–108 (A. Murcott, W. Belasco & P. Jackson, eds., 2013).

<sup>51</sup> *See, e.g.*, Lingwall, *supra* note 16, at 214–25 (describing plaintiff-side testing in litigation over octopus, parmesan cheese, vitamins, tea, protein powder, oatmeal, and so on).



plaintiff brings quantitative evidence (or at least the veneer of quantitative evidence) to the table.<sup>52</sup>

Courts confronted by product testing-based claims face a difficult analysis. While the tests sometimes reveal substantive problems with a product or “food fraud” as this literature might term it, such as DNA testing revealing the substitution of one ingredient for another, often the test reveals a minute harm.<sup>53</sup> This harm may be within the tolerances set by FDA regulations for food generally, but potentially contradicts a label claim. An example of this is the stream of litigation over glyphosate in products.<sup>54</sup> Plaintiffs have tested a wide variety of goods labeled as “natural” or “pure” and found the presence of small amounts of glyphosate, an artificial pesticide.<sup>55</sup> Although within the tolerances for pesticides set by regulation, plaintiffs argued that its presence in small amounts contradicted the labels.<sup>56</sup> These actions are often attacked on preemption and reasonableness grounds through 12(b)(6) motions, and courts must weigh whether they are the proper decision maker to adjudicate how much contamination should be considered physically or economically harmful. All foods, at the microscopic level at least, are contaminated, and imposing liability under a

<sup>52</sup> Cf. Sanne H. Knudsen, *Adversarial Science*, 100 IOWA L. REV. 1503, 1524 (2015) (“Contingent valuation aides lawyers in leveraging a sizeable settlement from defendants, but it does not advance the understanding of harm to the ecosystem in any scientific sense.”).

<sup>53</sup> See Complaint at 2, *Fonseca v. Goya Foods Inc.*, No. 5:16-cv-02559-LHK (N.D. Cal. May 11, 2016). See also Andreas Schieber, *Introduction to Food Authentication*, in MODERN TECHNIQUES FOR FOOD AUTHENTICATION 1-26 (DA-WEN SUN ED., 2ND ED. 2018), *supra* note 49, at 1–3 (discussing the term food fraud, including estimates that it occurs in 10% of all commercially sold foods) (“There are several terms that have been used to characterize different incidents in food, for example, food fraud, food adulteration, food crime, food terrorism, food safety, and others . . . Food fraud is the term very often used in the relevant literature . . .”).

<sup>54</sup> Glyphosate is a common herbicide first registered for use in the United States in 1974. See *National Pesticide Information Center, Glyphosate: General Fact Sheet*, <http://npic.orst.edu/factsheets/glyphogen.html> (last visited Feb. 21, 2020). Prolonged exposure to glyphosate may cause a variety of health problems. *Id.*

<sup>55</sup> *E.g.*, In re General Mills Glyphosate Litigation, No. 16-2869, 2017 WL 2983877, at \*1 (D. Minn. July 12, 2017).

<sup>56</sup> *E.g.*, *id.*

reasonableness standard requires someone draw a line between contamination no reasonable person would be concerned with and contamination a reasonable person would find substantive enough to consider having suffered an economic loss.

Several recent cases illustrate variations on this testing-based theme. In 2017, the Sioux Honey Association Cooperative was sued based on testing of their—ironically named—Sue Bee Honey, which revealed the presence of trace amounts of glyphosate.<sup>57</sup> This allegedly violated label statements noting the honey was “100% Pure,” and hence California consumer protection law.<sup>58</sup> The court considered the complaint, noting that the litigation “although ostensibly about the meaning of the terms ‘Pure’ or ‘100% Pure,’ is really about what constitutes a safe level of glyphosate in honey.”<sup>59</sup> It then referred the matter to the FDA for potential determination of appropriate levels and labeling regarding glyphosate in honey.<sup>60</sup> Ultimately, the FDA declined to address the matter.<sup>61</sup>

In 2019, a consumer advocacy group sued Twinnings North America, alleging its Twinnings teas were labeled as “100% natural” despite the presence of pesticides. “Tests conducted by an independent laboratory using liquid chromatography mass spectrometry” showed the presence of low amounts of

<sup>57</sup> First Amended Class Action Complaint at 36-37, *Tran v. Sioux Honey Ass’n Coop.*, No. 8:17-cv-110-JLS-JCGx, 2017 WL 5587276 (C.D. Cal. Oct. 11, 2017) (No. 8:17-cv-00110-JLS-SS) (C.D. Calif. Apr. 6, 2017).

<sup>58</sup> *Id.* at 4, 109.

<sup>59</sup> *Tran v. Sioux Honey Ass’n Coop.*, No. 8:17-cv-110-JLS-JCGx, 2017 WL 5587276 at \*2 (C.D. Cal. Oct. 11, 2017) (noting that counsel at argument distinguished between “bee leg versus biocide” when asked about contamination with other substances, and concluding that the plaintiff’s “contention that she was misled depends on the harmful nature of glyphosate.”).

<sup>60</sup> *Id.* at 3 (“For the foregoing reasons, pursuant to 21 C.F.R. § 10.25(c), the Court REFERS to the FDA for an administrative determination the question of whether and under what circumstances food products containing glyphosate may or may not be labeled ‘Pure’ or ‘100% Pure.’ . . . The parties and counsel will cooperate in expediting the presentation and explanation of this question to the FDA and will notify the Court promptly of any determination by the FDA, including any determination not to address the issue.”).

<sup>61</sup> Re: *Susan Tran v. Sioux Honey Assn’n, Coop.*, No. 8:17-cv-00110-JLS-SS (C.D. Calif. Apr. 10, 2018) (letter from Susan Mayne, Director, Center for Food Safety and Applied Nutrition, noting ongoing review of safety by the EPA and declining to consider the matter in response to the referral).

glyphosate, thiacloprid, and bifenthrin.<sup>62</sup> Thiacloprid and bifenthrin are insecticides that kill insects by disrupting their nervous systems, either by direct contact or by ingesting plants that absorbed the chemical.<sup>63</sup> The FDA classifies these as “likely” carcinogens, and so plaintiffs claimed violation of “pure” or “natural” labeling statements were material to purchasing decisions.<sup>64</sup> The consumer group sought declaratory relief, injunctive relief, and attorneys’ fees.<sup>65</sup>

As the final example, a putative class action was filed against Whole Foods in 2019, alleging its bottled Starkey water contained arsenic despite labeling stating “Protected, Pure, Unique” and “Untouched by surface contamination.”<sup>66</sup> Arsenic, “a metalloid chemical and known carcinogen that can lead to reproductive harm, circulatory and nervous system disorders, an increased risk of diabetes and hypertension, stomach pain and nausea, vomiting and diarrhea, numbness, paralysis, blindness, and other health problems,” was tested for arsenic with three water samples.<sup>67</sup> Consumer Reports found arsenic levels in two samples at slightly under the ten parts-per-billion (ppb) federal limit, with a third slightly over at 10.1 ppb.<sup>68</sup> Based on this testing by Consumer Reports, plaintiffs alleged an economic loss, having paid more for the product than they otherwise would have.<sup>69</sup> As with the prior two examples, this became the basis of alleged violation of various California consumer protection laws.<sup>70</sup>

<sup>62</sup> Complaint at 11-22, *Organic Consumers Ass’n v. Twinings N. Am.*, No. 2019-CA-004412-B (D.C. Sup. Ct. July 3, 2019).

<sup>63</sup> *Id.* at 90–92.

<sup>64</sup> *Id.* at 93.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> Class Action Complaint for: 1. Violation of the Unfair Competition Law, Bus. and Professions Code s 17200 et seq.; 2. Violation of the Consumers Legal Remedies Act, Civil Code s 1750 et seq.; 3. Violations of the Ill. Consumer Fraud and Deceptive Bus. Practices Act, 815 Ill. Comp. Stat. 501/1, et seq.; and 4. Unjust Enrichment at 2, *Berke v. Whole Foods Market, Inc.*, No. 2:19-cv-07471 (C.D. Cal. filed Aug. 28, 2019), No. 2:19-cv-07471.

<sup>67</sup> *Id.* at 2, 4.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.* at 21.

<sup>70</sup> As an additional example not involving low level contamination, consumers brought a class action lawsuit against Trader Joes in 2019, alleging the company defrauded consumers by charging for excess retained water in their

Once plaintiffs in these actions have discovered potential adulteration, they must tie the adulteration to a legal remedy. This connection is premised on the ability to connect contamination to a theory of economic loss. In the examples considered above involving pesticide presence in food, plaintiffs generally have two options to provide an ascertainable loss. First, they can claim the products were worthless as sold, which should result in a refund of the full purchase price to consumers. Courts may be reluctant to consider the product valueless, and if so, the economic value lost from the adulteration can be difficult to quantify. For example, in a “natural” oatmeal which has tested positive for the presence of glyphosate, in theory the damages are the price differential between the product labeled as “natural” and the product lacking that label statement. Unless the defendant has sold two identical versions of the oatmeal across markets, charging a higher price for the “natural” labelled product, ascertaining the loss due to the “natural” statement depends on statistical modeling.

Fortunately for the plaintiffs in these actions, advances in statistics and economic theory have enabled increasingly persuasive measurement of a consumer’s loss in these situations. As with the hard sciences, the more advanced the social science, the greater the potential measurability of harm.<sup>71</sup> Before the advent of economic or statistical theory it would be implausible to attempt to measure the economic loss from

chicken—retained water is water left over from processing that remains in packaging. Complaint at ¶¶ 39–45, 62–82, *Webb v. Trader Joe’s Company*, No. 3:19-cv-01587-CAB-WVG (Sup. Ct. Cal. Cnty. of San Diego, Aug. 23, 2019). The plaintiffs used random sampling to test 14 Trader Joe’s chicken products. Using an “analytical food laboratory” and a “calibrated legal-for-trade scale in accordance with applicable . . . regulations,” the plaintiffs found that Trader Joe’s products contained statistically significant more amounts of retained water than was advertised. *Id.* This again allegedly violated various California laws, as when class members “pay the marked price per pound” they paid “for excess Retained Water.” *Id.* at 129–251, 169.

<sup>71</sup> This point has generated controversy within economics, with some scholars pushing for increased emphasis on practical significance. *E.g.*, Deirdre N. McCloskey & Stephen T. Ziliak, *The Standard Error of Regressions*, 34 J. ECON. LIT. 97, 97 (1996) (arguing that statistical findings “can be permanent . . . without being ‘significant’ in other senses, such as for science or policy. And a difference can be significant for science or policy and yet be insignificant statistically”).

minute contamination, and before the advent of econometric regression techniques, ascertaining that loss through modeling would be difficult to perform. With these techniques, for example, if a slate of similar products and their prices can be assembled with variation in their label statements, it may be possible to identify the effect of “natural” or “pure” on the label using cross-product comparisons and statistical assumptions.<sup>72</sup> Although the terminology “resolving power” is typically used in the hard-scientific sense, modeling revolutions in social science fields may similarly be thought of as increasing the resolving power of their disciplines. Together, increased resolving power of product testing and increased social-scientific “resolving power” mean that plaintiffs can turn minute harms, previously the domain of regulatory bodies, into potentially actionable litigation. The next section considers the relationship between these litigation efforts and potential regulators.

