STUDENT COMMENT

NEW TWISTS ON OLD WRINKLES: PRIMARY JURISDICTION AND REGULATORY ACCOMMODATION WITH THE ANTITRUST LAWS

INTRODUCTION

In a free market economy, abusive business practices are kept in check by the forces of free competition. Recognizing free competition as a national policy, Congress has enacted antitrust laws in an effort to preserve free competition and its prophylactic effect.[1] On the other hand, in dealing with certain industries, Congress has implicitly recognized that unlimited free competition is either impossible or undesirable, by enacting specialized regulatory legislation[2]

[1] 15 U.S.C. § 12 (1970) designates as part of the "antitrust laws" the Sherman Act, 15 U.S.C. §§ 1 et seq. (1970); parts of the Wilson Tariff Act, 15 U.S.C. §§ 8 et seq. (1970); and the Clayton Act, 15 U.S.C. §§ 12-27, 44 and 29 U.S.C. §§ 52-53 (1970).

In addition to those provisions, which are formally designated "antitrust laws," other provisions also serve the function of preserving free competition. For example, § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a (1970), prohibits predatory pricing practices, though technically it is not a part of the antitrust laws. See MacIntyre & Volhard, Predatory Pricing Legislation—Is It Necessary?, 14 B.C. Ind. & Com. L. Rev. 1, 2 (1972). Although this comment is directed at the applicability of the antitrust laws to regulated industries, the arguments and rationales for antitrust exceptions apply equally to other enactments, such as § 3 of the Robinson-Patman Act, which prohibit activities within the scope of regulation under the regulatory act.

[2] See, e.g., Interstate Commerce Act, 49 U.S.C. §§ 1 et seq. (1970); Shipping Act of 1916, 46 U.S.C. §§ 801 et seq. (1970); Federal Aviation Act, 49 U.S.C. §§ 1301 et seq. (1970).

to encourage development in the chosen industries while affording protection from abusive practices through a specialized regulatory scheme. Because the goals of these specialized regulatory schemes often differ from the ultimate antitrust goal of free competition, the applicability of the antitrust laws to industries subject to regulatory legislation is questionable.[3] In particular, the recurrent question which has persistently plagued antitrust litigants and courts is the extent to which the prohibitions of the antitrust laws apply to those engaged in industries subject to a specialized regulatory scheme.

This comment will examine the broad question of antitrust immunity of regulated industries. Specifically, it will attempt to describe the different arguments which can be made in asserting an exception from the scope of the antitrust laws. In so doing, it will first describe the main issues arising in the area of expressly-stated exceptions from the antitrust laws. The comment will next describe the arguments available to litigants urging an implied exception to the operation of the antitrust laws by virtue of regulatory enactments and their regulatory mechanisms, comprising the arguments derived from pervasive regulation, primary jurisdiction, prior approval immunity, and self-regulatory justification as enunciated in *Silver v. New York Stock Exchange*.[4] This description will attempt to distinguish the four different types of implied exceptions, and, in each case, to trace the development of its underlying rationale. The comment will then discuss the doctrine of primary jurisdiction and attempt to resolve the current confusion in the law by distinguishing its use as an implied antitrust exception argument from its use as a means of allocating particular questions to the proper adjudicatory body. Toward this end, the circumstances surrounding the latter use of the doctrine will be explored and an underlying rationale will be proposed. Finally, the comment will analyze the recent Supreme Court decisions in the area, including *Ricci v. Chicago Mercantile Exchange*,[5] *Hughes Tool Co. v. Trans World Airlines, Inc.*[6] and *Otter Tail Power Co. v. United States*.[7] This analysis will lead to the submission that the Court has failed to clarify the principles of regulatory-antitrust accommodation. More specifically, it will be asserted that the Court did not correctly consider the different antitrust exception arguments, that it invoked arguably inapplicable antitrust exceptions, that it failed to take cognizance of others which

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[3] See Mitchell, Primary Jurisdiction: What It Is and What It Is Not, 13 ABA Antitrust Section 26, 36 (1958). One text has noted:

> It is generally recognized that the ultimate goal of free competition envisioned by the antitrust statutes may differ markedly from the goal of Congress in requiring that activities of a specific industry be regulated in the 'public interest', competition and other factors considered.

S. Oppenheim & G. Weston, Federal Antitrust Laws 39 (3d ed. 1968).

[4] 373 U.S. 341 (1963).

[5] 409 U.S. 289 (1973).

[6] 409 U.S. 363 (1973).

[7] 410 U.S. 366 (1973).

were more properly applicable, and that it frequently examined irrelevant criteria in evaluating antitrust exception claims. It will further be submitted that the Court improperly invoked the function of primary jurisdiction which results in administrative agency referral. For these reasons it will be concluded that the coordination of regulatory and antitrust law remains in need of further judicial clarification.

I. Antitrust Exception Arguments

A. *Express Exceptions*

Many express exceptions from the operation of the antitrust laws have been enacted by Congress.[8] For example, certain labor organizations are expressly excepted from the antitrust laws by a provision of the Clayton Act.[9] Otherwise, express exceptions from the antitrust laws can sometimes be found in the regulatory acts.[10] When an express exception argument is raised, the main issues concern the prerequisites and scope of the particular exception.

Such exception provisions are interpreted narrowly, both in terms of fulfilling the requirements for their application and of defining the scope of their operation. This restrictive treatment of express exceptions reflects the view that repeal of the antitrust laws should not be lightly assumed. By both requiring strict compliance with the prerequisites of the Agricultural Adjustment Act[11] and limiting the scope of immunity conferred by the Capper-Volstead Act,[12] the Supreme Court in *United States v. Borden*[13] implicitly established the proposition that express exceptions should be narrowly construed so as to give maximum effect to the operation of the antitrust laws. Similarly, in *Carnation Co. v. Pacific Westbound Conference,*[14] the Court disallowed asserted immunity, finding that the prerequisites of the express exception contained in section 15 of the Shipping Act[15] had not been met.[16] In sum, it is apparent that express exceptions have been applied only when their conditions have been fulfilled, and even then the scope of immunity conferred by the enactments has been narrowly viewed.

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[8] For an examination of such express exceptions, often referred to as "exemptions," see 33 ABA Antitrust L.J. 1 (1967).

[9] 15 U.S.C. § 17 (1970).

[10] See, e.g., the Bank Merger Act of 1966, 12 U.S.C. §1828(c) (1970), and the Agricultural Adjustment Act, 7 U.S.C. § 608b (1970).

[11] 7 U.S.C. § 608b (1970).

[12] 7 U.S.C. § 291 (1970).

[13] 308 U.S. 188, 201, 204-05 (1939). The *Borden* Court also considered an implied antitrust exception claim. See text at note 25 infra.

[14] 383 U.S. 213 (1966).

[15] 46 U.S.C. § 814 (1970).

[16] 383 U.S. at 216-17. After determining that the express exception did not apply, the Court also considered defendant's claim of an implied exception. See notes 36-37 infra.

B. *Implied Exceptions*

If an express exception is not applicable, defendants subject to regulation under a regulatory scheme still have several arguments available to avoid liability under the antitrust laws. Several implied arguments have been fashioned from the coexistence of regulatory and antitrust enactments. Certain factors, however, may preclude such an argument. In at least one case, a clear expression of legislative intent to the contrary prevented an implied antitrust exception argument.[17] In other cases,[18] an aversion to the implicit repeal of the antitrust laws has led to the denial of implied antitrust exception arguments.[19] However, in the absence of a clearly stated contrary legislative intent, the principle of avoiding the implicit repeal of the antitrust laws has been overcome by claims of implied antitrust exceptions wrought from regulatory act policy justifications. Four different forms of implied antitrust immunity have been asserted.[20]

1. *Pervasive Regulation*

The first implied exception argument—pervasive regulation—arises from the claim that the regulatory acts so thoroughly regulate the involved industry that there is no scope of operation for the antitrust laws.[21] The argument has never been successfully invoked. In *United States v. Trans-Missouri Freight Ass'n,*[22] decided in 1897, the Supreme Court refused to hold that Interstate Commerce Act[23] regulation of the railroad industry was so pervasive as to impliedly except the industry from the operation of the antitrust laws.[24] The Court reached a similar result as to the agricultural industry in *United States v. Borden.*[25]

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[17] United States v. Radio Corp. of America, 358 U.S.334 (1958). For further discussion of this decision, see note 49 infra. In other cases the presence of a "savings clause" providing that existing statutory and common law remedies should remain intact may preclude an implied antitrust exception argument. See Note, Antitrust and the Regulated Industries: The *Panagra* Decision and Its Ramifications, 38 N.Y.U.L. Rev. 593, 597-98 (1963).

[18] See, e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963); United States v. Borden, 308 U.S. 188, 198 (1939).

[19] It has been stated that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust laws and the regulatory provisions." *Philadelphia Nat'l Bank,* 374 U.S. at 350-51 (footnotes omitted).

[20] Nomenclature for the different implied exception arguments has not always been consistent. See note 35 infra and accompanying text. This comment therefore identifies the different arguments by the substance of their claim for immunity, and adopts descriptive names for each different argument.

[21] See Comment, An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered, 65 Nw. U.L. Rev. 260, 314 (1970).

[22] 166 U.S. 290 (1897).

[23] Ch. 104, 24 Stat. 379 (1897), as amended, 49 U.S.C. §§ 1 et seq. (1970).

[24] 166 U.S. at 316.

[25] 308 U.S. 188, 198 (1939). For a discussion of the *Borden* Court's treatment of express exceptions, see text at note 13 supra.

Since the *Borden* decision, the Court has considered the pervasive regulation argument several times, yet has failed to find even one regulatory act so pervasive as to repeal by implication the antitrust laws.[26] The argument has been asserted so many times and has met with such hostile reception that it has been suggested that *no* regulatory scheme exists that is so pervasive as to repeal by implication the antitrust laws.[27]

2. *Controversy Primary Jurisdiction*

Another argument which has been made by litigants urging an implied exception to the antitrust laws may be called "controversy primary jurisdiction."[28] This argument has been raised when the remedial provisions of a regulatory act have afforded an injured party the same type of relief obtainable under the antitrust laws.[29] In such cases, when certain other conditions have been met,[30] the

[26] See, e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 352 (1963); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 311-12 (1963); California v. FPC, 369 U.S. 482, 485 (1962); United States v. Radio Corp. of America, 358 U.S. 334, 351 (1959).

[27] Note, The New York Stock Exchange Minimum Rate Structure: Antitrust on Wall Street, 55 Va. L. Rev. 661, 671 n.76 (1969). But see Comment, An Approach for Reconciling Antitrust and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered, 65 Nw. U.L. Rev. 260, 314 (1970).

[28] This comment adopts the word "controversy" in referring to the primary jurisdiction implied exception argument to help clearly distinguish the different functions which the term "primary jurisdiction" has served. The other use to which the term "primary jurisdiction" has been put is described in the text following note 66 infra.

As an implied antitrust exception argument, primary jurisdiction has been invoked in cases in which a regulatory remedy has afforded the antitrust plaintiff the right to seek similar relief in an administrative proceeding. In such cases, the entire *controversy* (which may be defined as a claim for relief) has been removed from the antitrust court to the regulatory administration for determination.

[29] See, e.g., Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963); California v. FPC, 369 U.S. 482 (1962); Far East Conference v. United States, 342 U.S. 570 (1952); United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932); Keogh v. Chicago & Nw. Ry., 260 U.S. 156 (1922).

[30] In early cases, the dismissal of antitrust claims was ordered when there was both an available regulatory remedy which would afford relief similar to that sought under the antitrust laws and a policy reason—such as uniformity of damage awards or the need for administrative expertise—which was found to be compelling. See, e.g., *Far East*, 342 U.S. at 570; *Cunard*, 284 U.S. at 485; *Keogh*, 260 U.S. at 162-63. The rationale for these decisions evolved from two earlier cases in which plaintiffs sought relief under a common law theory of recovery notwithstanding available administrative remedies. See Great N. Ry. v. Merchants Elevator Co., 259 U.S. 285 (1922); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

In later cases, the Court has dismissed antitrust claims upon an additional finding that similar administrative remedies were available and that the administrative agency needed to consider the identical standards that an antitrust court would use in determining whether to grant relief. See *Pan Am*, 371 U.S. at 305; *California*, 369 U.S. at 485. The test employed in these later cases will be identified as the "identical standard" test. See text at note 47 infra. It will be submitted that it is improper either to search for a compelling policy reason to invoke controversy primary jurisdiction or to inquire whether the regulatory agency employs the identical standard as an antitrust court. See text at note 48 infra.