### III. Origins and Background of the Primary Jurisdiction Doctrine

#### A. Development of the Primary Jurisdiction Doctrine

To consider the effects of advances in the hard and social sciences on primary jurisdiction, it is useful to review the doctrine’s principles and origins, particularly with the present-day academic push to limit the doctrine closer to these roots. Put simply, primary jurisdiction is a discretionary doctrine which helps promote relationships between courts and administrative agencies. It was conceived as a mechanism for bypassing potential adjudicatory problems by allowing an agency to have say when an issue is within the agency’s purview but the case itself is still in the jurisdiction of the court.<sup>73</sup> Courts can invoke

<sup>72</sup> See, e.g., *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 944-46 (C.D. Cal. Feb. 23, 2015) (working through two separate damages models to ascertain a loss from “natural” labeling).

<sup>73</sup> See *Winters*, *supra* note 10 exploring the doctrine’s origins, which examines it in modern context, and arguing that many cases are being referred for agency advice without first finding the referral necessary, that this often causes needless and harmful delay, and that courts should confine the doctrine to rate-setting and labor dispute cases, replacing primary jurisdiction advice referral with other mechanisms that better facilitate agency participation).

the doctrine and thereby stay or dismiss proceedings of a case for the purpose of passing their power over to appropriate government agencies.<sup>74</sup> The doctrinal theory is that under certain circumstances, uniformity and consistency can be better attained by allowing these agencies, rather than the federal courts, to have discretion in a case. This is because acquaintance with certain intricate facts is commonly found only among a body of experts. Invoking primary jurisdiction can potentially be a more efficient course of action rather than courts developing expertise or attempting to create uniform national standards without national jurisdiction.<sup>75</sup>

The doctrine has its origins in a few historic twentieth century rate-setting incidents.<sup>76</sup> One such incident was the notable 1907 case *Texas & Pacific RR Co. v. Abilene Cotton Oil Co.*<sup>77</sup> There, Abilene sued to recover a sum of money that had been demanded and coercively collected by Texas & Pacific at a rate it alleged to be unjust and unreasonable. At this time, shipping rates and schedules were being determined by the Interstate Commerce Commission (ICC). However, Abilene tried to bypass the ICC by taking their case straight to federal court. The railroad insisted instead that the situation be heard by the ICC, stating that the ICC alone had authority and competence to determine the reasonableness of the rates under consideration. The Supreme Court ultimately agreed, and maintained that, even if the matter were indeed cognizable in the courts, the ICC should be consulted first, since there were

<sup>74</sup> *E.g.*, *Viggiano v. Johnson & Johnson*, No. CV 14-7250-DMG (MRWx), 2016 WL 5110500, at \*1 (C.D. Cal. June 21, 2016) (“The primary jurisdiction doctrine permits courts to stay proceedings or dismiss an action without prejudice pending resolution of a matter within the special competence of an administrative agency.”).

<sup>75</sup> *See* Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 735 (2007) (discussing efficiency).

<sup>76</sup> *See* Bryson Santaguada, *The Primary Jurisdiction Two-Step*, 74 UNIV. CHIC. L. REV. 1517, 1519 (2007).

<sup>77</sup> *Texas & Pacific RR Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (this case is widely agreed to be the start of the primary jurisdiction doctrine, with additional, important rate-setting cases following soon after).

technical and policy considerations within the agency's particular field of expertise:

the state court was without jurisdiction to entertain the cause, and even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission.<sup>78</sup>

Also mentioned was:

if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.<sup>79</sup>

Abilene laid the groundwork for what would eventually come to be known as the primary jurisdiction doctrine. The Supreme Court was arriving at the conclusion that having a federal agency, such as the Interstate Commerce Commission, handle the case would create a nationwide imperative, allowing for greater uniformity and unbiased decision making.<sup>80</sup>

A few decades later, two additional common-carrier rate-setting cases helped to solidify parameters and core features of the doctrine—*Far East Conference v. United States* and *United*

<sup>78</sup> *Id.* at 431.

<sup>79</sup> *Id.* at 441.

<sup>80</sup> See Richard M. Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 CALIF. L. REV. 926, 932 (1975) (“The traditional doctrine called primary jurisdiction . . . rested upon interests of ‘uniformity’ and ‘expertise’ . . . Neither policy should be used merely as a vehicle to accord uncritical deference to agencies or to substitute judicial judgment for that of Congress on the role of regulation in particular industries.”).

States v. Western Pacific RR Co. Far East, which took place in 1952, helped to further organize the doctrine as one which promotes the beneficial use of agency expertise.<sup>81</sup> The case involved the United States filing an antitrust action against a conference of maritime freight carriers who had created their own dual-rate shipping system. The conference moved for dismissal so that the Federal Maritime Board could give the dual-rate issues preliminary consideration. When the case found its way to the Supreme Court, the Court noted “[t]heir business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge.”<sup>82</sup> The Court then asserted that these issues could more straightforwardly be resolved by the Federal Maritime Board than by the district court:

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.<sup>83</sup>

Far East maintained Abilene’s original position of promoting comity between courts and agencies. However, it changed primary jurisdiction doctrine from being a tool used to discern the location of exclusive jurisdiction into one intended to facilitate appropriate use of an agency’s specialized knowledge. Advancing the doctrine’s fundamentals to concerns beyond uniformity made sense to a large degree, non-uniform decisions come both because of fractured adjudicative bodies but also because those bodies possess differing levels of expertise, and thus would not be expected to come to uniform decisions.<sup>84</sup>

<sup>81</sup> See Cunningham, *supra* note 10, at 2-5 (exploring the doctrine’s origin by showing how the twentieth century rate-setting cases created the doctrine’s initial core purposes, noting the doctrine lacks clear boundaries, and suggesting there should be uncomplicated guidelines for its future usage).

<sup>82</sup> Far East Conference v. United States, 342 U.S. 570, 573 (1952).

<sup>83</sup> *Id.* at 574.

<sup>84</sup> Cf. Great N. Ry. Co. v. Merchants’ Elevator Co., 259 U.S. 285, 291 (1922) (“Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission . . . the



Four years later, in 1956, *United States v. Western Pacific RR Co.* helped to further infuse the idea of promotion of working relationships between court and agency into the doctrine of primary jurisdiction.<sup>85</sup> The *Western Pacific* decision showcases a far more modern framework for the doctrine of primary jurisdiction and is possibly the doctrine's most cited opinion.<sup>86</sup> The case once again involved a dispute regarding reasonable shipping rates. It also entailed a question about the formal definition of an incendiary bomb. In the case, a shipment of 211 steel bomb canisters full of napalm gel were shipped by three railroads for the United States Army.

The federal government initially paid the railroad companies the rate required for incendiary bombs. However, because the canisters had no burster chargers or fuses, the government afterward contended that they ought only to have paid the much lower rate required for gas canisters.<sup>87</sup> The Court of Claims made an initial ruling which favored the shipping companies, but the Supreme Court reversed and remanded it. The Supreme Court stated that courts should consult administrative agencies when dealing with technical matters such as construction of explosives or scheduling of tariff rates.<sup>88</sup> In ever clearer terms, primary jurisdiction was spelled out during the case. It:

. . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.<sup>89</sup>

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.”).

<sup>85</sup> *United States v. Western Pacific RR Co.*, 352 U.S. 59 (1956).

<sup>86</sup> *Cunningham*, *supra* note 10, at 13.

<sup>87</sup> *Western Pacific RR Co.*, 352 U.S. at 61.

<sup>88</sup> *Id.* at 66.

<sup>89</sup> *Id.* at 64.

The Supreme Court recognized the authority the courts have, yet it emphasized the need for courts to work in harmony with administrative agencies by consulting them for their opinions on technical matters such as in defining an incendiary bomb or determining appropriate railroad tariff rates.<sup>90</sup>

Finally, it is important to note that, in the *Western Pacific* case, the Court made the now famous statement that “[n]o fixed formula exists for applying the doctrine of primary jurisdiction. Rather, the proper inquiry 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.”<sup>91</sup> Like many judge-made legal doctrines, primary jurisdiction was left as prudential and without definite boundaries, a fact that has invited expansive use by defendants and critiques by academics.<sup>92</sup>

## B. Where the Primary Jurisdiction Doctrine Stands Today

Since its inception through twentieth century rate-setting cases, the doctrine has seen widespread and varied usage. Food labeling, beyond the testing-based claims discussed above, has frequently seen primary jurisdiction arguments.<sup>93</sup> Much food labeling litigation, including the product testing actions considered here, has focused on the unregulated term “natural.”<sup>94</sup> When the FDA proposed potential regulation for the expression, many defendants attempted to invoke the primary jurisdiction doctrine to stay their cases pending a decision by the FDA. Some successfully reasoned that national uniformity from a regulatory agency might be preferable to ad-hoc adjudication

<sup>90</sup> *Id.* at 63.

<sup>91</sup> *Id.* at 64.

<sup>92</sup> See Cunningham, *supra* note 10, at 2–5.

<sup>93</sup> See Bradley W. Pratt, *The Pathway to Primary Jurisdiction*, A.B.A. (Aug. 10, 2015), <https://www.americanbar.org/groups/litigation/committees/products-liability/articles/2015/pathway-to-primary-jurisdiction/>.

<sup>94</sup> *E.g.*, *George v. Blue Diamond Growers*, No. 4:15-CV-962 (CEJ), 2016 WL 1464644, at \*1 (E.D. Mo. Apr. 14, 2016); *Forsher v. The J.M. Smucker Co.*, No. CV 2015-7180 (RDJ)(MDG), 2016 WL 5678567, at \*1 (E.D.N.Y. Sept. 30, 2016), *Kane v. Chobani, LLC*, 645 Fed. Appx. 593, 593 (2016); See generally Winters, *supra* note 10 (criticizing use of primary jurisdiction in food labeling).

by courts. For a typical example, *In re Kind LLC “Healthy & All Natural”* Litigation centered around Kind’s alleged deceptive marketing practices of their food items, listing as “natural” foods that contain “synthetic, chemically synthesized, and highly processed ingredients such as soy lecithin, soy protein isolate, citrus pectin, glucose syrup, vegetable glycerine, palm kernel oil, canola oil, ascorbic acid, vitamin A acetate, D-Alpha tocopheryl acetate, and annatto,” and that “[t]esting has detected the presence of GMOs” in some Kind products.<sup>95</sup>

Primary jurisdiction has also been invoked in the opioid epidemic, with defendants invoking the FDA’s oversight on prescription drugs.<sup>96</sup> In particular, the FDA has been referred to concerning opioid narcotics such as Vicodin, morphine, and codeine. These mass produced substances contain potent chemical agents which replicate the action of endorphins and are commonly used as medications for relief of intense pain or alleviation of severe depression. Unfortunately, the euphoric high achievable through the drugs, coupled with allegations of major fraud of product mislabeling and false advertising practices by the producing companies, have led to widespread misuse, tolerance, addiction, and even death. This has resulted in mass litigation, with primary jurisdiction again being used as an agency referral method.<sup>97</sup> Other areas generating primary jurisdiction referrals are labor disagreements applied to the National Labor Relations Board, antitrust issues, complicated environmental debates, and Medicare and Medicaid disputes referred to the Centers for Medicare and Medicaid Services.<sup>98</sup> Despite being a popular tool in legal practice from defendants seeking stays and dismissals, academics have developed mixed feelings about the doctrine, particularly with respect to its use as an advice referral method. The central practical argument is that these motions can cause a long or even indefinite delay, which has potential to add to litigation expenses and harm the

<sup>95</sup> *In Re: Kind LLC “Healthy and all Natural”* Litigation, 387 F. Supp. 3d 457, 461 (2018). The court stayed the case pending action from the FDA.

<sup>96</sup> See Catherine T. Struve, *Greater and Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims Concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039, 1039 (2008).

<sup>97</sup> See Cunningham, *supra* note 10, *passim*.

<sup>98</sup> See Winters, *supra* note 10, at 553–54 (cataloguing cases).

speedy resolution of disputes.<sup>99</sup> The argument goes that in cases requiring exclusive agency jurisdiction, having a delay may be relevant, since the agency must give a ruling before the case can proceed. With an advice referral case, however, the delay is often needless, and may be especially damaging if the case presents safety issues, such as leaving a product with a misleading label with health consequences on shelves. For this reason, some feel that the primary jurisdiction doctrine should be re-confined to cases involving rate-settings and labor disputes, and that courts should make use of other mechanisms to facilitate agency participation.<sup>100</sup>

An additional, commonly-cited concern is that the doctrine seems to lack definite borders or boundaries.<sup>101</sup> Even its name, primary jurisdiction, can be misleading, since the concept is prudential in nature and not necessarily about a district court lacking jurisdiction to adjudicate.<sup>102</sup> As such, it represents “a bit

<sup>99</sup> See *Access Telecomms. v Southwestern Bell Tel. Co.*, 137 F.3d 605, 605 (1998).

<sup>100</sup> We address these questions later, but as an initial note, one solution may be for a court to limit the negative effects of a delay by specifically limiting a stay’s length. For instance, a court could refer a case to an administrative agency, while specifying that if the agency does not make a ruling within a set, reasonable amount of time, the court would rescind the referral order and decide the matter on its own terms. See, e.g., *American Auto. Mfrs. Ass’n v. Massachusetts Dep’t of Env’tl. Protection*, 163 F.3d 74, 75 (1998):

For example, a court might refer a matter to an administrative agency, explicitly providing, however, that if the agency fails to rule within a reasonable amount of time, the court would either vacate the referral order and decide the matter itself, or issue an order under 5 U.S.C. § 706(1), which authorizes courts to ‘compel agency action . . . unreasonably delayed. (footnotes omitted).

<sup>101</sup> See *Winters*, *supra* note 10, at 241 (characterizing primary jurisdiction as an “ill-defined” doctrine).

<sup>102</sup> See Hilary G. Buttrick & Courtney Droms Hath, *Pomegranate Juice Can Do That? Navigating the Jurisdictional Landscape of Food Health Claim Regulation in a Post-Pom Wonderful World*, 49 IND. L. REV. 267, 289 (2016) (discussing primary jurisdiction together with preemption and preclusion in context of food labeling); Jeffrey R. Babbin, *Developments in the Second Circuit: 2001-2002*, 35 CONN. L. REV. 1565, 1616–17 (2003) (discussing the difficulty inherent in using “jurisdiction” inside the term “primary jurisdiction,” quoting

of an enigma in U.S. jurisprudence,”<sup>103</sup> where “myths and misconceptions abound, and . . . are shared by litigants, lawyers, and even judges.”<sup>104</sup> Ironically for a doctrine designed to promote uniformity, this criticism highlights a lack of uniformity amongst courts in the tests or factors to use deciding whether or not to apply the doctrine. It has likely been inappropriately utilized in many novel or difficult issues without closely adhering to one or more of the doctrine’s three original, core purposes.<sup>105</sup> Finally, primary jurisdiction may damage the regulatory process by altering the way agencies prioritize issues, and by removing state law benefits from parties.<sup>106</sup>

#### IV. Primary Jurisdiction as Institutional Evolution

This Section considers primary jurisdiction in light of institutional evolution and increased scientific ability to measure potential harms. The discussion of English peerage, duels, and criminal law reform above each illustrated two central principles: individuals respond to the incentives they are given, and changes in the ability to measure change incentives in powerful ways. As the ability to monitor complex public policy situations improved, there was less need for a land-based peerage system to incentivize proper behavior.<sup>107</sup> As trust became less of an institutional issue, one’s personal reputation for honor became less critical for economic success and dueling

Guido Calabresi as noting the term is “singularly infections” and that “[t]he Holy Roman Empire was ‘neither holy, nor Roman, nor an empire. . . . It was effective nonetheless.’ Similarly, ‘primary jurisdiction’ can be used to denominate what should be done in cases of this sort. And, so long as the words are not treated as implying what they do not intend, little harm will flow from this terminology.” (quoting *MFS Sec. Corp. v. N.Y. Stock Exchange*, 277 F.3d 613, 621-22 (2d Cir. 2002)).

<sup>103</sup> Catherine M. Sharkey, *Tort-Agency Partnerships in an Age of Preemption*, 15 THEORETICAL INQUIRIES L. 359, 384 (2014).

<sup>104</sup> Richard Welch, *Demystifying Primary Jurisdiction Referrals*, FEDERAL COMMUNICATIONS COMMISSION BLOG (July 29, 2010, 10:00 AM), <https://www.fcc.gov/news-events/blog/2010/07/29/demystifying-primary-jurisdiction-referrals>.

<sup>105</sup> *Id.*

<sup>106</sup> See Winters, *supra* note 10, at 240.

<sup>107</sup> See ALLEN, *supra* note 11.

as means of protecting honor faded, and so on.<sup>108</sup> In sum, technology changes incentives, and incentives change behavior.

#### A. Adjudicators of Testing-Based Quality Control Issues

Just as in these historical situations, as pre-suit resolving power in product testing increases, what was previously unmeasurable becomes measurable. This changes the incentives of litigants.<sup>109</sup> As the costs involved in product testing declined, both in access to new testing techniques, laboratories, and the opportunity cost of attorney time to engage product testing, rational plaintiffs' attorneys turned to testing to drive litigation. While the plaintiffs' bar in food litigation had justifiably earned the moniker "the food police" from frustrated defendants, as they adopted regulatory-style testing they took on this mantle in a fuller sense.<sup>110</sup> Now, rather than just bringing actions to enforce label claims in the presence of limited FDA enforcement actions, attorneys began taking on the role of quality-control regulators. What was traditionally a regulatory domain had entered litigation.

Once quality-control testing seeped into the courts, several possibilities existed to handle these claims. First, courts could deal with these claims "in house" using traditional screening doctrines. Twombly and Iqbal allow courts to screen for reasonableness under Rule 12(b)(6) motions, so a court can examine the complaint in a product testing action and conclude

<sup>108</sup> *Id.*

<sup>109</sup> In particular, the successful use of product-testing in pleadings through higher settlements or victories in 12(b)(6) motions encourages other plaintiffs' attorneys to pursue the same strategy. Litigation is generally a competitive marketplace, and plaintiffs' attorneys follow trends in litigation closely. *See, e.g.,* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice"*, 30 *CARD. L. REV.* 407, 407 (2008) (noting "[a] sizable literature on class actions has long suggested that the plaintiff's attorney is an independent entrepreneur"). This extends from formal conferences, such as the National Trial Lawyers Summit, to sniping legal theories that have resulted in success. Product testing begets product testing. For defendants, knowing product-testing litigation is possible likely changes their assessments of the costs and benefits of labeling decisions.

<sup>110</sup> U.S. CHAMBER: INSTITUTE FOR LEGAL REFORM, *THE FOOD COURT: TRENDS IN FOOD AND BEVERAGE CLASS ACTION LITIGATION* (2017).

that no reasonable consumer would consider their purchase deceptive despite the test results.<sup>111</sup> If the complaint is based on testing yet fails to disclose the results of the test, or if the complaint only alleges that future testing will yield damaging results, then defendants can claim that fraud-based claims have not been pled with particularity under Rule 8.<sup>112</sup> Or, if federal law speaks to the testing at issue, it may be possible to construct a preemption defense based on regulated quality control standards.<sup>113</sup>

The disadvantage of these techniques is that policing adulteration standards through court decisions leaves a patchwork, ad-hoc, and unpredictable environment for producers. In this environment, nationally-relevant quality control standards are subject to the vagaries of local courts. As attorneys working in labeling quickly realize, one court's reasonableness is another's unreasonableness, and one court's preemption argument is quickly distinguished by another.<sup>114</sup> Although each particular litigation centers on the question of whether the reasonable consumers in the state-based class have been deceived by a particular product, taken together, multiple litigations over nationally-marketed products, centered around the same testing-based themes, create ad-hoc policy surrounding the testing claims.

While states may serve as quasi-experimental laboratories in many situations, food labeling litigation is generally an exception. Labeling litigation generally concerns national-level production, as products are marketed nationally to take advantage of economies of scale. A negative decision in one state then inherently applies across the nation, and the result is not that producers create unique state-by-state labels, with quasi-experimental results giving optimal policy among these labels.<sup>115</sup>

<sup>111</sup> See Lingwall, *supra* note 16, at 227–39 (discussing the consumer protection labeling setting).

<sup>112</sup> See *id.*

<sup>113</sup> *Id.*

<sup>114</sup> Compare *Reynolds v. Wal-Mart Stores, Inc.*, No. 4:14cv381-MW/CAS, 2015 U.S. Dist. LEXIS 53405, at \*19–37 (N.D. Fla. Apr. 23, 2015), with *Stansfield v. Minute Maid Co.*, 124 F. Supp.3d 1226, 1235–37 (2015) (distinguishing *Reynolds*).

<sup>115</sup> E.g., Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 AM. J. OF POL. SCI. 294, 294–95

Instead, producers wishing to avoid liability must follow standards set by the most extreme adjudicators, giving inordinate power to local courts to create national-level policy. This creates a situation in which the parties generate externalities well beyond the litigation at hand, and the resulting national-level implications created are the result of one-off litigation rather than national-level democratic processes.<sup>116</sup> The resulting policy is likely to please the victor in the litigation, but perhaps not be socially optimal. For these reasons, as a solution to what is at heart a policy question—what level of contamination is acceptable in food with certain claims—court-based adjudication is wanting.<sup>117</sup>

(2006) (discussing the diffusion of state-level policies as “successful states’ policies were emulated” across the nation).

<sup>116</sup> *E.g.*, Mendelson, *supra* note 23, at 1343–46.