Supreme Court has ordered the antitrust action dismissed, and has thus suggested a second implied antitrust exception—that the similar administrative remedies made available to the antitrust plaintiff supersede those provided by the antitrust law.[31]

Controversy primary jurisdiction differs from pervasive regulation. While the latter presents the contention that the enactment of the regulatory act entirely displaces the operation of the antitrust laws on the regulated industry, the operation of controversy primary jurisdiction suggests a pro tanto repeal: *i.e.*, to the extent that the regulatory act provides an antitrust plaintiff with a remedy similar to that available under the antitrust laws, the antitrust remedy will be considered repealed.[32] Beyond the scope of asserted immunity, another distinction exists between controversy primary jurisdiction and pervasive regulation. Since controversy primary jurisdiction depends on the availability of an administrative remedy, it is applicable only where the regulatory enactment provides such a remedy. On the other hand, pervasive regulation can be asserted even where

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[31] Although the Supreme Court has frequently ordered dismissal of the antitrust case whenever similar available regulatory remedies have been present, it has suggested that a delay of the antitrust proceedings might also be appropriate. See note 37 infra and accompanying text. It will be submitted that the correct disposition when controversy primary jurisdiction is invoked is the dismissal of the antitrust action, under the theory that available administrative remedies replace, rather than supplement, similar remedies sought under the antitrust laws. See text at note 45 infra.

It is important to note that dismissal of a claim under controversy primary jurisdiction grounds need not always terminate an antitrust suit. If the antitrust suit consists of several claims for relief, only those claims for which similar remedial action is available through the regulatory apparatus will be displaced. Under controversy primary jurisdiction, not every claim for relief in a given case is necessarily transferred to the regulatory body for adjudication, although each claim for relief (controversy) which is so transferred is completely adjudicated therein. Once transferred, the antitrust court plays no part in determining the controversy so referred, except to the extent that it might be called upon to exercise judicial review of the regulatory body's decision. The role of the referring court is like that of an appellate court, and the process of judicial review is limited to inquiring whether any substantial evidence exists in support of the agency's decision, or whether the agency exceeded statutory or constitutional boundaries. See ICC v. Atlantic Coast Lines, 383 U.S. 576, 594 (1966); cf. 5 U.S.C. §§ 703, 706 (1970).

[32] Several cases in which the controversy primary jurisdiction argument has been successfully employed have been very careful to note that the decision did *not* find that the operation of the antitrust laws was completely ousted by the regulatory scheme. See, e.g., *Pan Am*, 371 U.S. at 305; *Cunard*, 284 U.S. at 485. Moreover, in *Keogh*, 260 U.S. at 162, the Court invoked controversy primary jurisdiction, finding that the remedial procedures available under the Interstate Commerce Act, 49 U.S.C. §§ 8, 9, 16 (1970), operated to the exclusion of similar antitrust remedies, although a prior decision, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), had found that the Interstate Commerce Act did not consist of such pervasive regulation as to completely displace the operation of the antitrust laws. The *Trans-Missouri* decision is discussed in the text at note 22 supra.

Despite this significant distinction between pervasive regulation and controversy primary jurisdiction, the Supreme Court has used the term "pervasive regulation" to refer to primary jurisdiction arguments. See note 35 infra. In addition, the Ninth Circuit has spoken of a "pervasive regulatory scheme" when considering in substance a controversy primary jurisdiction claim. Carnation Co. v. Pacific Westbound Conference, 336 F.2d 650, 651, 662-63, 666-67 (9th Cir. 1964), rev'd, 383 U.S. 213 (1966).

the administrative agency established by the regulatory act has no power to review the activities complained of.[33]

Unfortunately, the controversy primary jurisdiction argument has never been clarified by the Supreme Court. Though the Court has ordered dismissal of antitrust claims in order to permit administrative proceedings in which similar relief would be sought,[34] it has done so with little consistency. At times, the Court has used different nomenclature when referring to the controversy primary jurisdiction argument.[35] In one case in which the regulatory act provided remedies similar to those under the antitrust laws,[36] the Court concluded that the antitrust proceedings remained available, thus suggesting that regulatory remedies supplemented rather than replaced similar antitrust remedies.[37] In addition, the Court has frequently invoked without explanation different tests in considering claims for exception from the antitrust laws.[38]

These three areas of inconsistency associated with the controversy primary jurisdiction doctrine are nevertheless capable of resolution. As far as the problem of varying nomenclature is concerned, one need only ignore the various labels which courts have assigned to the implied antitrust exception argument involving similar regulatory and antitrust remedies. By focusing on its substance, the controversy primary jurisdiction claim can be readily identified.

The dispute over the appropriate function of controversy primary jurisdiction can also be resolved. An examination of the policy consequences of both the supplementary and replacement functions

[33] See Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963).

[34] See, e.g., cases cited in note 30 supra.

[35] In some cases, the Supreme Court has used no label when referring to a controversy primary jurisdiction claim. See *Pan Am*, 371 U.S. at 309; *Keogh*, 260 U.S. at 162. In at least one other decision the Court used the phrase "primary jurisdiction." *Carnation*, 383 U.S. at 220. Different terms have also been used. In *California*, 369 U.S. at 485, the Court found that an antitrust action should proceed, and implicitly was not replaced by regulatory remedies because the regulation was not "pervasive."

Finally, the term "exclusive preliminary jurisdiction" has been employed in reference to controversy primary jurisdiction claims. *Far East*, 342 U.S. at 574; *Cunard*, 284 U.S. at 485. This term is technically inaccurate. "Exclusive" incorrectly infers that any decision reached by an administrative agency in the course of regulatory act remedial proceedings would be insulated from judicial review. See Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 498 (1968), in which the Court held that the *Cunard* holding did not result in giving the regulatory agency free rein to interpret the regulatory act as it saw fit. "Preliminary" is also deceptive, as it incorrectly infers that a court, in dismissing an antitrust suit remanding the plaintiff to available regulatory act remedies, somehow retains "subsequent" jurisdiction. It will be submitted that regulatory remedies replace similar antitrust remedies, and therefore that dismissal of the antitrust claim is appropriate. See text at note 45 infra. It should be noted, however, that the inference of "subsequent" jurisdiction is appropriate to the very limited extent that the district court may exercise judicial review over regulatory act proceedings. 5 U.S.C. §§ 703, 706 (1970).

[36] Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966).

[37] Id. at 221, 224. The *Carnation* decision followed the suggestion of *Far East*, 342 U.S. at 574-77.

[38] See note 30 supra.

of controversy primary jurisdiction reveals that the latter function is more desirable than the former. If the supplementary function were to be adopted, similar regulatory and antitrust remedies would remain viable, and a prospective complainant would either have both remedies available or would need to elect either the regulatory or antitrust remedy. In the first case, the availability of both remedies can be criticized as, first, necessitating an awkward construction of the intended impact of the regulatory act upon antitrust legislation, and second, creating a double jeopardy situation. The conclusion of awkward construction may be demonstrated by noting that such construction renders unnecessary the regulatory remedy of obtaining a cease and desist order from the appropriate regulatory body, since the standard of proof is easier to meet in an antitrust proceeding in which injunctive relief could be sought.[39] Likewise, the conclusion of awkward coordination of the two enactments would be supported by noting that permitting both regulatory and antitrust remedies would have the practical effect of raising the potential damage award under the antitrust laws[40] from trebled damages to approximately quadrupled damages. Double jeopardy objections would stem from subjecting an alleged offender to both regulatory and antitrust proceedings in which liability for the same conduct would be sought to be imposed. In sum, if similar regulatory remedies were held to supplement antitrust remedies and both were available to a complainant, such an interpretation would lead to double jeopardy and awkward construction objections.

Similarly, objections can be raised which pertain to the adoption of the supplementary function in such a manner as to make available either—but not both—the regulatory or the antitrust remedy.[41] Again, a strained statutory accommodation would be created, and policy objections would ensue. The imposition of an election of remedies scheme, which is provided by neither enactment, raises the spectre of awkward statutory construction. Furthermore, permitting an election of remedies may foster a forum-shopping situation comparable to that which was condemned in the renowned decision of *Erie R.R. v. Tompkins*.[42] Moreover, since the standard of proof would be easier and the rewards for success greater in the antitrust proceeding, it is likely that the regulatory

[39] The antitrust laws impose liability for an attempt to monopolize or for actual monopolization. 15 U.S.C. § 2 (1970). In contrast, regulatory acts frequently require more than a mere showing that the conduct is monopolistic, imposing liability if the offending conduct is contrary to the public interest, considering other factors. See, e.g., § 14 of the Shipping Act of 1916, 46 U.S.C. § 812 (1970); cf. Gulf States Util. Co. v. FPC, 411 U.S. 747 (1973).

[40] 15 U.S.C. § 15 (1970).

[41] This result was suggested by the Court in *Carnation*, 383 U.S. at 224. The *Carnation* decision is the only controversy primary jurisdiction decision that has needed to consider the impact of supplementary remedies. See notes 36-37 supra and accompanying text.

[42] 304 U.S. 64 (1938).

remedy would never be chosen, a result clearly at odds with the congressional policy interest in providing a regulatory remedy.[43] Briefly stated, a consideration of both the consequent statutory coordination problems and the corresponding policy objections leads to the conclusion that the supplementary function of controversy primary jurisdiction is undesirable—regardless of whether both antitrust and regulatory remedies are allowed or an election between the two remedies is required.

In contrast, the replacement function, which would result in the replacement of antitrust remedies if a similar regulatory remedy were available to the complainant, appears to be appropriate.[44] Although it would have the harsh impact of constituting a pro tanto repeal of the remedial provision of the existing antitrust law, such a function would assure that the regulatory remedial procedures and standards for rewarding relief would be followed. The replacement function of controversy primary jurisdiction would thus assure the fulfillment of regulatory policy established by Congress in enacting the regulatory act. Accordingly it is submitted that the apparent inconsistency in past controversy primary jurisdiction decisions with respect to the appropriate function of that implied exception should be resolved in favor of the replacement of antitrust remedies when similar regulatory remedies are available to the complainant.[45]

The third inconsistency associated with primary jurisdiction —defining the proper test to be used in determining whether to apply the doctrine—can also be resolved. When faced with the problem of comparable regulatory and administrative remedies, the Court has looked for additional criteria. In some cases, if an additional policy reason for invoking controversy primary jurisdiction were found, the doctrine was invoked.[46] More recently, the Court has used an "identical standard" test and has invoked the doctrine upon a finding that the standards of the regulatory act for awarding the similar regulatory remedies are identical to those of the antitrust laws.[47] Since both of these tests require something more than the availability of similar antitrust and regulatory remedies for the invocation of controversy primary jurisdiction, both tests can be criti-

[43] For a discussion of the conclusion that the standard of proof is easier to meet in an antitrust proceeding, see note 39 supra. In addition, the rewards for success in the antitrust proceeding are greater by virtue of the treble-damages provision in the antitrust laws. 15 U.S.C. § 15 (1970).

[44] The availability of compensatory damages was suggested to be sufficiently similar to treble damages to justify the denial of an antitrust complaint in Keogh v. Chicago & Nw. Ry., 260 U.S. 156 (1922). Similarly, the Court has invoked controversy primary jurisdiction recognizing that a cease and desist order available under a regulatory act is a remedy similar to an injunction obtainable under the antitrust laws. United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 485 (1932).

[45] It would therefore follow that the appropriate disposition of a controversy primary jurisdiction decision is dismissal, since the plaintiff's recourse would be through the apparatus provided by the regulatory act rather than the antitrust laws.

[46] See note 30 supra.

[47] See note 30 supra.

cized. Whenever the tests would deny controversy primary jurisdiction despite the existence of similar available regulatory and antitrust remedies, the result would follow that the regulatory remedies would supplement rather than replace similar antitrust remedies, and the objections to the supplementing function would be pertinent.[48] In short, controversy primary jurisdiction should be invoked to deny an antitrust claim whenever a remedial provision of the regulatory act affords the complainant an opportunity to obtain such similar relief. Controversy primary jurisdiction would thus comprise an implied antitrust exception, implying the pro tanto repeal of antitrust laws to the extent of similar available regulatory remedies.