<sup>117</sup> Due to national-level product markets and the prohibitive costs involved in state-specific labeling or state-specific quality control standards, decisions in quality-control areas by state-level adjudicators have the practical effect of nationwide injunctions. For a critique, see *Dep’t of Homeland Security v. New York*, 589 U.S. \_\_\_ (2020) (Gorsuch, J., concurring):

The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of ‘nationwide,’ ‘universal,’ or ‘cosmic’ scope, these orders share the same basic flaw—they direct how the defendant must act towards persons who are not parties to the case. . . . As the brief and furious history of the regulation before use illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions. . . . [B]oth sides have been forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide stakes. . . . And the stakes are asymmetric. If a single successful challenge is enough to stay the challenged rule, the government’s hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. *A single loss and the policy goes on ice . . .*” (emphasis added).

Similarly in the labeling regime, nationwide product markets mean defendants must satisfy the most extreme state-level adjudicator to market their products nationally.



Second, agencies could envelop these claims under new regulation. Federal agencies are aware of litigation trends and could—at their own impetus—initiate regulation to preempt developing issues in the courts. This requires an administration willing to take action in the face of ongoing litigation. It also takes an administration not under pressure to relieve a perceived over-abundance of regulations. Given the wide variety of testing-based litigation, policing every type of adulteration through new regulation would unleash a large new regulatory scope over much of the economy due to the incredible sophistication of modern testing techniques and the number of issues they can find.<sup>118</sup> If de-regulation is the watchword in Washington, this is unlikely to occur.

As a third alternative, increased use of the primary jurisdiction doctrine can provide a middle ground. It avoids a continual, potentially contradictory series of one-off decisions by courts each facing essentially the same question, and it avoids extending regulation beyond the reach of what parties find worthwhile to litigate.<sup>119</sup>

### B. Primary Jurisdiction to Adjudicate

Despite many academic criticisms, including delay and failure to preserve Congressional intent for dual-regulatory systems, primary jurisdiction may serve as an attractive dispute resolution method in this quasi-regulatory context. To show this, it is first instructive to break down primary jurisdiction into two major motivations for its application. Following von Mehren and Trautman's famed division of "jurisdiction to adjudicate" into specific jurisdiction (based on the events at issue in the case) and general jurisdiction (based on the presence of the defendant) which the Supreme Court adopted through its *Daimler* and *Bristol-Meyers Squibb* line of cases, it is useful to categorize

<sup>118</sup> See, e.g., Danezis & Georgiou, *supra* note 49, at 21.

<sup>119</sup> Cf., e.g., Linda R. Stanley & Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J. LEGAL STUD. 145, 147–50 (1990) (modeling law and economics approaches to settling versus litigating). Similar analysis encompasses the decision to pursue any form of legal remedies for small harms.

primary jurisdiction as two aspects: general primary jurisdiction and specific primary jurisdiction.<sup>120</sup>

In our terminology, general primary jurisdiction denotes primary jurisdiction invoked when courts have expertise to efficiently adjudicate the matter at hand, but feel agency rulemaking or adjudication would be beneficial due to more general concerns with uniformity, federalism, dual-regulatory schemes, and so on.<sup>121</sup> This lies close to the original justification for primary jurisdiction in *Texas & Pacific Railway Co.*<sup>122</sup> There, the Court worried that “unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question.”<sup>123</sup>

In contrast, specific primary jurisdiction denotes primary jurisdiction invoked for case-specific reasons, such as by the need for specific agency expertise or case-specific efficiency.<sup>124</sup>

<sup>120</sup> Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). The Supreme Court essentially adopted von Mehren and Trautman’s analysis in its personal jurisdiction cases; *Walden v. Fiore*, 571 U.S. 277 (2014) (limiting personal jurisdiction); *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (categorizing personal jurisdiction as either specific, general, or non-existent); *Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 1773 (2017) (applying *Daimler* in the mass litigation context).

<sup>121</sup> Efficiency may be a concern with general primary jurisdiction, but it is efficiency beyond the specific case at hand, such as concerns that non-uniform adjudication leads to a risky, unpredictable, and costly legal landscape which would be inefficient for parties in general. For example, consider the discussion of uniformity in *infra* note 132 and accompanying text. For a general critique of the idea that primary jurisdiction can promote uniformity at all, see Lauren Kostman, *The Natural Response to Adjudicating Current Litigation When the Creation of a Related Agency Rule Is Simultaneously Underway*, 41 CARDOZO L. REV. 353, 384-85 (2019).

<sup>122</sup> *Abilene*, 204 U.S. at 431-41.

<sup>123</sup> *Id.* at 440.

<sup>124</sup> See *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 838 (D.C. Cir. 2012) (noting “the primary jurisdiction doctrine is rooted in part in judicial efficiency; if an agency has particular expertise in an area, then invoking the primary jurisdiction doctrine could ‘enhance court decision-making and efficiency by allowing the court to take advantage of [that] administrative

This lies closer to the reasoning Justice Brandeis added to the motivations for invoking primary jurisdiction in *Great Northern Railway Co.*<sup>125</sup> There, efficiently resolving the dispute required understanding “many intricate facts” which would “commonly . . . be found only in a body of experts.”<sup>126</sup> For example, in this usage specific primary jurisdiction was invoked in *Access Telecommunications v. Southwestern Bell Telephone Co.* when plaintiffs alleged certain technical violations of federal law establishing standards for wiring phone service.<sup>127</sup> The defendant had filed a schedule of charges for telephone service which had been approved by the FCC. The schedule set certain transmission standards for, e.g., “attenuation distortion, echo control, impulse noise, and phase jitter.”<sup>128</sup> Defendant had established a 6,000 foot limit for using certain types of wire, due to problems with meeting transmission standards, while plaintiffs argued this violated the terms of the approved rate schedule, and hence federal law.<sup>129</sup> The court reasoned that (1) reasonableness of a rate was within the statutory authority of the FCC, and (2) the “FCC has far more expertise than the courts on matters such as circuit designs, signal transmissions, noise attenuation, and echo return loss. Thus, the need to draw upon the FCC’s expertise and experience is present here.”<sup>130</sup>

expertise.”) (quoting *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000)).

<sup>125</sup> *Great N. Ry. Co. v. Merchants’ Elevator Co.*, 259 U.S. 285 (1922).

<sup>126</sup> *Id.* at 291.

<sup>127</sup> *Access Telecommunications v. Sw. Bell Tel. Co.*, 137 F.3d 605 (8th Cir. 1997).

<sup>128</sup> *Id.* at 607.

<sup>129</sup> *Id.* at 608.

<sup>130</sup> *Id.* at 609. *See* *Tran v. Sioux Honey Ass’n Coop.*, No. 8:17-cv-00110-JLS-SS, 2017 WL 5587276, at \*1 (C.D. Calif. Oct. 11, 2017) (referring to the FDA for an “opportunity to bring its expertise to bear on appropriate tolerance levels for glyphosate in honey and on labeling requirements regarding the same,” “the EPA and FDA have the requisite expertise to evaluate this research and determine what levels of glyphosate in honey can be considered ‘safe’ and whether consumers should be informed of its presence through labeling,” and that “[n]ot only does the FDA have experience defining such terms for food labeling . . . but it has the re to gather facts and comments from the wider public to help define the term”); *See generally* *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000) (noting that “efficiency” and “expertise” would not be enhanced with a primary jurisdiction referral, because the court had

The concepts of specific and general primary jurisdiction are related. Highly technical matters risk being misunderstood by non-specialists, and so uniformity is more likely to occur when issued from a central body of experts. For example, in finding the need for primary jurisdiction in the antitrust case *Far East Conference v. United States*, the Court first appealed to expertise. It noted that facts “generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in . . . intricate and technical facts” was “better equipped than courts by specialization” to resolve the case.<sup>131</sup> Then in the same breath, the court noted “[u]niformity and consistency in the regulation of business . . . are secured.”<sup>132</sup> In other words, a lack of judicial expertise risks lack of uniformity.

### C. Resolving Power, Efficiency, and Transaction Costs in Adjudication

With this framework for primary jurisdiction, consider the effect of increased scientific resolving power on the institutional relationship between courts and agencies. This Section considers this relationship in light of transaction costs, how scientific change alters those transaction costs, how altered transaction costs change the incentives of litigants, and how those altered incentives play out in light of institutional frameworks.

In a Coasean analysis, it can be instructive to first consider a simplified version of the world without many of the transaction costs that apply in practice.<sup>133</sup> In this simplified world, first

already decided a key factual issue, and then noting that because of the “extremely rare” facts at hand, “there would have been little uniformity to gain by referring” the matter to an agency).

<sup>131</sup> *Far East Conference v. United States*, 342 U.S. 570, 573–75 (1952).

<sup>132</sup> *Id.* at 574.

<sup>133</sup> The literature on the Coase theorem is perhaps the largest in all of social science. See Steven G. Medema, *1966 And All That: Codification, Consolidation, Creep, and Controversy in the Early History of the Coase Theorem*, 36 J. ECON. THOUGHT 271, 273–75 (2014) (discussing how the Coase Theorem was “codified” into economic thought through the efforts of George Stigler). See also Lee Anne Fennel, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1472 (2013) (“In *The Problem of Social Cost*, Ronald Coase firmly installed transaction costs at the center of the economic analysis of law. The potential for these costs to

consider how the parties would react to the creation of a rule governing testing claims, and then consider the process by which the rule could be created. If litigation, regulation, and alternative dispute resolution were frictionless, then whether courts or agencies were tasked with establishing rules for testing-based claims would be immaterial. Indeed, the rules themselves would be immaterial. In such a world, parties would costlessly gather and share all the information relevant to their position on a label, and potential plaintiffs and defendants would bargain to efficient outcomes regardless of the rule established. For example, in our food labeling situation, suppose society wished to establish the limit for when label statements such as “Real,” “Natural,” or “Simple” were violated by contamination with artificial substances.<sup>134</sup> There is a trade-off between the societal value of the descriptor (aiding consumers in purchasing decisions) and the costs of complying with the standards of the rule (producer supply chain monitoring, production-line quality control, and so on).<sup>135</sup> Suppose further that the societally efficient rule, that is, the one that maximized the sum of the welfare of all consumers and producers, was ten parts per billion.<sup>136</sup> A less strict standard would decrease the value added

inconveniently interpose themselves between the world as we know it and an idea of perfect efficiency has provided generations of law and economics scholars with an analytic North Star.”).

<sup>134</sup> See Shyam Narayan Jha, *Food Standards and Permissible Limits, in* RAPID DETECTION OF FOOD ADULTERANTS AND CONTAMINANTS: THEORY AND PRACTICE 63 (Shyam Narayan Jha, ed., 2016) (discussing the permissible limits and food standards with health concerns). See, e.g., LAW360, *Swiss Miss Hot Cocoa Ingredients Not So ‘Simple,’ Buyers Say* (Nov. 20, 2019), [https://www.law360.com/foodbeverage/articles/1221707/swiss-miss-hot-cocoa-ingredients-not-so-simple-buyers-say?nl\\_pk=bc58e84-93b2-4da6-99e5-a98e96f90cccK](https://www.law360.com/foodbeverage/articles/1221707/swiss-miss-hot-cocoa-ingredients-not-so-simple-buyers-say?nl_pk=bc58e84-93b2-4da6-99e5-a98e96f90cccK) (discussing litigation over whether “simple” on Swiss Miss label was violated by inclusion of alkalized cocoa).

<sup>135</sup> The costs of complying with food regulation can be extensive—these costs are themselves the subject of academic study. E.g., John M. Antle, *Benefits and Costs of Food Safety Regulation*, 24 FOOD POL’Y 605, 609 (1999) (discussing academic modeling of the costs involved in complying with food safety regulation).

<sup>136</sup> This simplified version of reality also assumes there are, e.g., no threats to human health from this standard. The “costs” involved in adverse health events could be treated as one more factor over which to bargain with producers. See, e.g., *id.* at 607-08 (discussing models of the perception of risky food).

to consumers from the label statement greater than the corresponding savings in compliance costs, and a more strict standard would similarly add more to compliance costs than to increased consumer benefits.<sup>137</sup>

Suppose then that either a regulator or series of court decisions established a stricter standard, at one part per billion.<sup>138</sup> A firm viewing this regulation has a series of choices: (1) remove the label descriptor, (2) maintain the label descriptor and comply with the new standard, or (3) maintain the label descriptor, fail to comply with the new quality control standard, and risk litigation. For a risk-neutral, rational firm, if the revenue from the label descriptor is less than both the costs of compliance and the expected value of testing-based lawsuit settlements, then the firm will find it rational to remove the label descriptor. If the added revenue from the label descriptor exceeds that of either compliance or the expected value of settlement payouts, then the firm will maintain the label. Assuming the firm keeps the label, whether the firm complies or risks litigation then depends on the costs of compliance compared to the expected value of settlement payouts for noncompliance.<sup>139</sup> The total expected value of settlement

<sup>137</sup> For example, assume consumers have increasing utility with decreasing levels of contamination, that is, consumers are happier with lower amounts of contamination. While these consumers will always be happier with lower levels of contamination, the marginal costs of quality control are increasing with the level of quality. That is, it becomes increasingly costly to ensure higher and higher levels of quality control, due to the need for increasing amounts of monitoring, more precise and expensive testing, and so on. As with standard supply and demand models, there will be a point at which the marginal benefit to consumers from the additional quality will exceed the costs to producers of providing that level of quality assurance. It would be inefficient for society to push quality control beyond this level. A more formal framework could, e.g., model consumer preferences in greater details, but the general reasoning above motivates the theoretical conclusions in this simplified view of the world. *See supra* note 3 for discussion of these applications of the Coase Theorem.

<sup>138</sup> *See* Jha, *supra* note 134 (providing an overview and theory of establishing label standards).

<sup>139</sup> A risk-neutral firm directly compares the cost of compliance to the probability of litigation multiplied by the amount it expects to pay to settle the lawsuits. *See* Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J. L. ECON & POL'Y, 593, 597-98 (2012) (discussing risk-neutral firms in litigation).

payouts depends on how the firm assesses the probability of plaintiffs targeting them with testing lawsuits and the expected payouts that would then occur for meritorious claims.<sup>140</sup> If the firm decided to risk litigation, in a world without transaction costs settlements would be negotiated costlessly, without holdouts, and the efficient outcome would be reached. The producer would compensate consumers the difference between the one-part-per-billion legal standard and the ten-parts-per-billion efficient standard, all while maintaining quality control and supply chain monitoring to keep the level of contamination at ten parts per billion.<sup>141</sup>

Similarly, if the standard created via court decision or regulation were higher, say 100 parts per billion, then informed consumers would be willing to compensate the producer for tighter quality control standards, up until the costs of providing a higher quality product exceeded consumers' willingness to pay for it.<sup>142</sup> Again, the Coase Theorem suggests that without transaction costs the parties will ultimately settle on the societally optimal level.<sup>143</sup> The power of this theory is to suggest

<sup>140</sup> In a fuller sense, the firm would then discount these to the appropriate time periods based on when they expected settlements to occur, and then compare that value to discounted expected revenues from the label claims. For an introduction to discounting, see Vincent M. Jolivet, "Present Value of Future Earnings" Revisited, 49 INS. COUNSEL J. 316, 316 (1982).

<sup>141</sup> The producer's profits increase by saving costs through looser quality control standards as it relaxes its procedures. It passes some of the savings on to consumers to compensate them for violating the rule. Per the assumptions of the exercise and the fundamental reasoning behind the Coase Theorem, at the socially efficient level of ten parts per billion the costs to compensate consumers begins to exceed the savings, and so the efficient equilibrium level is reached. See *supra* note 133 for history and discussion of the principles of the Coase Theorem.

<sup>142</sup> The consumers extend additional compensation to the company to tighten quality control standards up until the benefit from the tightened quality control exceeds the amount the company charges for improving its standards. Again, per the assumptions behind this exercise, the Coase Theorem suggests the costs to producers will begin to exceed the amount consumers are willing to pay for enhanced quality at the socially efficient level. See *id.*

<sup>143</sup> In this simplified analysis, we assume there is no "anti-commons" situation in which, e.g., multiple plaintiffs or plaintiffs' attorneys attempt to maximize welfare vis-à-vis *each other* with complementary rights, as well as versus their respective defendants. Such a situation implies inherent inefficiencies. Ivan Major, Ronald F. King & Cosmin Gabriel Marian, *Anticommons, the Coase Theorem and the Problem of Bundling Inefficiency*, 10

that this efficient outcome would be reached regardless of whether the rule was one part per billion or 100 parts per billion. In either case, the parties would negotiate costlessly to the efficient solution of ten parts per billion in the shadow of the legal rule. The difference in outcome is not the ultimate level of contamination in the product, but whether producers compensate consumers or consumers compensate producers to reach the socially efficient level. In other words, the established level of legal contamination—the height of the “fence” between actionable and non-actionable contamination—fails to matter to the level of contamination in the product after negotiation between consumers and producers.<sup>144</sup>

While this clearly describes an unrealistic setting, relaxing the assumptions of this model to more closely match the real world is useful. First, if we allow transaction costs in litigation, the particular standard (one, ten, or 100 parts per billion) ceases to be irrelevant. The process of settlement becomes costly, due to legal fees, discovery costs, and the price of paying attorneys to negotiate. For each defendant, the possibility of being sued by many plaintiffs adds hold-out costs to settlements—defendants in litigation often wish for universal peace, and plaintiffs knowing this have incentive to delay settlement beyond others, increasing the value of their individual claim.<sup>145</sup> With costly

INT’L J. COMMONS 244, 262 (2016) (“As long as there are multiple owners of complementary rights, maximizing against each other as well as against the actor who wishes to purchase a portion of that right, outcomes systematically will be inefficient.”).

<sup>144</sup> Importantly, in this simplified world the same result would apply regardless of the process of creating the rule. Without transaction costs, that is, in a model in which litigation and coordination among parties are costless, plaintiffs and defendants would reach efficient outcomes whether the standard were created through court decision *or* regulation. The process of rule creation would be irrelevant to social efficiency, as the rule itself would not impede costless bargaining to efficient outcomes. *See* Lingwall, *supra* note 11, at 168 (discussing how parties will reach optimal outcomes regardless of the particular legal rule in a world of costless bargaining).

<sup>145</sup> *See, e.g.,* D. Bruce Johnsen, *A Transaction Cost Assessment of SEC Regulation Best Interest*, 18 COLUM. BUS. L. REV. 695, 701 (2018) (“Transaction costs are never zero, and, in any event, they increase with the number, size, and complexity of transactions, eventually overwhelming the benefits from negotiating further adjustments.”).



litigation and coordination, the socially optimal level is not guaranteed to be reached if the standard is not set at the efficient level at the beginning. If the standard is established at less than ten parts per billion, the added costs of finding and negotiating with consumers, whether through attorneys in the context of litigation or directly through consumer outreach, will add to the producer's quality control costs, so that the point at which costs match and then begin to exceed consumers' willingness to pay for extra quality control will remain below the socially optimal level. Similarly, if the standard established were greater than ten parts per billion, the costs to consumers in coordinating responses to the producer's practice, engaging the producer through litigation, and so on, lower the net benefit to consumers from the label statements. Consumers' willingness to pay for extra quality control will be lower because of these costs, and the ultimate level of contamination will exceed the efficient level. With transaction costs, the level of legally acceptable contamination or "height of the fence" matters not just to establishing winners and losers (whether producers pay consumers to reach the efficient level, or vice versa), but also to the overall efficiency of the market. The frictions inherent in exchange mean that a rule established at other than the socially optimal level will give less than optimal results. In sum, in a world with transaction costs, the rule will matter.<sup>146</sup>

In this relaxed model, creating an efficient legal rule creates value, as parties facing a different rule are unlikely to bargain in the shadow of the rule to the efficient level. This begs two related questions. First, what will be the cost of creating the rule, and second, regardless of cost, which rulemaking process is most likely to lead to socially optimal rules.<sup>147</sup> If the cost of

<sup>146</sup> See, e.g., Lingwall, *supra* note 11, at 169-172. Here, we use the term "rule" colloquially as an established legal principle, not necessarily the result of notice and comment regulatory rulemaking.

<sup>147</sup> At a theoretical level, this is also an argument for the regulator itself. See D. Bruce Johnsen, *A Coasean Approach to Cost-Benefit Analysis*, 42 HARV. J. L. & PUB. POL'Y 489, 494 (2018) (arguing that regulators should simply ask whether a proposed regulation lowers transaction costs, and if not, then "the regulation should be scrapped absent convincing evidence that its benefits exceed its costs"). In the situation of many-on-many litigation over regulatory versus quasi-regulatory standards, coordinating standards-creation in mass actions is likely an

creating an efficient rule exceeds the societal benefit from the rule itself, then the rule creation process has thrown the baby out with the regulatory bathwater.<sup>148</sup> If the cost of creating an efficient rule is minor compared to the societal benefit from the rule, that is, if rule optimization is more important than the transaction costs involved in its creation, then choosing a rulemaking entity or procedure that will achieve, near as possible, the efficient rule becomes crucial. In the consumer goods setting considered here, the billions of potential products sold to millions of consumers mean that due to scale, inefficiencies in the rule likely outweigh the transaction costs inherent in the rule creation process, and so the fundamental question is which rulemaking body is most likely to create a rule that approaches a societally efficient level.

As discussed above, traditional modeling of this question would consider at least two options: courts or agencies.<sup>149</sup> While parties will favor either courts or agencies as decision makers based on over whom they expect to levy the most comparatively effective influence, each of these options comes with a complex slate of costs and benefits. For example, agencies are subject to capture,<sup>150</sup> the electorate may be driven by factors other than the regulatory issues at hand, such as the social positions of candidates, only highly sophisticated parties may be able to substantially influence rulemaking, and so on.<sup>151</sup> At the same time, agency decision making allows the possibility of

area in which “transaction costs [are] so high that market transactions between the affected parties are precluded.” *Id.* at 495.