3. *Prior Approval Immunity*

Another argument that can be made in support of an implicit exception to the antitrust laws is that of prior approval immunity, which arises when the particular activities for which antitrust liability is sought to be imposed have been approved by an administrative body under the standards of a regulatory act. When the legislative history of the regulatory act has not precluded the argument,[49] prior approval immunity has been found to the extent that the transaction causing the antitrust plaintiff's injury has been approved by the administrative body under its regulatory act mandate.[50] Underlying the prior approval immunity argument is the

[48] See text at notes 39-43 supra. Further, the particular factors examined by the Court in its decisions are subject to criticism. See Convisser, Primary Jurisdiction: The Rule and Its Rationalizations, 65 Yale L.J. 315, 322, 329-30 (1956).

It may be contended that the recently developed identical standard test, first invoked in California v. FPC, 369 U.S. 482 (1962), is particularly objectionable, since this test arguably denies the possibility that Congress may have intended that certain conduct be adjudged under the more lenient standards of the regulatory act in recognition of a national policy other than free competition. See note 3 supra. This problem is illustrated by an analysis of United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). See Kintner & Hanson, A Review of The Law of Bank Mergers, 14 B.C. Ind. & Com. L. Rev. 213, 231 n.105, 233 n.117 (1972).

Notwithstanding the criticisms applicable to the identical standard test, at least one commentator has suggested that test as the determinative factor in invoking controversy primary jurisdiction. See Comment, Antitrust Immunity of the National Association of Securities Dealers Under the Maloney Act, 14 B.C. Ind. & Com. L. Rev. 111, 129 n.117 (1972).

[49] The Supreme Court twice denied a prior approval immunity claim when it found that the legislative history of the regulatory act clearly indicated that the administrative agency's approval was not intended to confer antitrust immunity. See United States v. Radio Corp. of America, 358 U.S. 334, 344 (1959); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[50] The prior approval immunity argument was first recognized in Keogh v. Chicago & Nw. Ry., 260 U.S. 156 (1922), and later clarified in Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). Though the *Keogh* Court applied traditional controversy primary jurisdiction analysis to reach the result that the sole remedial forum for a party claiming injury from unreasonable charges was that of a proceeding before the Interstate Commerce Commission, the Court suggested an alternate ground for its decision by questioning rhetorically, "[M]ay it be assumed that Congress intended to give . . . a[n] [antitrust] remedy, where, as here, the rates complained of have been found by the Commission to be legal . . . ?" 260 U.S. at 162.

assumption that Congress intended that administrative approval under the procedures and standards of a regulatory act should have some meaning.[51] If an administrative agency approves a transaction as consistent with a broad standard under the regulatory act —considering all factors, including the transaction's anticompetitive impact—the transaction should be permitted. Should an antitrust court impose liability for the approved transaction, the prior approval by the administrative agency would have been meaningless.

Like the controversy primary jurisdiction claim, prior approval immunity differs from pervasive regulation, in that the latter asserts a total repeal of the antitrust laws to the extent of the scope of the regulatory act, while the former argument asserts only a pro tanto repeal and admits that the antitrust laws may have some application to the regulated industry. In addition, the prior approval immunity argument is by definition available only where the regulatory scheme includes a supervisory administrative body.

4. *The* Silver *Implied Exception*

A fourth implied antitrust exception, derived from the noted *Silver v. New York Stock Exchange*[52] decision, does not depend upon a regulatory scheme involving a supervisory administrative body. The *Silver* implied exception maintains that a regulatory act expressing the policy of industry self-regulation should command an antitrust exception just as a similar enactment providing for specialized governmental regulation commands special treatment.

The Court thus suggested the basis for prior approval immunity: since the conduct against which antitrust complaint was made had been approved by a regulatory agency with the specific duty of regulating the conduct in question, the judgment of that agency should prevail.

In the *Pennsylvania R.R.* decision the Court clarified the prior approval immunity claim by indicating the extent of the immunity conferred by an administrative agency's prior approval. Plaintiff state sought to file a bill of complaint under the Supreme Court's original jurisdiction, seeking both damages and injunctive relief from alleged participants in a conspiracy to fix arbitrary and non-competitive railroad rates to the detriment of shippers within the state and to the advantage of shippers in the northern part of the country. The Court noted that plaintiff Georgia could not maintain a suit for damages to set aside what it felt were unreasonable rates because, under the principle of the *Keogh* decision, the conduct for which antitrust relief was sought (railroad rates) had been approved by the appropriate regulatory body. 324 U.S. at 453. However, the Court did permit Georgia to seek injunctive relief under the antitrust laws from the alleged conspiracy to discriminate against Georgia shippers. The result in the *Pennsylvania R.R.* case suggests that prior approval immunity extends only as far as the administrative body has approved the transaction for which antitrust liability is sought to be imposed.

[51] The rationale for prior approval immunity does not apply where the regulatory standards to be considered by the administrative body are narrow and do not encompass competitive considerations. If, for example, an administrative body must determine only whether a party is technically competent to engage in an enterprise, that finding of competence will not be rendered meaningless by a subsequent antitrust decision ordering that party to stop engaging in the enterprise. On the other hand, prior approval immunity would properly flow from an administrative decision that a party's engaging in an enterprise will be in the public interest, considering the impact of many factors.

[52] 373 U.S. 341 (1963).

According to the *Silver* decision, exception to the antitrust laws should be implied for all actions taken by the self-regulated parties, to the extent justifiable by the purposes of self-regulation.[53] As indicated in the *Silver* opinion, the *Silver* self-regulatory exception is applicable only: first, where Congress has enacted regulatory legislation designed to encourage industry self-regulation,[54] and second, where there is no supervisory regulatory body with powers of enforcement over the particular issue sought to be brought before the antitrust court.[55]

The parameters of the *Silver* exception have not been charted by judicial development of the doctrine. All that is thus far certain about the doctrine is that which was decided in *Silver:* a self-regulated industry's actions which deny an injured party notice and hearing cannot be justified by the goal of self-regulation and such actions thereby subject the industry to antitrust sanctions. Since the self-regulatory situation is rather unique, it is not surprising that there has been no further development of this implied exception's parameters.

The *Silver* implied exception can be distinguished from other implied exception arguments. It differs from the primary jurisdiction and prior approval immunity exceptions, in that it is applicable only when the regulatory act fosters a policy of self-regulation and does not grant a supervisory administrative body the powers to review and enforce its decision on particular actions taken by the industry. In addition, unlike pervasive regulation, the *Silver* implied exception admits to some operation of the antitrust laws on the regulated industry. When industry conduct cannot be justified in terms of self-regulatory goals, the *Silver* exception ceases to operate and the antitrust laws apply.

To summarize briefly, this comment has thus far noted express and implied exception arguments to the antitrust laws, distinguish-

[53] Id. at 361.

[54] Id. at 352.

[55] Id. at 358 n.12. The Court stated:

> Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary action by a registered securities association . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today.

Id. On its face the Court appears to state that it simply is not confronted by and does not wish to consider the applicability of the *Silver* exception under the Maloney Act amendments, 15 U.S.C. §§ 78o, o-3, q, cc, ff (1970). In spite of this, it might be inferred that the Court intended to suggest that if the regulatory act creates a regulatory administration with jurisdiction to scrutinize particular practices of the regulated industry (as in the case of the 1938 Maloney Act amendments), then the appropriate tests for antitrust immunity would include the four which had been used prior to the *Silver* decision: (1) an express immunity provision in either the regulatory act or the antitrust act; (2) a pervasive regulatory scheme implied exception; (3) a controversy primary jurisdiction exception; or (4) a prior approval immunity implied exception. This inference was not drawn from the *Silver* decision by another commentator. See Comment, Antitrust Immunity of the National Association of Securities Dealers Under the Maloney Act, 14 B.C. Ind. & Com. L. Rev. 111, 129, 131 (1972).

ing between the different particular arguments. The controversy primary jurisdiction implied antitrust exception noted above needs further distinction from what will be called issue primary jurisdiction.

II. Issue Primary Jurisdiction

Having discussed the various antitrust exception arguments, this comment will now attempt to distinguish one of those exceptions, the controversy primary jurisdiction implied exception, from another use of the term "primary jurisdiction." The current disagreement among commentators as to the function of primary jurisdiction will first be noted. In attempting to resolve the differences, it will be suggested that the term serves two functions: first, as an implied antitrust exception as noted above;[56] and second, as a means of referring certain issues to an administrative body for its consideration, which function will be identified as issue primary jurisdiction.[57] The comment will then discuss the circumstances under which issue primary jurisdiction has been invoked, noting the uncertainty surrounding the doctrine's use. Consideration will then be given to the potential problems posed by the doctrine's lack of parameters, and a rationale will be suggested which, if adopted, would avoid those pitfalls. In concluding the discussion of issue primary jurisdiction, this comment will suggest the appropriate inquiries to be made when considering whether to invoke issue primary jurisdiction.

A. *The Current Debate*

As noted by one commentator, an attempt to determine the meaning of "primary jurisdiction" can be frustrating:

> Less than two years ago, an eminent antitrust practitioner characterized the subject of primary jurisdiction and the antitrust laws as one enveloped in obscurity. Since the [primary jurisdiction] cases . . . confirmed that gloomy observation, confusion was compounded by the sanguine comment of a leading administrative law treatise that "few

[56] See text at note 28 supra.

[57] In some instances the phrase "non-exclusive primary jurisdiction" has been used to refer to what is here called issue primary jurisdiction. See, e.g., Note, Antitrust and the Regulated Industries: The *Panagra* Decision and Its Ramifications, 38 N.Y.U.L. Rev. 593, 604, 611 (1963). The latter designation has been chosen by this comment because it is felt that the former designation fails to adequately distinguish the two functions of primary jurisdiction, since controversy primary jurisdiction cannot accurately be termed "exclusive primary jurisdiction." See note 35 supra. Further, the term "non-exclusive primary jurisdiction" is intrinsically inaccurate. Although both the court and regulatory agency decide some aspects of the controversy, and, in this sense, the agency's role is non-exclusive, in some instances the issue referred by the court to the regulatory agency can be decided only by the regulatory agency, subject to review in an appropriate court of appeals. See 28 U.S.C. § 2342 (1970); see, e.g., Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970). But see 28 U.S.C. § 1336(b) (1970); 5 U.S.C. § 703 (1970).

> aspects of administrative law have been so systematically and satisfactorily developed."[58]

Some commentators, among them Jaffe[59] and Schwartz,[60] recognize that primary jurisdiction refers to an exception to the antitrust laws:

> [P]rimary jurisdiction . . . may be thus summarized: judges will not give relief against an unlawful restraint of trade if there is a possibility that a subsequent administrative decision would approve the questioned activities. The prosecutor or plaintiff is told to take his complaint to the administrative agency whose jurisdiction is "primary." The agency may then decide whether to approve the activities. Judicial intervention will then take the form of appellate review in the usual course, limited by the usual deference to administrative expertise.[61]

Briefly stated, these commentators use the term "primary jurisdiction" to refer to what has been identified as controversy primary jurisdiction, as evidenced by their beliefs that a plaintiff or prosecutor is told to bring his complaint to the administrative agency. On the other hand, other commentators, including Davis,[62] McGovern,[63] and Stokes,[64] believe a contrary position is correct:

> The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court. . . .
>
> The purpose of the doctrine of primary jurisdiction is not to divide powers between courts and agencies but to determine which tribunal shall take initial action. . . . The reason for the doctrine is not a belief that an agency's expertise makes it superior to a court; the reason is that a court confronted with problems within an agency's area of specialization should have the advantage of whatever contributions the agency can make to the solution.[65]

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[58] Kestenbaum, Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions, 55 Geo. L.J. 812, 813 (1967) (footnotes omitted), citing 3 K. Davis, Administrative Law Treatise § 19.01 (1958).

[59] Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037 (1964); Jaffe, Primary Jurisdiction Reconsidered. The Antitrust Laws, 102 U. Pa. L. Rev. 577 (1954).

[60] Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954).

[61] Id. at 464.

[62] 3 K. Davis, Administrative Law Treatise §§ 19.01, .09 (1958).

[63] McGovern, Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction, 13 ABA Antitrust Section 57 (1958).

[64] Stokes, A Few Irreverent Comments About Antitrust, Agency Regulation, and Primary Jurisdiction, 33 Geo. Wash. L. Rev. 529 (1964).

[65] 3 K. Davis, supra note 62, § 19.01, at 3, § 19.09, at 53.

In sum, it can be seen that this contrary position views the primary jurisdiction doctrine as assisting, but not replacing, the court proceeding.

The two contrary views of primary jurisdiction can be reconciled by noting that the term "primary jurisdiction" refers to two different doctrines. As noted above, controversy primary jurisdiction operates so as to remove a controversy from the jurisdiction of a court under the theory that administrative remedies available to a complainant replace similar available antitrust remedies.[66]

In addition to its use as an implied antitrust exception argument, "primary jurisdiction" serves another function: courts sometimes invoke *issue* primary jurisdiction to refer certain issues arising in a claim for relief to an administrative agency for resolution. In contrast with controversy primary jurisdiction, when issue primary jurisdiction is invoked the court retains jurisdiction over the controversy, but refers one or more issues pertinent to the controversy to an appropriate regulatory body. Consequently, issue primary jurisdiction could not result in an antitrust exception, because the power of the court to grant relief is not displaced by any concurrent regulatory agency's power to grant relief.

Briefly stated, there are two different uses for the term "primary jurisdiction"—first, as a means of referring the *entire controversy* to the regulatory administration as in its use as an implied antitrust exception; and second, as a means of referring *only certain issues* to the regulatory administration, with the court retaining jurisdiction over the entire controversy. Accordingly, the apparent conflict among the commentators might be resolved by noting that Jaffe and Schwartz refer to controversy primary jurisdiction, while Davis, McGovern, and Stokes refer to issue primary jurisdiction.

B. *Issue Primary Jurisdiction Rationale*

Issue primary jurisdiction has been invoked on several occasions by the Supreme Court.[67] The Court has consistently ordered lower courts to refer certain issues to an appropriate administrative body and to retain the court action on their dockets pending the administrative determination when certain conditions have existed: (1) the plaintiff has no means of securing from the administrative agency relief similar to that sought in court; (2) the proponent of a material issue in the case can invoke the jurisdiction of an administrative agency to resolve the issue; and (3) sufficient policy reason has been found to have the administrative agency rather than the courts resolve the issue in dispute.[68] Despite the uniform circum-

[66] See text at note 31 supra.

[67] United States v. Western Pac. R.R., 352 U.S. 59 (1956); General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940); Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247 (1913). More recently, the Supreme Court discussed a lower court's use of the doctrine in Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).

[68] See cases cited in note 67 supra.

stances surrounding its use, the rationale underlying issue primary jurisdiction is obscure; even the Supreme Court has noted that "no fixed formula" exists for its invocation.[69]

The absence of underpinnings for issue primary jurisdiction suggests that problems are likely to develop if the doctrine is used either too sparingly or too frequently. Should a court fail to invoke issue primary jurisdiction whenever the proponent can secure a determination by an administrative agency—when, for example, it exercises its discretion and finds insufficient policy reason to compel referral—it would encourage forum-shopping. A litigant would have the choice of having the issue resolved in an administrative proceeding prior to bringing suit or otherwise merely commencing the court action with the possibility that the court will determine the issue.[70] On the other hand, should a court apply issue primary jurisdiction too frequently, other problems could ensue. First, a litigant might be left without remedy if an issue within the subject matter competence of an administrative agency was referred back to the agency and the litigant had no opportunity to proceed before that agency. Similarly, excessive use might result in the referral of an issue not essential to the resolution of the law suit. In such an event, the court action would be delayed so that an issue could be resolved which would ultimately make no difference to the court's decision. The interests of speedy justice would be frustrated and the energy of both the referred party and administrative agency would be wasted.[71]

It is submitted that a rationale for issue primary jurisdiction may be developed to avoid the potential problems which derive from both the too infrequent and overly excessive use of the doctrine. It might be assumed that Congress intended to replace a party's means of obtaining a court determination of a particular issue by providing that party with a means by which he could secure an administrative decision. Should such a rationale be adopted, the forum-shopping potential from the sparse use of the doctrine would disappear, since referral to the administrative agency would always be made whenever an issue's proponent could secure an administrative determination. Similarly, the adoption of such a rationale would eliminate one potential problem created by the doctrine's unfettered use. A litigant would never be left without remedy, as the court would never order a party to secure an administrative determination unless that party could invoke the administrative agency's jurisdiction.

To determine whether issue primary jurisdiction should be in-

[69] United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956).

[70] Though it is possible that a litigant might be able to select the forum in which he wishes a particular issue to be decided, the impact of such a selection would be somewhat mitigated by the appellate system. Ultimately, the various courts of appeals or the Supreme Court could insure the uniformity of the law, regardless of whether a district court or administrative agency made the initial decision.

[71] For an apt summary of this problem, see McGovern, supra note 63, at 66.

voked it would thus be desirable for a court to inquire into whether the proponent of the issue in question is provided a means by which he can secure an administrative agency determination. In addition, to avoid the final problem engendered by unrestrained use of the doctrine—*i.e.*, the referral of issues not material to the lawsuit —inquiry should also be made into the materiality of the issue in question. If its proponent is the defendant, it should be asked whether the issue is an essential part of a valid defense. Conversely, if the proponent of the issue is the plaintiff, the inquiry should focus on whether the issue is an essential part of a valid theory of recovery. In either event, if the answer is affirmative, the issue may be properly deemed material, and issue primary jurisdiction would be appropriately invoked. In such a manner, the distinction between issue primary jurisdiction and its implied antitrust exception counterpart, controversy primary jurisdiction, would crystallize, and, with this clarification, the concurrent appreciation of the differences between the several antitrust exception claims would smooth the old wrinkles of confusion in antitrust-regulatory accommodation.

III. Analysis of Recent Cases

The Supreme Court has recently decided three cases involving coordination of antitrust and regulatory enactments. This comment will examine each case individually, noting the Court's findings of antitrust exceptions derived from express and implied regulatory act mandates, as well as its use of issue primary jurisdiction. After analyzing the three decisions, it will be submitted that the Court departed from precedent in applying an express exception, failed to clarify the several implied exceptions, and unnecessarily invoked issue primary jurisdiction. Accordingly, it will be submitted that further judicial clarification is needed to better integrate the antitrust and regulatory enactments.

A. *Ricci v. Chicago Mercantile Exchange*[72]

1. *The* Ricci *Holding*

In the *Ricci* case, plaintiff, a commodities dealer (Ricci), brought suit against the Chicago Mercantile Exchange (Exchange), several of its officers, Siegel Trading Company (Siegel), a company similarly engaged in trading commodities futures, and Siegel's president.[73] Ricci claimed that defendant Exchange deprived him of his exchange membership, required of all futures dealers by the Commodities Exchange Act,[74] by transferring it to defendant Siegel

[72] 409 U.S. 289 (1973).

[73] Id. at 290.

[74] 7 U.S.C. §§ 1 et seq. (1970). One section prohibits transactions in commodities futures unless the dealings are conducted by a member of a board of trade, which board has been designated a "contract market" by the Secretary of Agriculture. 7 U.S.C. § 6 (1970). Another section prohibits the maintenance of offices to engage in transactions prohibited by § 6. 7 U.S.C. § 6h (1970).

at the latter's request.[75] Ricci claimed that Siegel sought and obtained the transfer using a previously revoked transfer authorization.[76] As a result, plaintiff was excluded from trading on the Exchange for a period of three weeks, until he purchased another membership at a considerably higher price than his original membership had cost. Ricci brought suit, claiming that the actions of defendants violated the rules of the Exchange and the Commodities Exchange Act, and were pursuant to a conspiracy in violation of section 1 of the Sherman Act.[77]

The district court dismissed the complaint, accepting defendants' contentions that the complaint failed to state a claim upon which relief could be granted.[78] On appeal, the Seventh Circuit first determined that the complaint stated facts sufficient to allege a per se violation of the Sherman Act, in that the alleged acts constituted a group boycott.[79] The court then considered appellant Ricci's claim that no exception to the Sherman Act could be inferred from the provisions of the Commodities Exchange Act. Ricci used the *Silver v. New York Stock Exchange*[80] precedent and argued that no justification for the antitrust violation could be drawn from the Commodities Exchange Act.[81] The Seventh Circuit found the *Silver* argument inapplicable.[82] Rather, the court determined that the power vested in either the Secretary of Agriculture or the Commodities Exchange Commission (CEC) was comparable to that of an antitrust court,[83] and therefore required that the doctrine of primary jurisdiction be invoked.[84] The court then issued an order staying the

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[75] 409 U.S. at 290.

[76] Id.

[77] 15 U.S.C. § 1 (1970). See 409 U.S. at 290-91.

[78] Ricci v. Chicago Mercantile Exch., 447 F.2d 713, 714 (7th Cir. 1971). The opinion of the district court is unreported.

[79] Id. at 716.

[80] 373 U.S. 341 (1963). See text at note 52 supra for an analysis of the *Silver* decision.

[81] 447 F.2d at 716.

[82] Id. at 718. The Seventh Circuit there limited the availability of the *Silver* exception argument to regulatory acts which provide for industry self-regulation without regulatory agency review, and suggested that a different implied exception might properly apply in the *Ricci* case. It has been stated that such a limitation of the *Silver* decision is appropriate. See text at note 55 supra.

[83] Regulations promulgated under the Commodities Exchange Act provide a procedure by which an injured party might challenge contract market trading requirements before the Secretary of Agriculture or contract market rule enforcement decisions before the CEC. 17 C.F.R. §§ 0.3, 0.53 (1973). Under these provisions, any interested person can request the Secretary of Agriculture or the CEC institute proceedings. If the requests are granted and proceedings begin, any person may then intervene at the discretion of the administrative body conducting the review. 17 C.F.R. §§ 0.8, 0.58 (1973). Without permission to intervene, complainants have no legal status in the proceedings. 17 C.F.R. §§ 0.3(b), 0.53(b) (1973).

The Secretary of Agriculture is empowered to invalidate any contract market rule. 7 U.S.C. § 12a(7) (1970). Correspondingly, the CEC is authorized to issue cease and desist orders to certain violators of the Commodities Exchange Act. 7 U.S.C. § 13a (1970).

[84] 447 F.2d at 718. The Seventh Circuit thus referred to controversy primary jurisdiction.

antitrust proceeding until the CEC or the Secretary of Agriculture acted upon the case.[85]

The Supreme Court upheld the Seventh Circuit's determination that the antitrust action should be delayed pending the administrative action.[86] In so doing, the Court applied a tripartite analysis: (1) that the antitrust court would need to determine whether the alleged activities came within an antitrust exception; (2) that the resolution of whether the membership rules were broken would materially aid the court in determining whether an antitrust exception existed; and (3) that the statutory jurisdiction of the CEC to determine whether exchange rules were followed indicated that the question of whether any membership rules were broken was one that should be considered by the CEC.[87]

Following the Court's analysis, it can be seen that the Court initially recognized that an antitrust exception argument could be made. However, it was indicated that neither the pervasive regulation nor controversy primary jurisdiction implied exceptions were applicable.[88] Rather, the Court suggested that the *Silver* implied exception might be applicable, noting:

> If the transfer of Ricci's membership was pursuant to a valid rule, the immediate question for the antitrust court is whether the rule itself and Ricci's exclusion under it are insulated from antitrust attack. . . . On the other hand, if, as Ricci alleges, loss of his membership was contrary to exchange rules, the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commission are exclusive.[89]

The Court thus suggested the *Silver* test, stating that the antitrust exception claim would fail if the asserted conduct could not be justified by the regulatory act. This statement thus connotes the *Silver* antitrust exception argument, even though the Court did not first inquire whether the purpose of the regulatory scheme was industry self-regulation.[90]

In the second part of its analysis, the Court indicated that a CEC decision would be essential to a valid defense since it would

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[85] Id. at 720. The Seventh Circuit thus followed the suggestions of the *Far East* and *Carnation* cases that the primary jurisdiction implied antitrust exception (controversy primary jurisdiction) operates to delay, rather than replace, the antitrust proceeding. See note 37 supra. It has been submitted that sound policy considerations support the opposite result—i.e., that controversy primary jurisdiction, when invoked, should deny entirely the antitrust proceeding. See text at note 45 supra.

[86] 409 U.S. at 291.

[87] Id. at 302.

[88] Id. at 302 n.13.

[89] Id. at 303-04.