<sup>148</sup> *Cf.* Fennell, *supra* note 133, at 1474 n.11 and accompanying text (discussing when a focus on reducing transaction costs entails such costs that they “swamp the gain from the newly enabled trades.”).

<sup>149</sup> Third-party certification, pressure from trade groups, and other non-legal options could also be considered, but as primary jurisdiction is the main focus of the Article we limit this analysis to the creation of enforceable legal standards rather than those rules that rely on market forces alone. Third party certification of compliance with a label claim could be valuable, but third party certifications come with a host of other substantial problems. See, for example, the problems with “greenwashing” labels to convey to consumers a message of sustainability. See, e.g., William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 255 (2003).

<sup>150</sup> See Shleifer, *supra* note 4, at 441.

<sup>151</sup> See Coglianese, *supra* note 24, at 951.

nationwide input from multiple parties, filtered through a process reflecting, at least partially, the will of voters through their elected officials' regulatory stances. Similarly, standards-creation by courts results from litigation, which is driven by what plaintiffs find worthwhile to sue about, and is unlikely to give outcomes reflecting nationwide democratic bargaining by producers and consumers. On the other hand, courts may be able to resolve disputes much more quickly than a regulatory process and may reflect more independent judgment than agency decision making, which is inherently tied to political forces, despite the science-based mission of agencies.<sup>152</sup>

Faced with such a barrage of costs and benefits, theorizing whether courts and agencies may create more socially optimal rules requires strong assumptions. For example, agency expertise in a particular subject matter may mean that agencies are better positioned to weigh the costs and benefits of a particular rule, and in a model assuming no regulatory capture, efficiency could dictate tasking the agency with rule creation. On the other hand, if one assumes that independence is the primary factor motivating efficient rule creation, then courts less bound by political forces are the better regulatory body, despite the extra time that may be needed to develop sufficient subject matter expertise to create efficient rules.<sup>153</sup> The assumptions required to solve this debate may vary by the particular issue at hand.<sup>154</sup> In our setting, the negative effect of ad-hoc local

<sup>152</sup> See Winters, *supra* note 10, at 596.

<sup>153</sup> Cf. Schlag, *supra* note 12, at 189:

Another of Coase's arguments . . . is that we do not have (and almost never have) the information required to make the analysis work. In order to decide whether to adopt a liability or a no-liability regime . . . we need to calculate, at the appropriate level of generality, all external effects . . . on all the relevant markets . . . [W]e almost never have that kind of information available.

(footnotes omitted).

<sup>154</sup> The need for strong assumptions to resolve the court versus agency question is itself an argument for the continued existence of the primary jurisdiction doctrine, as primary jurisdiction allows a court to assess the relevant costs and then allow the opportunity for agency action on a case-by-case basis. The court can weigh the time necessary to educate itself, the potential delay, and

litigation on national product markets could weigh in favor of agency rulemaking over court-based adjudication.

More importantly, and regardless of whether one believes courts or agencies are generally better adjudicators in the quality-control setting, the issues involved in selecting efficiency-enhancing adjudicators set up the more pertinent problem considered in the next section: technological change has the capacity to alter the framework of these calculations. In our product testing setting, the ability for plaintiffs' attorneys to easily access sophisticated laboratory testing has altered their incentives to bring quality-control based litigation, shifting what was formerly a regulatory matter to the court system.<sup>155</sup> The existence of testing results drives up pre-class certification settlement values, which are overwhelmingly distributed as attorneys' fees. In addition to inefficiencies created through patchwork adjudication of similar issues among courts and defendants, this shifts the potential value created through efficient quality-control and labeling standards away from consumers and producers to transaction costs in the form of attorneys' fees. Primary jurisdiction stands as one of the few ways to shift the benefits of quality-control based labeling standards away from transaction costs and back to the parties.<sup>156</sup>

the costs in terms of uniformity if it proceeds. It may conclude that the costs and benefits lie in favor of potential agency action. *E.g.*, *Tran v. Sioux Honey Ass'n Coop.*, No. 8:17-cv-110-JLS-JCGx, 2017 WL 5587276 at \*3 (C.D. Cal. Oct. 11, 2017) (analyzing the possibility of a primary jurisdiction referral).

<sup>155</sup> Technological-based decreases in costs associated with laboratory testing increase the potential gains to plaintiffs attorneys from bringing testing-based litigation. The incentivizes moving potential quality control violations to the court system rather than the regulatory process, which offers a participatory, rather than litigation-based, way of creating standards. *See, e.g.*, Farina, *supra* note 23, at 402 (discussing participation in the rulemaking process).

<sup>156</sup> Setting efficient regulatory quality control standards creates social value by maximizing the sum of (1) consumer welfare from informative labeling minus (2) the costs in quality control to conform to labeling statements. *See supra* note 146 and accompanying text. In the absence of an efficient rule, this value is either lost due to transactions that do not occur or is converted into transaction costs as parties negotiate towards the efficient outcome. *See id.* In areas without clear regulatory standards, enhanced attorneys' fee awards based on product testing thus represent conversion of the potential value from efficient standards into attorney paychecks. The incentives created for attorneys to establish quasi-

#### D. Increased Scientific Resolving Power and Institutional Evolution

The prior section showed that the choice of policymakers in a transaction-cost laden world is a significant one, as the choice of policymakers matters to both the distributional aspects of legal rights and to their overall efficiency. It also showed that technological change is central to this debate, as it alters the incentives for parties to engage the court system rather than traditional regulatory channels. This section applies this analysis to the situation of increasing scientific resolving power in product testing, its effect on institutions, and the relationship between courts and agencies in particular.

In the setting of our primary example, the amount of foreign substance in consumer products was historically difficult to measure,<sup>157</sup> although records exist of contamination of some goods.<sup>158</sup> The penalties for food adulteration when it did occur

regulatory standards thus mirrors those encouraging fraud-detection in other settings. *E.g.*, Thomas F. Cotter, *An Economic Analysis of Enhanced Damages and Attorney's Fees For Willful Patent Infringement*, 14 FED. CIR. B.J. 291, 315 (2004) (“[F]rom the standpoint of optimal deterrence, enhanced damages are appropriate . . . when there is a risk of underdetection or underenforcement.”).

<sup>157</sup> In Accum's lurid 1820 exposé, he suggests detecting “grosser abuses” of essential oils by, e.g., testing for the presence of alcohol by adding water and observing color changes, testing for the presence of turpentine by dipping the oil in to paper, drying and smelling. ACCUM, *supra* note 50, at 24. He then notes that “[t]he more subtle artists, however, have contrived other methods of sophistication, which elude all trials . . . without any possibility of discovering the abuse by any of the before-mentioned trials.” *Id.* at 24–25. As to food, Accum believed “[t]he ingenuity and perseverance of self-interest is proof against prohibitions, and contrives to elude the vigilance of the most active government.” *Id.* at 42. In the modern world, testing for the presence of food adulteration at home is daunting, if not impossible. Some testing can be done, but even that generally requires some knowledge of chemistry. *See* D.P. Attrey, *Detection of Food Adulterants/Contaminants*, in FOOD SAFETY IN THE 21ST CENTURY: A PUBLIC HEALTH PERSPECTIVE 129, 139–41 (Rajul Kumar Gupta, Puja Dudeja & Amarjeet Singh Minhas, eds., 2017).

<sup>158</sup> *See* Demetrios G. Sotirchos, Georgios P. Danezis & Contantinos A. Georgiou, *Introduction, Definitions and Legislation*, in FOOD AUTHENTICATION: MANGAGEMENT, ANALYSIS, & REGULATION 3, 45 (2017) (noting that since antiquity “traders used to adulterate wine, pepper, and balsam, all commodities of high added value and price.”) (citing H. RACKHAM, IV PLINY NATURAL HISTORY IV LIBRI XII-XVI (1960)). *See generally* P. Dudeja & A. Singh, *Food Safety in*

could be severe, such as being forced to consume the adulterated food until death.<sup>159</sup> The capacity for fraud or other adulteration increased with industrial-level food production, which developed on pace with other technology in the industrial revolution.<sup>160</sup> For example, consider the industrialization of a common food product: bread. Industrial-level production of bread began around 1810 as various inventions and processes lowered the costs involved in bread production. In Austria, a process was developed in 1810 to separate bran from wheat as it was milled.<sup>161</sup> This made producing refined flour less costly.<sup>162</sup> A few decades later in 1834, the McCormick reaper made it far quicker and easier to harvest grain.<sup>163</sup> Around the mid-1800s, commercial gas ovens were put into use, which stopped bakery reliance on chopped wood.<sup>164</sup> Steel-rollers were invented in Hungary in 1865, which again lowered the cost of milling wheat, and in 1868 Fleischmann's industrialized "compressed yeast" took away the need for tending sourdough levains and their

*Modern Society—Changing Trends of Food Production and Consumption, in FOOD SAFETY IN THE 21ST CENTURY: A PUBLIC HEALTH PERSPECTIVE* 83, 85 (Rajul Kumar Gupta, Puja Dudeja & Amarjeet Singh Minhas, eds., 2017) (describing the change from pre-industrialized to post-industrialized food processing, characterized by lower nutritive value and greater safety hazards). By "food fraud" we mean both intentional activities done to deceive consumers and more general contamination regardless of intent. *See generally* Demetrios G. Sotirchos, Georgios P. Danezis & Contantinos A. Georgiou, *Introduction, Definitions and Legislation, in FOOD AUTHENTICATION: MANAGEMENT, ANALYSIS, & REGULATION* 3, 4 (2017) (discussing how the food science literature classifies food fraud).

<sup>159</sup> *Schieber, supra* note 53, at 2 ("Punishment . . . was rigorous and cruel. In Nuremberg in the 15th century, an adulterator of saffron was burnt over his own produce, and others were buried alive or their eyes were gouged out. . . . In some cases offenders were forced to consume their adulterated food until they died.").

<sup>160</sup> *Id.* at 3 ("With the advent of the Industrial Revolution, this issue increased dramatically. . . . For example, flour was added to sausages to enhance their water binding capacity, colorants were used to improve the overall appearance of foods, and milk was diluted with water.").

<sup>161</sup> NATHAN MYHRVOLD & FRANCISCO MIGOYA, 1 *MODERNIST BREAD* 86 (2017).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 87.

corresponding lengthy rise times.<sup>165</sup> In 1928, Otto Rohwedder's ingenuity made sliced bread possible.<sup>166</sup> Chemical means to control weeds and pests began to be used around World War II, and their use multiplied over following decades.<sup>167</sup> In the 1960s, the Chorleywood process was invented, in which bakers could dramatically speed up bread production "by adding hard fats, extra yeast and a number of chemicals and then mixing at high speed."<sup>168</sup> As industrial-level processing emerged through heavy use of pesticides, industrial-scale processing of ingredients, and creative use of food science to manipulate ingredients during production, the capacity for food fraud increased.<sup>169</sup>

Until 1800 little could be done scientifically to test for the presence of contamination.<sup>170</sup> The only substantial institutional check on food quality remained the market reputation of food

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 88.