[90] See text at note 54 supra.

resolve the *Silver* implied exception argument. The Court apparently believed that if the defendant's activities were determined by the CEC to be in violation of its rules, the activities could not be justified under the goals of the regulatory act, and accordingly the *Silver* exception would not apply.[91] Thus the determination by the CEC would materially aid the antitrust court in considering the antitrust exception argument, as a negative finding would eliminate the *Silver* argument. Resolving whether the membership requirements were followed would therefore be critical to the outcome of the lawsuit, and so would fulfill one of the necessary elements in determining whether issue primary jurisdiction should be applied.[92]

Furthermore, in the third part of its analysis, the Court determined that the issue was one that should be resolved by the regulatory commission.[93] The Court reasoned that since the issue of adherence to the Exchange's membership rules was within the apparent jurisdiction of the CEC, the issue should be referred. The Court declined, however, to finally decide the issue of the CEC's jurisdiction.[94]

2. *Analysis of the* Ricci *Holding*

The Court's decision can be justified on several grounds: first, that neither pervasive regulation nor controversy primary jurisdiction apply; second, that the *Silver* implied exception argument is appropriately suggested to be used in the *Ricci* case; and third, that issue primary jurisdiction should be invoked to have the appropriate administrative bodies determine issues within their competence which may be determinative of the proposed *Silver* defense.

The Court's suggestion that neither the pervasive regulation nor the controversy primary jurisdiction arguments apply can be justified in terms of both precedent and the provisions of the Commodities Exchange Act. The pervasive regulation argument has never received judicial acceptance.[95] In addition, the Court's result in finding inapplicable the controversy primary jurisdiction antitrust exception can be supported, although the method used to reach this decision is subject to question. Since neither the CEC nor the Secretary of Agriculture is empowered to award damages, which was the relief sought by plaintiff in the antitrust court, and since plaintiff does not have a statutory right to participate in proceedings before either administrative entity,[96] it is apparent that the controversy primary jurisdiction exception should not apply.[97] Though

[91] The Court indicated several times its belief that a CEC finding that the rules were not followed would sound the death-knell of the possible *Silver* argument presented in *Ricci*. See 409 U.S. at 303-04, 306, 307-08.

[92] See text following note 71 supra.

[93] 409 U.S. at 304.

[94] Id.

[95] See text at note 27 supra.

[96] See note 83 supra.

[97] See text at note 48 supra.

the Court reached this result, it did so on arguably inappropriate grounds. Rather than questioning whether the appropriate regulatory body could afford an antitrust plaintiff the same relief, and rather than correspondingly inquiring whether a regulatory act gave the antitrust plaintiff a right to participate in proceedings before the regulatory body, the Court looked to other criteria. In so doing, the Court followed the lead of the *California v. Federal Power Commission*[98] and *Pan American World Airways, Inc. v. United States*[99] decisions, in obscuring the test for the implied antitrust exception, by inquiring whether the administrative agency's review would be "particularly focused on competitive considerations."[100] Nevertheless, the result of the Court's inquiry—that controversy primary jurisdiction does not apply—appears correct, even if the validity of its foundation is debatable.

The Court's apparent determination that a *Silver* antitrust exception argument may be present is also supportable, despite the fact that the Commodities Exchange Act provides for an administrative agency with powers to review specific instances of exchange rules enforcement. Accordingly, it can be argued that although the Commodities Exchange Act permits the CEC to review specific instances of Exchange rulings, a situation unlike that in *Silver,* the Commodities Exchange Act still fosters the goal of exchange self-regulation because neither the CEC nor the Secretary of Agriculture are *required* to review Exchange actions. Accordingly, because the Act grants both regulators discretionary powers to regulate, it can be contended that it embodies a design of self-regulation akin to that of the Securities Exchange Act of 1934.[101] It would therefore follow that the *Silver* argument is applicable.

The *Ricci* decision can also be supported in its determination that issue primary jurisdiction should be invoked. It will be recalled that issue primary jurisdiction should be invoked if a material issue is raised in the court setting and its proponent is able to obtain a resolution of the issue from a regulatory body.[102] In the *Ricci* case, the issue raised was whether the membership rules of the Exchange were violated. This issue was found by the Court to be critical to the plaintiff's theory of recovery, as the Court stated that the

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[98] 369 U.S. 482 (1962). See note 30 supra for an analysis of the *California* case and its departure from prior controversy primary jurisdiction tests.

[99] 371 U.S. 296 (1963). See note 30 supra for an analysis of the *Pan Am* case and its adoption of the *California* Court's identical standard inquiry for invoking controversy primary jurisdiction.

[100] 409 U.S. at 302-03 n.13. An appropriate test for the invocation of controversy primary jurisdiction has been submitted. See text at note 48 supra.

[101] 15 U.S.C. §§ 77b et seq. (1970). The provision of the Commodities Exchange Act which enables the Secretary of Agriculture to take action against invalid Exchange rule-making does not require the Secretary to so act against invalid rules. 7 U.S.C. § 12a(7) (1970). Similarly, the Act does not compel the CEC to issue a cease and desist order whenever it finds a violation. 7 U.S.C. § 13a (1970).

[102] See text following note 71 supra.

Exchange's asserted *Silver* antitrust exception would "dissolve" if the Exchange violated its own rules.[103] In addition, the Court noted that Ricci could possibly invoke administrative action to determine whether the rules of the Exchange were broken.[104] In sum, because the Court found that the question of whether the Exchange violated its membership rules was critical, and concurrently found available to the appellant a means of requesting administrative action to decide that question, the Court's invocation of issue primary jurisdiction can be supported.

It is submitted, however, that several of the arguments presented in support of the *Ricci* decision on closer analysis do not merit the result that the *Ricci* Court reached. First, *Ricci*'s treatment of the implied antitrust exception arguments is subject to question. It is admitted that the *Ricci* Court correctly suggested that the Commodities Exchange Act does not consist of pervasive regulation so as to impliedly repeal in toto the antitrust laws in relation to commodities exchanges. Further, it is likewise admitted that controversy primary jurisdiction does not properly operate in the *Ricci* case, as the Commodities Exchange Act does not afford plaintiff Ricci any means of obtaining damages and therefore lacks a necessary element of that exception.[105] However, the validity of the Court's assumption that the *Silver* test applies is disputable, in view of the differences in the statutory frameworks out of which the *Silver* and *Ricci* cases developed. In *Silver* the Court found that the regulatory scheme of the Securities Exchange Act contemplated exchange self-regulation, as the SEC could not review specific instances of exchange rules enforcement.[106] Accordingly, it was felt that the intent of the Securities Exchange Act was to promote exchange self-regulation. Under the Securities Exchange Act, the SEC is empowered only to punish an exchange if it appears that the exchange has failed to enforce the exchange rule required by the Act, which must prohibit violations of the Act.[107] However, the SEC is neither empowered to reverse the decision regarding enforcement of the required rule of the exchange,[108] nor empowered to review exchange enforcement decisions relating to other rules.[109] The Securities Exchange Act can thus be said to unquestionably

[103] 409 U.S. at 306.

[104] Id. at 304 n.14.

[105] See note 83 supra for a summary of the regulations which provide for possible complainant-instituted proceedings before either the CEC or the Secretary of Agriculture. The denial of controversy primary jurisdiction is justified since a complainant does not have an absolute right to proceed, under the theory that Congress did not intend to replace the complainant's antitrust recourse, as evidenced by its failure to provide in the Commodities Exchange Act such recourse through either the CEC or the Secretary of Agriculture.

[106] 373 U.S. at 357-58.

[107] 15 U.S.C. § 78s(a)(1) (1970).

[108] The SEC is empowered only to seek injunctive relief against threatened Securities Exchange Act violations. 15 U.S.C. § 78u(c) (1970).

[109] 373 U.S. at 357.

foster a policy of exchange self-regulation. The *Silver* antitrust exception argument can therefore be limited by its facts to a regulatory scheme in which the policy of self-regulation exists.

In contrast, the regulatory structure out of which the *Ricci* case grew can be characterized as commonplace government regulation without a view toward exchange self-regulation. In support of such an argument it could be noted that, in contrast to the Securities Exchange Act, the Commodities Exchange Act empowers the CEC not only to punish the exchange involved, but also to issue a cease and desist order whenever an exchange fails to enforce its rules.[110] It has been noted that the power conferred on the CEC is voluntary, rather than mandatory, suggesting still that the intent of the Commodities Exchange Act was self-regulation,[111] and it cannot be controverted that this voluntary nature of the Act suggests self-regulation. However, it can nevertheless be argued that the *Silver* exception is inapplicable, in light of the fact that in the *Silver* case the regulatory body—the SEC—had no power to review specific instances of alleged rule-breaking, and that the *Silver* Court stated that "a different case would arise concerning exemption from the operation of [the antitrust] laws" if the regulatory body was empowered to review specific instances of exchange enforcement.[112] At the same time, the *Silver* Court suggested that if the regulatory body had such powers the antitrust exception argument presented would be that of controversy primary jurisdiction, involving the problem of "coextensiveness of coverage with the agency's regulatory power."[113] Hence, due to the difference between the statutory structure of the Securities Exchange Act and the Commodities Exchange Act and the suggestion in *Silver* that a case such as *Ricci* presents only the potential argument of controversy primary jurisdiction, the unchallenged assumption of the *Ricci* Court that the *Silver* implied exception argument is available is at least subject to question.

In addition, on policy grounds, the decision to extend the *Silver* exception to industries which are regulated by administrative bodies which are not compelled to invoke their regulatory powers is of dubious merit. The *Silver* argument's availability might encourage industries to avoid available, though not mandatory, regulatory proceedings. Rather than seeking approval from which prior approval immunity could be claimed, a regulated industry might simply engage in the conduct, relying on the self-regulatory argument. In this case, a regulated industry would be given a forum-shopping situation. Accordingly, on policy grounds, the undiscussed suggestion of *Ricci*—that the *Silver* self-regulation exception applies to industries in which the regulatory body is not compelled to approve or review the regulated industry's action—is subject to criticism.

[110] 7 U.S.C. § 13a (1970).

[111] See text at note 101 supra.

[112] 373 U.S. at 358 n.12.

[113] Id. at 358.

Even if it is assumed that the *Silver* implied exception may be applied to the *Ricci* case despite the differences in regulatory structure and the policy objection, another objection can be raised to the *Ricci* Court's decision. It can be argued that the *Ricci* Court sent Ricci on a purposeless venture in invoking issue primary jurisdiction to determine an issue in the regulatory agency which will be of no help to the antitrust court.[114] It will be recalled that the *Ricci* Court assumed that if the CEC determines that the Exchange violated its rules, the *Silver* implied exception argument would "dissolve," and then invoked issue primary jurisdiction to have the CEC determine whether the Exchange's membership rules had been violated.[115] It has been noted that the *Ricci* Court's decision to invoke issue primary jurisdiction can be supported on the basis of the Court's finding that the resolution of whether the Exchange violated its rules was a material issue that needed to be resolved by an administrative body—the CEC—which was possibly available to the appellant.[116] It is submitted that these contentions are without merit.

First, it is arguable that the determination of whether membership rules were followed is not pertinent to the *Silver* argument and that resolution of the issue is therefore unnecessary. In terms of the *Silver* exception, all that needed to be resolved in the *Ricci* case was whether the actions of the Exchange could be justified by a self-regulatory purpose. The fact that the Exchange's actions violated its own rules does not compel the conclusion that its actions could not be justified as having a valid self-regulatory purpose. In short, all that the CEC will consider will be whether the membership rules were followed. Even if this issue were decided adversely to the Exchange, the antitrust court will still need to determine whether the rules violation could be justified by a valid self-regulatory objective. The issue primary jurisdiction referral will not contribute to this later antitrust court decision and is therefore unnecessary.[117] It is therefore likely that Ricci's time, effort, and money would be wasted by an unnecessary referral to the CEC.

Moreover, the invocation of issue primary jurisdiction in the *Ricci* case is subject to further criticism, even aside from the fact that the issue referred for administrative adjudication is not essential to the decision of the antitrust court. The *Ricci* Court compelled issue primary jurisdiction, despite the fact that the Commodities

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[114] See text at note 71 supra.

[115] See text at note 91 supra.

[116] See text at notes 103-04 supra.

[117] The Court recognized that a decision by the CEC on the question of whether the Exchange followed its membership rules would not determine whether the Exchange's actions could be justified by a self-regulatory purpose—the prerequisite for the *Silver* exception. The Court stated: "We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies." 409 U.S. at 307. Nevertheless, the Court assumed that a finding that the Exchange violated its rules would preclude an argument that the Exchange's actions served a valid self-regulatory purpose. See id. at 304, 306-07.

Exchange Act does not grant Ricci the right to proceed before the regulatory body. Ricci must now apply to institute proceedings before the CEC, as well as request intervention as a party. Either his application for proceedings or his request to intervene might very well be denied. In its reasoning the Court failed to recognize what has been suggested to be the underlying rationale for issue primary jurisdiction—that the doctrine responds to the policy implicit in a congressional design which establishes regulatory bodies and provides parties access to those bodies to have issues resolved.[118] Since the Commodities Exchange Act does not provide aggrieved parties the right to invoke the decision-making power of the CEC, it is apparent that the reason for the invocation of the doctrine does not exist.[119] In addition, serious objections weigh against the invocation of the doctrine. Aside from the additional legal expense incurred by Ricci, delay in obtaining adjudication of his claim will be inevitable. The delay may be needless, if the CEC refuses to institute proceedings.[120] Yet, if the CEC instituted proceedings but denied Ricci's request to intervene the result would be more objectionable. As explained by Justice Marshall,[121] if such a situation arises and estoppel is later invoked to prevent the issue from being relitigated by the trial court,[122] then Ricci will be bound by a decision in which he was not allowed to participate. This result suggests due process objections.[123] On the other hand, if the issue is relitigated, then the referral process would have been a total waste of energy for both Ricci and the CEC.

In sum, it appears that several aspects of the *Ricci* decision lack justification. The applicability of the *Silver* implied exception is at least questionable in light of the difference between the provisions of the Securities Exchange Act and the Commodities Exchange Act

[118] See text following note 71 supra for a discussion of the rationale underlying issue primary jurisdiction.

[119] Even a stronger indication that the reason for invoking the doctrine is not present appears from the possible lack of CEC jurisdiction over the question. While noting the CEC's apparent jurisdiction, the Court declined to finally decide that matter. See text at note 94 supra. Thus, Ricci is denied immediate court relief so that he can first request an administrative agency to institute proceedings and permit him to intervene, even though it is possible that the agency has no jurisdiction over the question referred to it. Such a result suggests excessive application of issue primary jurisdiction. See text following note 70 supra.

[120] Justice Douglas suggested that the CEC will deny Ricci's petition to institute proceedings, stating:

> . . . [I]t would appear to be an anomaly to direct the plaintiff . . . to a[n] . . . agency for a determination as to whether the regulations which it is charged to enforce have been violated, when the agency has, by its inaction, already shown every indication of sanctioning the alleged violation. By remanding, we are requiring the petitioner to seek from the regulators an admission of their failure to regulate (or negligence in regulating).

409 U.S. at 308-09 (dissenting opinion).

[121] Id. at 312 (dissenting opinion).

[122] See Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).

[123] Cf. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

and the limiting language in *Silver*. Moreover, it appears that the referral to the CEC for a determination of the question whether the membership rules were followed is unnecessary to resolution of the issues before the antitrust court. Yet, even if adherence to the membership rules was relevant, the fact that Ricci did not have an absolute right to proceed before the referral agency suggests that the issue primary jurisdiction doctrine should not have been invoked.

In conclusion, the *Ricci* decision is subject to criticism on several counts. Its result, in terms of the pervasive regulation and controversy primary jurisdiction exceptions, is correct, although the Court perpetuated the highly objectionable tests for the latter claim which emerged without explanation from the *California* and *Pan Am* decisions. The Court also suggested as applicable the *Silver* antitrust exception. Finally, it invoked issue primary jurisdiction to determine an issue that need not be determined in the antitrust suit, even though the agency to which the issue was referred was not available by the operation of law to the aggrieved party. Accordingly, the Court failed to recognize sensible parameters and the underlying rationale for issue primary jurisdiction. Because the *Ricci* case neither clearly limits the application of the *Silver* exception, nor shows appreciation for the relevant test set forth in *Silver,* nor takes cognizance of the rationale underlying issue primary jurisdiction, the *Ricci* decision can be said to contribute to further confusion in the application of antitrust laws to regulated industries. Whether the other recent decisions clarify this area of confusion shall next be considered.

B. *Hughes Tool Co. v. Trans World Airlines, Inc.*[124]

1. *The* Hughes *Holding*

In the *Hughes* case, an airlines, Trans World Airlines, Inc. (TWA), sought damages from its former controlling stockholder, Hughes Tool Company (Toolco), and its president for alleged antitrust violations which occurred after the Civil Aeronautics Board (CAB) had approved Toolco's acquisition of TWA control.[125] TWA alleged that Toolco had attempted to monopolize the aircraft supply market during the period between 1955 and 1960, by requiring TWA to boycott all aircraft suppliers other than Toolco, and by conditioning its financing of TWA and sales to TWA on the requirement that TWA not purchase or lease the goods of a competitor.[126] Prior to the trial, defendants moved for dismissal, claiming that the CAB had primary jurisdiction and had approved all the transactions alleged in the complaint.[127] The trial judge ruled

[124] 409 U.S. 363 (1973).

[125] Id. at 364-66.

[126] Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 606 (2d Cir. 1964).

[127] In 1942, several events caused Toolco to fall within the ambit of § 408 of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 1001, as amended, 49 U.S.C. § 1378 (1970), which

that nothing in the Federal Aviation Act precluded court jurisdiction, and that the approval decisions of the CAB did not immunize Toolco from antitrust liability.[128]

Thereafter, Toolco refused to participate in discovery proceedings ordered by the court, and default judgment was entered in favor of TWA.[129] Appeal was taken, and the court of appeals affirmed.[130] The Supreme Court granted certiorari, and, after full briefing and argument, dismissed the writ as improvidently granted.[131] The case returned to the district court and for nearly three years the question of damages was considered.[132] In April 1970, damages were awarded in the amount of approximately $145.5 million, plus interest.[133] On appeal, the Second Circuit first determined that the only issue to which collateral estoppel applied was whether the cross-claim of Toolco against TWA was properly dismissed on default.[134] Then, reviewing TWA's claim and the damage award, the appellate court affirmed.[135] Toolco then appealed to the Supreme Court, claiming, *inter alia,* that TWA's complaint should have been dismissed because the supervision of the CAB over Toolco's control over TWA conferred antitrust immunity upon the transactions.[136]

The Court held that the lower courts had erroneously rejected Toolco's defense that the transactions had immunity by virtue of the surveillance of the CAB under the Federal Aviation Act.[137] Without considering any of the other arguments presented in the case, the

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prohibited acquisition by a person engaged in aeronautics of control of an air carrier without prior approval of the Civil Aeronautics Board. See 409 U.S. at 369-70. The CAB, authorized to approve any such acquisition so long as the control "would not result in a monopoly . . . and thereby jeopardize another air carrier," 49 U.S.C. § 1378 (1970), approved in 1944 Toolco's acquisition of 45.6% of TWA's outstanding stock. Authorized by the same section to condition its approval, the CAB imposed a limitation of intercompany purchases and a requirement for annual accounting to the CAB. 409 U.S. at 370.

Similarly, the CAB approved Toolco's increase in ownership of outstanding TWA stock. In 1950, after reviewing the relationship between TWA and Toolco, the CAB approved Toolco's acquisition of 80% of TWA's outstanding stock. Id. at 371-73.

[128] 332 F.2d at 606. The trial judge thus ruled inapplicable the express antitrust exception contained in the Federal Aviation Act, which exemption provides in pertinent part:

> Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

49 U.S.C. § 1384 (1970), formerly ch. 601, § 414, 52 Stat. 1004 (1938).

[129] 409 U.S. at 365.

[130] Id. at 365 n.1.

[131] Id.

[132] Id. at 391 (dissenting opinion).

[133] Id.

[134] Id. at 365 n.1.

[135] Id. at 365.

[136] Brief for Petitioners at 65-66, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) [hereinafter cited as Brief for Petitioners].

[137] 409 U.S. at 366.

Court determined that the conduct charged in the complaint was immune from the operation of the antitrust laws by virtue of two antitrust exception arguments.[138]

After noting that the Federal Aviation Act did not completely displace the operation of the antitrust laws, the Court found an applicable implied exception. With reference to *Pan American World Airways, Inc. v. United States*,[139] the Court determined that the previously exercised CAB jurisdiction over the events in question created an implied exception to the antitrust laws.[140] Taking issue with the lower court's decision that the *Pan Am* case was inapplicable,[141] the Court found that the authority of the CAB first to grant Toolco the power to control TWA, and second to investigate and alter the manner in which Toolco exercised its control over TWA, conferred antitrust immunity upon Toolco.[142] The Court stated that Toolco was excepted from antitrust liability because, as in the *Pan Am* case, the authority of the CAB "pre-empts the antitrust field."[143] Despite its reference to the *Pan Am* decision, which, it will be recalled, was decided upon controversy primary jurisdiction grounds,[144] and its use of pre-emption language, which suggests a "pervasive regulation" claim, it is apparent that the Court implied an antitrust exception in the *Hughes* case on the basis of a prior approval immunity claim, as it determined that the CAB authorization and concurrent supervision of Toolco's control of TWA removed Toolco from antitrust liability.[145]

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[138] Id.

[139] 371 U.S. 296 (1963). The *Pan Am* decision is discussed in note 30 supra.

[140] 409 U.S. at 387.

[141] Id. at 380-81. The Second Circuit recognized that the *Pan Am* decision presented a different implied exception, while the Supreme Court apparently failed to do so. The Second Circuit found the *Pan Am* case inapplicable to the instant case, stating that "TWA's complaint alleges transactions which are unrelated to any specific function of the CAB." 332 F.2d at 608. The appellate court then distinguished the *Pan Am* case, finding two grounds for distinction. Id. One of the grounds used was that the *Pan Am* complaint alleged matters that could have been brought before the CAB, while in the instant case the CAB had no apparent means of exercising jurisdiction over the matters in the complaint. Id. The Supreme Court, on the other hand, took issue with the Second Circuit's other basis for distinction, and failed to appreciate the different applicable implied antitrust exception arguments. Instead, the Court rested its decision on prior approval immunity grounds, while likening the decision to the controversy primary jurisdiction *Pan Am* decision by using broad "pre-emption" nomenclature. 409 U.S. at 385.

[142] 409 U.S. at 385. It has already been noted that CAB approval was required by the Federal Aviation Act. See note 127 supra. The same section that requires CAB approval prior to merger or control acquisition also permits the CAB to condition or modify its approval order. 49 U.S.C. § 1378(b) (1970).

[143] 409 U.S. at 385. Before reaching the conclusion that the approval and supervision of the CAB conferred antitrust immunity upon Toolco, the Court first noted that the CAB employed "competition and monopoly—two ingredients of the antitrust laws" as standards for their approval. Id. This language, along with the statement that the action of the CAB "pre-empts the antitrust field," raises the question whether the Court intended to apply prior approval immunity or some other implied antitrust exception.

[144] See notes 29-30 supra.

[145] 409 U.S. at 389. Besides enunciating its belief that the prior control and supervision

Aside from the prior approval immunity grounds, the Court invoked an expressly stated exception supplied by the Federal Aviation Act. The Court determined that section 1384 (designated section 414 by the original enactment) expressly provided for the removal of the complained activities from liability under the antitrust laws.[146] The Court found that both CAB decisions approving Toolco control of TWA implicitly contemplated and approved Toolco decisions regarding the source, conditions, and timing of TWA equipment purchases.[147] Having found antitrust immunity, the Court remanded the case with directions to dismiss.[148]

2. *Analysis of the* Hughes *Holding*

The Court's decision in *Hughes* can be supported both in terms of its application of the express exception and in its determination of prior approval immunity.

First, the express immunity conferred by section 1384 of the Federal Aviation Act may arguably apply, if its prerequisites have been met and its scope encompasses the activities about which TWA complained. It will be recalled that express exceptions have been applied only when their requirements have been meticulously followed and the activities are clearly within the intended scope of the exception.[149] It can be argued that the *Hughes* case passes both of these tests, and accordingly the express exception should apply.