<sup>167</sup> MYHRVOLD & FRANCISCO, *supra* note 161, at 89. See S.P. Singh, S. Kaur & D. Singh, *Food Toxicology—Past, Present, and the Future (the Indian Perspective)*, in FOOD SAFETY IN THE 21ST CENTURY: A PUBLIC HEALTH PERSPECTIVE 91, 95 (Rajul Kumar Gupta, Puja Dudeja & Amarjeet Singh Minhas, eds., 2017) (providing an international perspective and noting the:

problem of pesticides in food in India is so widespread that many consider it extremely difficult, if not impossible to rectify. . . . [D]espite a ban, the toxic pesticides are freely available in the market, showing a blatant disregard for public safety. . . . [T]he public response to pesticide misuse is dismal as no one except a few wishes to come forward and build pressure on the government to take remedial actions.

<sup>168</sup> BBC, *Chorleywood: The Bread that Changed Britain* (June 7, 2011), <https://www.bbc.com/news/magazine-13670278>.

<sup>169</sup> This is not to say bread was free from adulteration before modern methods. Bread could be "plumped up with chalk" before industrialized processes. David Edwards, *Food Fraud: It's What's for Dinner?*, SCI. AM. (Aug. 19, 2014), <https://blogs.scientificamerican.com/guest-blog/food-fraud-it-s-whats-for-dinner/>. See Christina Davis, *Panera Bread Class Action Challenges 'Clean' Food Marketing*, TOPCLASSACTIONS (Apr. 3, 2019), <https://topclassactions.com/lawsuit-settlements/consumer-products/food/889097-panera-bread-class-action-challenges-clean-food-marketing/> (discussing a modern allegation).

<sup>170</sup> See Atkins, *supra* note 50, at 100 ("No reliable tests for the adulteration of foods existed until about 1800.").

producers, but as “advances in science made it possible for firms to adulterate their goods in ways that were not easily perceived by consumers,” reputation alone was now insufficient.<sup>171</sup> In response, city-level laboratories began to conduct testing in the mid-1800s, initially providing help to merchants who suspected supplier problems.<sup>172</sup> States did not begin to pass legislation to regulate “pure food” until the late 1800s, perhaps in response to technological change which created substitutes for traditional products, such as oleomargarine for butter.<sup>173</sup> In the United States, the Pure Food and Drugs Act of 1906 created the FDA. This was followed by its more powerful sister, the Food, Drug, and Cosmetic Act of 1938. The FDA’s subsequent rulemaking under these laws represented something of a culmination of federal adulteration efforts, establishing national-level standards to police certain aspects of adulteration.<sup>174</sup>

Summarizing this history from an institutional perspective, reputation effects were initially the main check on adulteration as food production systems industrialized.<sup>175</sup> As food science advanced, reputation effects became insufficient because undetectable fraud could not generate negative reputation and check producers. This created incentives to develop testing technology in response. As it became possible to measure and test for subtle adulteration at the city or state level, this enabled previously impossible regulatory mechanisms to police these standards. The new institutional framework was regulation rather than reputation, built on advancing resolving

<sup>171</sup> *Id.* at 104.

<sup>172</sup> *Id.*

<sup>173</sup> See Marc T. Law, *The Origins of Pure Food Regulation*, 63 J. ECON. HIST. 1103, 1103–1104 (2003) (analyzing historical data on consumption of adulterated food and state law passage and finding evidence that pure food laws served an informational purpose by informing consumers what they were, in fact, purchasing).

<sup>174</sup> *Schieber*, *supra* note 53, at 5. See *Atkins*, *supra* note 50, at 103 (discussing how other countries lagged the United States).

<sup>175</sup> See *Attrey*, *supra* note 157, at 133–37 (providing an international perspective with an extensive list of common food adulterants/contaminants and their health effects including, e.g., pesticide residues, asbestos, antibiotics, microorganisms, and toxins). In the United States, FDA is joined by other regulators with authority over food and pesticides, such as the EPA (regulating pesticides) and the USDA (regulating, e.g., inspection of meat processing facilities).



power in testing. Regulation flowed from this push-pull between technological change advancing ways to adulterate food and methods to detect adulteration, with the regulatory issue often how much adulteration was too much. All food is adulterated at some level, and so the institutional view was that reasonable standards could not demand Platonic purity from food products. In the United States, the FDA eventually adopted an entire slate of these food quality standards, along with instructions for how those standards would be evaluated by the agency.<sup>176</sup> These standards were, to some extent, the product of food producer input and consumer advocacy.<sup>177</sup>

Current standards for natural contamination are outlined in the FDA Food Defects Level Handbook.<sup>178</sup> For many foods, it lists common sources of contamination along with acceptable levels of contamination. For frozen berries, the standard is no more than an average of four or more insect larvae per 500 grams.<sup>179</sup> For cornmeal, no more than an average of one or more whole insects per fifty grams.<sup>180</sup> Contamination is specified for, e.g., insect parts, parasites, mold, mildew, rodent filth (no more than two or more rodent hairs per ten grams crushed oregano!), and so on. If a particular food is not described specifically via regulation, “FDA’s technical and regulatory experts in filth and extraneous materials use a variety of criteria, often in combination, in determining the significance and regulatory impact of the findings.”<sup>181</sup> Contamination by other sources such as pesticides are given in 40 CFR § 180, “Tolerances and Exemptions for Pesticide Chemical Residues in Food.” This contains an enormous list of possible food contaminants, from acephate<sup>182</sup> to ziram.<sup>183</sup>

<sup>176</sup> See, e.g., FDA, GUIDANCE FOR INDUSTRY: FOOD LABELING GUIDE (2013) (providing guidance on FDA food labeling policy).

<sup>177</sup> For example, food industry lobbyists were concerned with the burden of varied state regulations. See DONNA J. WOOD, STRATEGIC USES OF PUBLIC POLICY: BUSINESS AND GOVERNMENT IN THE PROGRESSIVE ERA 144 (1986).

<sup>178</sup> FDA, FOOD DEFECT LEVELS HANDBOOK (2018).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> An insecticide tolerated in, e.g., milk at 0.10 ppm. 40 CFR § 180.108.

<sup>183</sup> A fungicide tolerated in, e.g., almonds, up to 0.10 ppm. 40 CFR § 180.116.

With standards for many types of adulteration in place at the national level, and with threat of regulatory enforcement for violation, food producers had incentive to establish quality control standards that would generally ensure products within regulatory specifications. This did not stop consumer preferences moving towards demand for clarity about food production.<sup>184</sup> For example, pesticide residue was tolerable within existing regulations, but consumers with evolving tastes began to push for something more.<sup>185</sup> In 1990, organic labeling standards were established to provide additional bright lines for producers and consumers, taking the place of scattered marketing and state regulation.<sup>186</sup> Even then, demand for higher quality, or in some sense, simpler food persisted.<sup>187</sup> Organic standards allowed a host of somewhat unnatural substances in food, and producers saw the ability to signal wholesomeness and simplicity without the need to qualify as organic. The result was a host of labeling terms such as “natural,” “real,” and “simple,” each attempting to convey the idea of sidestepping the industrialized food chain and avoiding artificial substances.

New label claims outside FDA regulations were blood in the water to plaintiff attorneys. Litigation over these claims flourished, hitting the “sweet spot” of labeling that seemed to convey material facts about the food yet were not subject to preemption defenses. These litigations centered around what reasonable consumers might make of label claims, and enterprising attorneys began to take advantage of relatively

<sup>184</sup> See generally Sotirchos, Danezis & Georgiou, *supra* note 158 (“In recent days, especially in more economically developed countries . . . consumers have demanded to know without any doubt the origin and content of the food and whether it is safe to eat; in certain cases, consumers are willing to pay more for specific quality attributes.”) (citing Cuputo M. Aprile & R.M. Nayga, Jr., *Consumers’ Valuation of Food Quality Labels: The Case of the European Geographic Indication and Organic Farming Labels*, 36 INT’L J. CONSUMER STUDIES 158 (2012)).

<sup>185</sup> See Arielle Lessing, *A Supplemental Labeling Regime for Organic Products: How the Food, Drug, and Cosmetic Act Hampers a Market Solution to an Organic Transparency Problem*, 18 MO. ENV’T L. & POL’Y REV. 415, 415–31 (2011) (discussing the history of organic regulation).

<sup>186</sup> *Id.*

<sup>187</sup> See, e.g., MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER’S MANIFESTO (2009) (developing, for example, his famous saying “Eat food. Not too much. Mostly plants.”).

costless ways to drive up settlement values: come to the litigation armed with independent testing results which showed potential violation of label claims. What would have been a message from a regulator was now the subject of a complaint: technological advances in the ability to measure for incredibly subtle adulteration challenged the existing institutional framework. In the absence of regulation for these new terms, reputational effects had again become a central institutional check on producers—in substance consumers relying on trusted “natural” brands, and so on, but were now becoming subject to measurement, and hence litigation.<sup>188</sup>

Institutionally, as the gap between what was permissible via regulation and what consumers began to expect from food widened, plaintiff attorneys began to act as an informal regulatory body, sending products to laboratories for testing and using litigation, rather than regulation, as a policing mechanism.<sup>189</sup> In the agency-based regulatory process,

<sup>188</sup> In a sense, plaintiff attorneys utilizing testing results in pleadings were exposing a potential lemons problem created by this new wave of food labeling. Producers knew much more about the contents of food, including the remnants from pesticide use and production aids, that under existing regulations need not be listed as ingredients or disclosed on labels. Modern consumers, just as those in the 1800’s confronting industrial-level food fraud for the first time, could not reasonably be expected to possess this level of information. The resulting informational asymmetries between buyer and seller gave incentive for sellers to pass off lower-quality products as higher quality or at least keep silent about low-level adulteration in “natural” or similarly-labeled foods. Unlike a market for lemons in cars, however, before the advent of litigation-based product testing that revealed the possibility of contamination, most consumers would remain unaware and continue to rely on reputational effects to trust the quality of the item.

<sup>189</sup> We use the term “quasi-regulatory” in the sense of (1) pushing a traditional regulatory agenda, with (2) traditional regulatory mechanisms such as statistical testing, that (3) imposes traditional regulatory burdens such as quality control standards, that (4) are established through litigation. The food quality literature assumes that product testing is embedded in a regulatory framework, not in plaintiff-pushed patchworks. *See Sotirchos et al., supra* note 158, at 3:

The proper description of food . . . and its ingredients is enforced by labeling regulation which aims to reassure the consumer by giving them all the available information needed by issuing guidelines . . . . In order to enforce this legislation, *state inspection bodies* use various scientific methods to certify

producers would have the ability to weigh in on proposed rules through lobbying and participation in notice and comment rulemaking.<sup>190</sup> Absent these processes, producers facing the burdens of quasi-regulatory, litigation-enforced quality control without the corresponding benefits of the regulatory process have responded by trying to reshape the litigation towards regulation. In this way, the rational response to plaintiff attorneys stepping into the shoes of regulators is to move the court to treat the litigation like regulation, moving decision making back to regulatory bodies. The primary vehicle to shift adjudication back to the jurisdiction of the regulators is thus aptly named: primary jurisdiction.<sup>191</sup>

The two main justifications for primary jurisdiction: expertise, justifying specific primary jurisdiction in our terminology, or uniformity, justifying general primary jurisdiction, flow naturally from this reasoning.<sup>192</sup> The possibility of engaging regulatory agencies staffed by subject-matter experts through an application of specific primary jurisdiction may be attractive to defendants concerned with

that the food products . . . fully comply with the label description.