The prerequisites of the section 1384 express exception can be argued to have been met, in that the CAB approved Toolco control of TWA and the transactions by which TWA acquired aircraft from Toolco. This argument assumes that the allegations of the complaint charging intent to restrain trade and attempt to monopolize are not admitted by default.[150] Accordingly, the only facts admitted by the default would be the specified transactions between TWA and Toolco, which, it could be contended, were implicitly approved by the CAB in its decisions—first, to allow Toolco to acquire control of TWA, and second, to allow Toolco to acquire additional TWA stock. By so viewing the effect of the default, it can be contended

of Toolco's activities conferred antitrust immunity, the Court also reaffirmed its view that the Federal Aviation Act did not displace the antitrust laws entirely. Id. The Court thus made it apparent that prior approval immunity was the implied exception being invoked.

[146] Id. at 386. See 49 U.S.C. § 1384 (1970). For the text of the express exception, see note 128 supra.

[147] 409 U.S. at 386-87.

[148] Id. at 389.

[149] See text following note 16 supra.

[150] Both Toolco and TWA agreed that a default admits certain allegations made in the complaint. Toolco, however, suggested that the allegations of intent to restrain trade and attempt to monopolize are "conclusory" and should not be considered admitted by the default under the rule that legal conclusions of the complaint are not admitted by the default. See Brief for Petitioners, supra note 136, at 50. On the other hand, TWA contended that their allegations of attempt to monopolize and intent to restrain trade *were* admitted by default, as they represented "ultimate facts" rather than "conclusions of law." See Brief for Respondent at 106-09, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

that the requirements of the express exception are met. Additionally, the activities sought to be excepted can be claimed to be within the scope of the section 1384 immunity provision, as its clear language excepts persons from antitrust liability for engaging in conduct authorized by the CAB. It can thus be asserted that, by determining when and how TWA was to acquire aircraft, Toolco exercised control over TWA—control that was authorized by the CAB and excepted from antitrust liability under section 1384.

Support can also be produced for the implied exception argument used by the Court. It will be recalled that prior approval immunity has been found when the specific activity for which antitrust liability was sought to be imposed had been approved by a regulatory body under a broad regulatory act standard.[151] In light of the prior approval immunity precedents, the result in the *Hughes* case can be supported, as it can be contended that the CAB approved Toolco's acquisition of TWA control and effectively monitored intercompany activities with its power to modify its necessary approval.[152] Accordingly, insofar as the CAB supervised the control of TWA to assure its continued operation in the public interest throughout the tenure of the Toolco-TWA relationship, it could be argued that no antitrust liability could be imposed upon Toolco. Underlying this argument would be the rationale that since the CAB assured that TWA was managed in the public interest, TWA cannot complain of injury from Toolco's control. For this reason, the immunity implied from CAB supervision of Toolco would extend only to antitrust objections raised by TWA.[153] Accordingly, it can be

[151] See text at notes 49-51 supra.

[152] It has been noted that the approval of the CAB is required by the Federal Aviation Act, which also permits the CAB to condition and modify its approval of any transaction. See notes 127, 142 supra.

[153] This limitation on the extent of the antitrust immunity conferred by the CAB approval and supervision is supported by a comparison to Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). In that case, the Court dismissed the antitrust complaint, insofar as it sought damages allegedly caused by the design of railroad tariffs which had been approved by the ICC. However, the Court found no antitrust immunity with respect to an alleged conspiracy, and permitted the plaintiff to continue to seek injunctive relief against the conspiracy. See note 50 supra. Hence, it can be concluded that prior approval immunity extends only so far as the regulatory agency has approved the conduct for which antitrust liability is sought to be imposed.

Correspondingly, in the instant case the CAB can be seen to have approved the control of TWA, but not the subsequent transactions between Toolco and TWA which allegedly had an anticompetitive impact on the aircraft supply industry. Although TWA might still be barred from seeking antitrust relief by virtue of the CAB's continuing supervision of TWA, which supervision assured that the airline was managed in the public interest, neither the federal government nor other aircraft suppliers should be similarly denied antitrust claims, since the CAB had not specifically approved the particular transactions in which Toolco exercised its control over TWA, which transactions prevented the air carrier from obtaining aircraft from other suppliers.

Moreover, even if the subsequent transactions alleged to create antitrust liability had been approved by the CAB, it is arguable that neither the federal government nor another aircraft supplier would be barred from antitrust action under the concept of prior approval immunity. Because the CAB approval was limited in scope to the impact on TWA, and

argued that the *Hughes* case reached the correct result on prior approval immunity grounds. Thus, with reference to both implied and express antitrust exception arguments, the *Hughes* decision can be supported.

It is submitted, however, that closer analysis reveals that the decision may be criticized. First, the express exception contained in section 1384 is arguably inapplicable. Viewing the default judgment as admitting the allegations of the complaint, *i.e.*, that the actions of Toolco were in furtherance of an anticompetitive design in the aircraft supply market, it can be asserted that the requirements of the express exception have not been met, since the anticompetitive scheme and the acts in furtherance thereof are not "necessary to . . . do anything authorized, approved, or required" by a CAB order, and therefore do not qualify for antitrust immunity under section 1384. Although the effect of the default was briefed by both parties,[154] and controverted in reply briefs and memoranda,[155] the Court never squarely faced the issue. To the contrary, the Court assumed that the activities for which damages were awarded at the damage hearings were the sole matters admitted by the default and determined that the particular transactions were approved by the CAB, thus possibly fulfilling the requirements of the expressly stated exceptions.[156] In other words, the requirements of the section 1384 express exception may not have been met, for the default judgment can be viewed as admitting the anticompetitive conspiracy characterization of Toolco's activities, which activities as elements of an anticompetitive scheme were *not* necessary to do anything approved, authorized, or required by the CAB. The Court's reliance on the express exception may therefore be considered misplaced.

More significantly, even if one assumes—as the Court did—that the allegations of anticompetitive activity are not admitted by default, it is arguable that the section 1384 exception does not apply, as the approval of the CAB, viewed in light of past interpretations of express exceptions, did not extend to the events from which TWA asserts Toolco's liability. The CAB approved only Toolco's acquisi-

consequently the air transportation market, it is arguable that such approval did not encompass consideration of the impact on the aircraft supply market. Since the CAB approval did not encompass these considerations, antitrust liability need not follow, as the CAB would have considered only the narrow issue of whether—for the purposes of the air transportation market—the transaction should be permitted, and had not determined the broader issue of whether the transaction was in the public interest, all factors considered. See note 51 supra.

[154] See note 150 supra.

[155] See Reply Brief for Petitioners at 8, Memorandum for Respondent in Response to Reply Brief at 5, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

[156] 409 U.S. at 386. The Court did not discuss precisely what was admitted by virtue of the default, but did comment without further elaboration:

> It is said, however, that . . . the approval of the [Civil Aeronautics] Board did not sanction the precise way in which Toolco allegedly used the power to the disadvantage of TWA. But that is not an answer to the problem of exemption.

Id. at 379.

tion of TWA control and several intercompany aircraft acquisition transactions. Just as an earlier decision had limited an applicable express exception, finding that the provision excepted agricultural producers from the operation of the antitrust laws only to the extent of per se liability and not for activities done thereafter with others,[157] the section 1384 exception could be applied in the *Hughes* case to immunize Toolco from per se antitrust liability for the acquisition of TWA and for the aircraft sales and leasing transactions approved by the CAB. Not included in the scope of the conferred immunity would be Toolco's use of control to prevent TWA from purchasing aircraft from other suppliers and Toolco's actions diverting aircraft to other airlines and delaying aircraft delivery to TWA. Since these actions were neither approved by the CAB, nor necessary to do anything approved by the CAB, the express exception provided by section 1384 arguably does not apply.[158] In sum, although it has been noted that the *Hughes* decision can be supported in terms of the express exception contained in section 1384, it is submitted that this exception is inapplicable because, first, the CAB did not approve Toolco's anticompetitive design, the existence of which is arguably admitted by default, and second, the immunity which section 1384 confers upon Toolco should be limited to per se antitrust liability for control of TWA and should therefore not encompass the exercise of that control so as to deny or delay TWA aircraft acquisition.

The *Hughes* decision is also subject to criticism for its treatment of the prior approval immunity exception. First, it is apparent that the Court's means of determining whether prior approval immunity should apply is subject to criticism. The Court's reliance on the *Pan Am* decision can be criticized as misplaced, since that decision was grounded in controversy primary jurisdiction, as evidenced by the finding of the *Pan Am* Court that the proceedings available before the CAB replaced comparable antitrust court proceedings.[159] Similarly, the *Hughes* Court's use of the identical standard test, wherein it inquired whether the CAB applied the anticompetitive standards of the antitrust laws in determining whether it should approve the Toolco-TWA transactions, can be criticized as irrelevant.[160] As this comment has already noted, the identical standard test fails to appreciate the possibility that Congress intended the standards of a regulatory act rather than the antitrust laws to govern certain

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[157] United States v. Borden, 308 U.S. 188 (1939). For a discussion of this decision, see text at note 13 supra.

[158] This argument was raised by the CAB, an intervenor in the *Hughes* case. Memorandum for the Civil Aeronautics Board as Amicus Curiae at 12-13, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) [hereinafter cited as Memorandum for the CAB].

[159] See notes 29-30 supra.

[160] For a discussion of the Court's prior use of the identical standard test, see note 30 supra.

transactions.[161] To an even greater extent, the finding that the jurisdiction of the CAB "pre-empts the antitrust field" is subject to criticism.[162] By phrasing the implied immunity in terms of preemption, the Court suggests a broader implied exception than is appropriate. The *Hughes* Court indicated that it did not contemplate a pervasive regulation exception, but rather an implied exception to the extent of the exercised jurisdiction of the CAB.[163] It has been noted that analogy to previous decisions involving the prior approval immunity exception leads to the conclusion that the scope of prior approval immunity would be limited to injuries allegedly sustained by TWA during the CAB supervision of Toolco control.[164] Yet the use of the preemption language suggests that Toolco is immune from antitrust liability sought to be imposed by parties whose status was not protected by the CAB. The preemption language suggests that either the United States or an aircraft supplier would be precluded from seeking antitrust damages from Toolco for the latter's alleged anticompetitive activities with respect to TWA. Such a result would be unsupportable.[165]

To a greater extent, however, the *Hughes* decision engenders criticism for implying antitrust immunity. Though it has been noted that the use of prior approval immunity can be supported in the *Hughes* case,[166] it is submitted that this contention is without merit. It was there contended that the CAB supervision of the Toolco-TWA relationship generated prior approval immunity, insofar as the CAB regulation assured that TWA was managed in the public interest. On closer analysis, this argument has flaws. It can be contended in full agreement with the CAB that they did not so supervise the Toolco-TWA relationship.[167] Moreover, as noted above in criticism of the application of the express immunity provision, certain activities—among them Toolco's restraining TWA from acquiring aircraft from other suppliers and diverting aircraft to other airlines—were never approved by the CAB. In sum, it appears fundamentally incorrect to imply prior approval immunity when the appropriate regulatory body never approved the conduct in question.

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[161] See note 48 supra. In addition, the use of the identical standard test permits the coexistence of regulatory and antitrust remedies, and the consequent problems of forum-shopping, disuse of regulatory remedies and double jeopardy. See text at notes 46-48 supra.

[162] See 409 U.S. at 385.

[163] Id. at 387-88.

[164] See note 153 supra.

[165] See note 153 supra.

[166] See text at note 151 supra.

[167] The CAB stated in its amicus brief that "we do not believe that an order approving an acquisition immunizes post-acquisition managerial decisions under the antitrust or other laws. The legality of such decisions must be determined on their own merits." Memorandum for the CAB, supra note 158, at 11. The CAB then added that "none of the modification orders in this case purported to sanction the antitrust violations found to have damaged TWA." Id. at 11 n.11.

To summarize, because the application of the section 1384 express exception was arguably incorrect, and further, because the means used for implying antitrust immunity suggests overbroad immunity, and finally, because the invocation of prior approval immunity appears to be inappropriate, the *Hughes* decision is subject to criticism. Since the *Hughes* Court departed from precedent, finding an express exception when the prerequisites had not been met, the decision can be criticized as failing to clarify the principles involved in regulatory-antitrust accommodation. In addition, the same objection applies to the *Hughes* decision for its implying antitrust immunity. The Court failed to clearly identify the prior approval immunity claim, using broad preemption language, citing a controversy primary jurisdiction decision for support, employing the questionable identical standard test, and finally, concluding that immunity should be implied, notwithstanding the facts that the CAB never approved the actions alleged to create antitrust liability and that the CAB, by its own admission, never closely supervised the Toolco-TWA relationship. It is thus apparent that the Court departed from the principles of prior approval immunity and so contributed to further confusion in regulatory-antitrust accommodation. Whether the principles of accommodation were clarified in the third case recently decided by the Court will be examined next.

C. *Otter Tail Power Co. v. United States*[168]

1. *The* Otter Tail *Holding*

In the *Otter Tail* case, the United States brought a civil action against an electric utility company, claiming that defendant attempted to monopolize the retail distribution of electric power in its service area in violation of section 2 of the Sherman Act.[169] The series of events surrounding the charges commenced when defendant's franchise for supplying electric power in four cities terminated. At that time the citizens chose to establish municipal power distribution systems instead of purchasing power individually at retail from Otter Tail.[170] Defendant refused to sell power produced by its generating facilities to the municipal companies, and also refused to "wheel" (transfer electric power from one utility to another over its transmission facilities) power to the municipal companies.[171] Otter Tail relied on provisions in its contracts with its customers which barred the use of its lines for wheeling power to towns which it served at retail as an excuse for refusing to wheel power to the municipal systems.[172] Two of the towns had access to

[168] 410 U.S. 366 (1973).

[169] 15 U.S.C. § 2 (1970). See 410 U.S. at 368.

[170] 410 U.S. at 371.

[171] Id.

[172] Id. At trial the district court found that these anti-wheeling contract provisions were added to Otter Tail's contracts at the power company's insistence and thus were not a condition imposed by the purchasers. Id. at 379.

other sources of power.[173] One of the other towns built its own generating station and requested the Federal Power Commission (FPC) to order Otter Tail to interconnect and sell it power under section 824a(b) of the Federal Power Act.[174] The fourth town eventually relented and renewed Otter Tail's franchise.[175]

At trial, the district court found that Otter Tail had attempted to prevent the municipal systems from taking root and had attempted to monopolize, and in fact monopolized, the retail distribution of electricity in its service area.[176] The trial court entered a decree enjoining Otter Tail from: (1) refusing to sell electric power at wholesale to existing or proposed municipal electric power systems; (2) refusing to wheel power to such existing or proposed systems; (3) entering into or enforcing any contract which prohibits use of Otter Tail's lines to wheel power; (4) entering into or enforcing any contract which limits customers to whom and areas in which Otter Tail may sell electric power; and (5) instituting, supporting or engaging in litigation against municipalities for the purpose of delaying or interfering with the establishment of municipal power systems.[177] In addition, the district court retained jurisdiction to carry out the decree or to modify any of its provisions.[178]

Otter Tail took a direct appeal to the Supreme Court, under the Expediting Act,[179] claiming that its activities were immune from antitrust prosecution because the Federal Power Commission has the authority under section 824a(b) of the Federal Power Act to order involuntary interconnection.[180] Otter Tail thus framed a controversy primary jurisdiction implied antitrust exception argument,

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[173] Id. at 371.

[174] 16 U.S.C. § 824a(b) (1970). See 410 U.S. at 371. For the text of the pertinent portion of this section, see note 180 infra.

[175] 410 U.S. at 371-72.

[176] Id. at 368. The district court found that Otter Tail employed four principal tactics in furtherance of its monopolistic goals: (1) it refused to sell power at wholesale to the new municipal companies; (2) it refused to wheel power; (3) it instituted litigation designed to prevent or delay the establishment of the municipal systems, which systems were financed by bonds which could not be issued until the town's attorney submitted an opinion stating that no litigation was pending which would impair the value of the bonds; and (4) it included in its contracts with other power suppliers provisions against wheeling. Id. at 368, 372.

[177] Id. at 368-69.

[178] Id. at 376.

[179] 15 U.S.C. § 29 (1970).

[180] 410 U.S. at 373. The section to which appellant Otter Tail referred provides:

> Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons . . . .

16 U.S.C. § 824a(b) (1970).

contending that the power of the FPC to grant relief replaces the Court proceeding.

The Court rejected Otter Tail's contention, finding that the authority of the FPC to order interconnection was not "intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations."[181] In reaching this conclusion, the Court noted first that antitrust standards did not govern the FPC when deciding whether to order interconnection.[182] To further support its decision, the Court noted that the FPC was not given broad powers over power companies, since the Federal Power Act neither conferred upon the FPC the power to order "wheeling" nor imposed upon electric utilities the obligations of a common carrier.[183] In sum, the Court found that the available proceeding before the FPC did not replace the antitrust court proceedings, since, first, the FPC would not apply standards identical to the antitrust court in determining whether to order interconnection, and second, the Federal Power Act did not comprise a "pervasive regulatory scheme."[184] The Court then noted that the decree of the district court was phrased so that it presented no actual conflict with any decision of the FPC.[185] In support of this view, the Court found that no conflict existed on record, since the FPC had issued no contrary order with respect to interconnection.[186] Further, the Court suggested that such a conflict was unlikely, as the district court in its decree retained jurisdiction over the case, and hence might amend its order should any conflict arise.[187]

2. *Analysis of the* Otter Tail *Holding*

The denial of antitrust immunity—asserted in a controversy primary jurisdiction context—can be supported in the *Otter Tail* case. An examination of the statute describing FPC powers reveals no procedure whereby the United States could invoke the authority of the FPC to order either interconnection or "wheeling."[188] Accordingly, since there exists no regulatory procedure which could replace

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[181] 410 U.S. at 374-75.

[182] Id. at 373.

[183] Id. at 374.

[184] Id. The Court stated: "It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power . . . ." Id.

[185] Id. at 377. Later in the opinion the Court reached several findings apart from antitrust immunity claims. The Court determined that the allegations of the United States were sufficient to state a per se antitrust claim. Id. at 378. In addition, it also remanded the decision to the district court on the question of the appropriateness of enjoining Otter Tail from sponsoring litigation to delay the establishment of municipal systems. Id. at 380. Insofar as these issues are not pertinent to the implied antitrust exception claim, they are beyond the scope of this comment and will not be analyzed.

[186] Id. at 376.

[187] Id.

[188] See 16 U.S.C. § 824a(b) (1970). For the text of this section, see note 180 supra.

the antitrust proceeding, the denial of the controversy primary jurisdiction claim can be justified.

On the other hand, the *Otter Tail* decision is open to criticism on several grounds. Objection may first be raised to the Court's reasoning in denying the controversy primary jurisdiction claim. It will be recalled that the Court denied the claim because the FPC would not use the same standards as an antitrust court in determining whether to order interconnection and because the FPC did not have a broad range of powers in its regulation of power companies.[189] It is submitted that neither of these inquiries should be given any consideration in determining the controversy primary jurisdiction issue. As noted above, the identical standard test presumes the coexistence of regulatory and antitrust remedies, concomitantly creating forum-shopping, disuse of regulatory remedies, or double jeopardy problems.[190] Moreover, the existence or nonexistence of broad powers vested in the FPC should have no relevance with respect to controversy primary jurisdiction, which should be granted if concurrent regulatory and court powers can be invoked, no matter how narrow those powers may be. The "scope of powers" inquiry would be used more appropriately to determine the pervasive regulation exception—*i.e.*, whether the regulatory act totally replaced the operation of the antitrust laws.[191] Instead of inquiring whether the FPC would invoke the same standard as an antitrust court, or whether the powers given the FPC are broad in scope, the Court might more appropriately have inquired whether the Federal Power Act made available to the antitrust plaintiff the means for securing similar relief through regulatory apparatus.[192] Finding none, the Court would then be justified in denying the primary jurisdiction claim. In such a manner, the Court might have reached the same result, while recognizing the rationale underlying controversy primary jurisdiction.

The *Otter Tail* decision also triggers criticism for its failure to recognize and invoke the *Silver* implied antitrust exception argument implicitly presented. It has been noted that the Court's decision not to imply a controversy primary jurisdiction is justifiable.[193] However, it is here submitted that the failure of the Court to apply another antitrust exception argument is erroneous, as the case presents the same type of antitrust-regulatory coordination problem that was dealt with in the *Silver* case—namely, the extent to which voluntary actions made under a congressionally mandated scheme of self-regulation are subject to the antitrust laws. As in the *Silver* case, in which the SEC had no power to review specific instances of rule enforcement, the FPC had no power to order wheeling,[194]

[189] See text at notes 182-83 supra.
[190] See text at notes 46-48 supra.
[191] See text at note 21 supra.
[192] See text at note 48 supra.
[193] See text at note 188 supra.

Congress having felt that "enlightened self-interest" would lead the utilities to coordinate their facilities.[195] As Justice Stewart noted, "[the] legislative history . . . indicates a clear congressional purpose to allow electric utilities to decide for themselves whether to wheel . . . as they see fit."[196] Accordingly, it is submitted that since the legislative intent was industry self-regulation in the area of wheeling power, one activity found in violation of the antitrust laws—the refusal to wheel power—should have been subjected to the *Silver* test of determining whether the alleged violation could be justified by legitimate self-regulatory goals. If, for example, the trial court determined that Otter Tail had a legitimate self-regulatory justification for refusing to wheel, no antitrust liability should attach to that denial, and, correspondingly, "wheeling" should not be compelled. On the other hand, if the trial court finds no legitimate self-regulatory goal, but rather sham excuses offered to justify an attempt to monopolize, antitrust liability should be imposed under the *Silver* test. In either event, the *Silver* test should have been employed, because the *Otter Tail* case posed the *Silver* question—to what extent are voluntary actions made under a congressionally mandated self-regulatory scheme subject to the prohibitions of the antitrust laws. Because the *Otter Tail* Court failed to consider or apply the *Silver* test, its decision to impose antitrust liability is subject to the above criticisms.

To summarize, although the *Otter Tail* Court reached the correct result with respect to the asserted controversy primary jurisdiction claim, the decision itself can be criticized. The Court failed to recognize the rationale underlying controversy primary jurisdiction and persisted in applying the identical standard, with its concomitant undesirable policy implications. Additionally, it inquired as to the scope of power of the FPC, thus invoking a test irrelevant to controversy primary jurisdiction. Finally, the Court failed to note a potential *Silver* argument, readily applicable to one aspect of the case. By so failing to test properly the applicability of the controversy primary jurisdiction claim and by also failing to note the applicable *Silver* argument, the *Otter Tail* decision further contributes to the obfuscation of regulatory-antitrust accommodation.

CONCLUSION

Since the first enactment of the antitrust laws, questions have arisen as to the extent to which antitrust prohibitions apply to

[194] It should be noted that the potential *Silver* claim in the instant case is limited to Otter Tail's refusal to "wheel" power, since that activity alone was committed to self-regulation by the Congress. Insofar as the FPC, in specific cases, could review a power company's refusal to interconnect, the *Silver* argument is inapplicable. This limitation derives from the statement in the *Silver* decision that the argument is inapplicable where a supervisory body has specific powers of enforcement. See text at note 55 supra.

[195] 410 U.S. at 385 (opinion of Stewart, J.).

[196] Id. at 386 (opinion of Stewart, J.) (footnote omitted).

regulated industries. In several instances Congress has created express provisions in order to detail the interaction between the two regimes. In other instances, arguments have been presented for implying exceptions to the operation of the antitrust laws, some of which the courts have accepted. In later years, however, the distinctions between different arguments have become blurred. Moreover, the policies underlying the implied antitrust exception arguments have been lost in the passage of time and have been replaced on a case-by-case basis with superficial underpinnings. Additionally, one implied exception has become confused with a device for administrative referral. In recent months the Supreme Court has decided three cases involving the application of antitrust laws to regulatory enactments, and thus has had ample opportunity to refine the interaction between the antitrust laws and regulatory acts. Instead of doing so, however, the Court has contributed to the obfuscation process. An analysis of the recent cases reveals that the Court departed from established principles of express exception interpretation in *Hughes,* added to the confusion surrounding the rationale underlying controversy primary jurisdiction in *Otter Tail,* failed to appreciate the rationale underlying issue primary jurisdiction in *Ricci,* needlessly invoked implied prior approval immunity in *Hughes,* and made a shambles out of the *Silver* implied self-regulatory exception by misapplying it in *Ricci* and failing to consider it in *Otter Tail.* The three recent decisions mark a continued alienation from the rationales underlying the several antitrust exceptions and the issue primary jurisdiction doctrine, and concomitantly foster undesirable policy consequences. Therefore it is submitted that judicial clarification of the principles governing the accommodation between the antitrust laws and the various regulatory acts is now needed.

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