(emphasis added).

<sup>190</sup> The tendency to view courts as a kind of uber-decision maker is not the province of administrative law alone. It extends to constitutional analysis broadly. See Leah Litman, *The Guns Case is About Much More than Guns*, THE ATLANTIC (Dec. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/new-york-state-rifle-pistol-court/602725/> :

In making the argument that their case still be heard, the plaintiffs reveal a worrisome, implicit belief: The courts are the only forum for remedying or stopping unconstitutional conduct. This is not—nor should it be—the case. The political branches (including state legislatures and state executives) can remedy unconstitutional conduct as well; they may even be preferable to courts, given that they are democratically elected and accountable to the people—something the Constitution values.

<sup>191</sup> This is, of course, not the etymology of the term. “Primary” in “primary jurisdiction” conveys the idea of a regulator being more fundamental or vital to the resolution of a particular issue. See Babbin, *supra* note 102, at 1616–17 (discussing the etymology of “primary jurisdiction”).

<sup>192</sup> Stanley & Coursey, *supra* note 119.

judge or jury misinterpreting or over-weighting the defendant's testing results. Similarly, the potential to influence and create national-level product liability standards may be attractive to defendants tired of facing repeated lawsuits in one-off class actions surrounding label standards around the nation. In each case, applying either specific or primary jurisdiction has the potential to extend regulatory benefits and safeguards to defendants.

If primary jurisdiction is restricted to its origins in rate setting or similar frameworks, this counterbalancing of the emergence of a quasi-regulatory state cannot occur. This restriction would limit institutional evolution in response to technological change, in effect formalizing plaintiff-based product testing as an essentially regulatory mechanism. Making permanent this subsidy to the bar would shift the value created through regulatory standards from consumers towards transaction costs.

#### E. Primary Jurisdiction as Transaction Cost

This final subsection examines a potential response to our argument. The prior subsection argued that in the face of plaintiff-based product testing, primary jurisdiction serves as an avenue to stop conversion of regulatory value into transaction costs. Yet, invoking primary jurisdiction itself is a costly litigation strategy. Attorneys' fees are generated litigating primary jurisdiction motions, courts must give time to analyzing them, and if granted, litigation may be delayed, itself a form of transaction cost as parties remain with undecided disputes. While these are valid concerns, the nature of quality-control litigation weighs in favor of allowing referrals.

When litigation is delayed for a specific primary jurisdiction referral, an efficient court is acknowledging that either the time needed to develop expertise to adjudicate in a specific field would cause delay in and of itself, or the benefits from a more efficient agency-created rule outweigh the costs of delay.<sup>193</sup> Whether the delay is awaiting agency action, or for the

<sup>193</sup> See *California v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC (Cal. Super. Ct. Aug. 27, 2015):

court to develop sufficient mastery of a technical area to adjudicate, delay results. In other words, delay is a symptom of complex litigation, not the primary jurisdiction process alone.<sup>194</sup> When expertise to adjudicate would require extraordinary effort by a court to develop, leaving adjudication to those already versed in the relative expertise by invoking specific primary jurisdiction may be efficiency-enhancing and delay reducing in the long run. Even if an agency takes more time to establish standards, delay in resolving an individual case is likely outweighed by the probability an agency will consider the issue, take public input, and reach a more efficient nationwide rule. As far as primary jurisdiction “shortcuts” Congressional intent and violates federalism in establishing a dual regulatory regime,<sup>195</sup> a court allowing a specific primary jurisdiction referral again recognizes that a dual regulatory scheme is excessively costly in those circumstances.<sup>196</sup> The factual issues

[T]his case is about determining what the public and doctors need to be told about opioids. That determination . . . entails much more than determining issues of false and misleading marketing. Underlying every issue here, this case requires this court to become an expert in the field in which it has no expertise. It will have to determine which study, trial, etc. is appropriate and correct as to each issue concerning the use of opioids, and to what extent.

If the litigation involves a pressing need for human life or health, delay is a more significant issue, but both courts and agencies can move quickly when these issues are at stake. Courts could also issue temporary injunctions to halt immediate risk of harm while then allowing agency action.

<sup>194</sup> *But see* *Occidental Chem. Corp. v. La. Pub. Serv. Comm’n*, 810 F.3d 299, 309–10 (5th Cir. 2016) (characterizing primary jurisdiction as causing “certainty of delay”).

<sup>195</sup> *See* *Cunningham*, *supra* note 10, at 44.

<sup>196</sup> Additionally, the argument that primary jurisdiction violates principles of a dual regulatory scheme are difficult to reconcile with Congress creating many dual-regulatory schemes *after* primary jurisdiction was established as a legal doctrine, meaning Congress acted knowing the possibility of primary jurisdiction based dialogues between courts and agencies existed. For example, the FDCA, which creates a dual regulatory system for food labeling, was passed in 1938, years after the primary jurisdiction doctrine had been created and elaborated on by the Supreme Court. Whether Congress anticipated the doctrine being invoked in new areas is questionable, but the doctrine had been well established before much of the modern regulatory state emerged. *See generally* Gregory Ablavsky,

in some regulatory areas are more intricate than others—a court may be an efficient adjudicator of a simple dispute as part of a dual regulatory scheme but find itself lacking in a complex one.<sup>197</sup> Similarly, an efficient court allowing a general primary jurisdiction referral does so because the costs involved in non-uniformity exceed the benefits from dual regulation. In the context of mass actions, which often involve many potentially injured parties affected by nationwide products or policies, this is likely the case.

In this context, preserving the primary jurisdiction doctrine may also be efficiency enhancing generally in the same manner as class actions versus individual actions. Just as class actions coordinate and create efficiencies in many-on-one litigation for small claims, primary jurisdiction may coordinate and create efficiencies in many-on-many litigation settings for small claims. For instance, this might occur when multiple class actions are filed against many defendants, all hinging on a central factual theme or question.<sup>198</sup> Class actions in the context of small claims offer at least three advantages over traditional litigation: collective action enables litigation that could not occur severally due to direct transaction costs, such as the cost of legal

*Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1800 (2018) (noting that modern conceptions of constitutional federalism are quite different from its original construction, as establishing a dual-sovereign governance system which strengthened states against competing claims from, e.g., corporations and separatists).

<sup>197</sup> That is not to say all food labeling disputes are simple, as food labeling law may often involve statistical issues (such as in a dispute of nutritional claims) and economic expertise (such as when establishing a price premium to calculate damages). *E.g.*, In Re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 944-47 (C.D. Cal. 2015) (discussing hedonic regression and statistical techniques to establish a price premium in “all natural” litigation).

<sup>198</sup> Class actions themselves may be coordinated, such as pre-trial MDLs formed from multiple state class actions. “Natural” class actions in particular have been the subject of multiple law review articles. *E.g.*, Sarah Valenzuela, *Tracing the Evolution of Food Fraud Litigation: Adopting an Ascertainability Standard that is “Natural”*, 34 REV. LITIG. 609 (2015); Shea Thompson, *Artificially “Natural”*: Class Action Lawsuits Attack Misleading “Natural” Claims in FDA’s Absence, 47 IND. L. REV. 893 (2014); Nicole E. Negowetti, *Defining Natural Foods: The Search for a Natural Law*, 26 REGENT U. L. REV. 329 (2013); Nicole E. Negowetti, *A National “Natural” Standard for Food Labeling*, 65 ME. L. REV. 581 (2012).

services versus small harms, the class action device solves barriers against collective action such as free-riders and the externalities created by early litigants exhausting defendants' resources, and class actions generate positive externalities outside the litigation itself.<sup>199</sup>

Through a primary jurisdiction referral, the agency-based regulatory process becomes a similar way for multiple stakeholders on both sides of the v. to combine input on a dispute "mediated" by the agency through a regulatory, non-litigation process. This enables collective national action which has not occurred due to the transaction costs involved in many-on-many decision-making, particularly between state-level actors, and generates positive externalities in areas beyond the series of litigations at hand. For example, should the FDA engage rulemaking surrounding the term "natural" as to trace pesticide contamination, the hundreds of parties in uncoordinated litigation over the term would have a collective forum to weigh in on the term with binding results as the agency acts, something that has not occurred through costly, competing court decisions.

In sum, the benefits of maintaining primary jurisdiction as a possibility for producers in product testing claims likely outweigh the costs inherent in its invocation. This holds for both the transaction-cost analysis behind specific and general primary jurisdiction and the analysis of the nature of efficiencies in collective action for small harms.

## V. Conclusion

We began with a quote from Robert Frost's *Mending Wall*, noting that legal realism does not "love a wall" imposed between courts and agencies. In contrast to many academic models which assume separation between these bodies, primary jurisdiction has traditionally been a prominent way for these to interface. In

<sup>199</sup> See William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710–11, 725–27 (2006) (identifying "decree effects" and "settlement effects" which like *stare decisis* make later litigation more efficient by adding information on the value of legal claims to the marketplace, "threat effects" as the class action deters future bad behavior by potential defendants, and "structural effects" of decreasing the need to rely on public enforcement of existing law).



this Article, we argue that technological change drives litigation strategies in ways that justify keeping open this channel for agency referrals, rather than limiting the doctrine to its origins in specific settings. In Frost's poem, the farmer continues by noting "Before I built a wall I'd ask to know // What I was walling in or walling out."<sup>200</sup> Limiting the primary jurisdiction doctrine to its original context risks walling product-testing based claims out of agencies, preserving the creation of quasi-regulatory, statistical-based quality control regimes by plaintiffs' attorneys. Courts and agency regulators in this context need the ability to integrate, allowing defendants the potential to move these actions to a regulatory space designed for national-level deliberating.

In this statistical quality-control framework, primary jurisdiction allows courts the crucial flexibility of examining testing-based cases, weighing the transaction costs—whether in the court developing expertise or the costs stopping collective action across jurisdictions—and judging when an agency, rather than the court, might be a better adjudicator. Invoking specific primary jurisdiction may let agencies construct more optimal rules due to prior expertise in technical matters that are often at issue. Similarly, for product-testing based claims with inherently multi-state implications, invoking general primary jurisdiction moves the creation of national-level standards away from courts to a body designed for that purpose. Both these prevent plaintiff attorneys from capturing the societal benefits from regulation by establishing themselves as a quasi-regulatory body enforcing label claims through independent testing. In this way, as scientific resolving power and the scope of potentially measurable harm continue to evolve, primary jurisdiction serves as a much-needed mechanism allowing corresponding evolution in adjudication.

<sup>200</sup> FROST, *supra* note 2 at 34.