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THE DOCTRINE OF PRIMARY JURISDICTION MISCONCEIVED: END TO COMMON LAW ENVIRONMENTAL PROTECTION?

KENNETH F. HOFFMAN*

I. INTRODUCTION

In 1907 the United States Supreme Court created the "primary jurisdiction doctrine," which bars court relief whenever a court determines that the plaintiff's cause would more appropriately be heard by an administrative tribunal, either to ensure "uniformity" or to make use of particular administrative "expertise."¹ In 1917 Franz Kafka wrote the major portion of his famous unfinished novel, The Trial,² in which he introduced the reader to Joseph K., a man arrested for an unspecified crime, who was shuttled from bureaucrat to bureaucrat, each lacking "authority" or "jurisdiction" to determine the infraction for which Joseph K. was to be tried. In 1973 the Supreme Court of New Mexico embraced Kafka's bureaucratic nightmare when it distorted the primary jurisdiction doctrine to bar an action brought by that state's attorney general and an environmental group to abate a pollution-caused public nuisance.³

The principal purpose of this article is to examine the effect of applying the primary jurisdiction doctrine to common law actions that seek abatement of pollution-caused nuisances. The article reviews both the history of the doctrine and its inherent limitations. Traditionally government has possessed the authority and the duty to seek abatement of nuisances that threaten the public health and welfare; concurrently the courts of equity have had jurisdiction to hear such actions. This article describes how the primary jurisdiction doctrine destroys both that traditional authority and that jurisdiction, replacing them with administrative control by agencies that, most commentators agree, are unresponsive to public needs.

The plight of Kafka's Joseph K., who searched in vain for justice, is not unlike that of modern plaintiffs who seek to abate a pollution-caused nuisance. These litigants, hoping to present their case to the court of equity, may instead find the way barred by the doctrine of

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2. F. KAFKA, THE TRIAL (Mod. Libr. ed. 1956) [hereinafter cited as KAFKA].
primary jurisdiction. Joseph K. learned too late the futility of his search for justice:

"How am I being deluded?" asked K. "You are deluding yourself about the Court," said the priest. "In the writings which preface the Law that particular delusion is described thus: before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is possible,' answers the doorkeeper, 'but not at this moment.' "

The Priest continued:

"These are difficulties which the man from the country has not expected to meet, the Law, he thinks, should be accessible to every man and at all times, but when he looks more closely at the doorkeeper in his furred robe, with his huge pointed nose and long thin Tartar beard, he decides that he had better wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at the side of the door. There he sits waiting for days and years."

The man from the country awaited this permission for years; finally his health failed and, as the Priest explained it:

"The doorkeeper perceives that the man is nearing his end and his hearing is failing, so he bellows in his ear: 'No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it.' "

Joseph K. finally realized that "[t]he doorkeeper gave the message of salvation to the man only when it could no longer help him."

Has the action of the Supreme Court of New Mexico, adopting the "doctrine of primary jurisdiction" to deny the state's chief legal officer access to state courts for pressing suits of public concern, brought us one step closer to the world of Joseph K.?

The plaintiffs in the New Mexico case claimed that the defendant's Four Corners Power Plant, located in northwestern New Mexico, was emitting such amounts of particulate matter, sulphur oxides, nitrogen

4. KAFKA 267.
5. Id. at 268.
6. Id. at 269.
7. Id. at 269-70.
oxides and mercury that it had created a public nuisance. The trial court denied a motion to dismiss the case. The New Mexico Supreme Court reversed that decision, remanding the case to the lower court for dismissal. The court's rationale was that primary jurisdiction for air and water pollution control rested with the New Mexico Environmental Improvement Agency and that claims for relief, including injunctive relief, against polluters must be evaluated by that agency, not the courts. This case is analyzed in greater depth later in this article. At this point it will be helpful to review the primary jurisdiction doctrine: its creation, development and, particularly, how it came to be applied in a public nuisance action.

II. THE DOCTRINE'S CREATION

It is generally agreed that the primary jurisdiction doctrine was established in the case of Texas & Pacific Railway Co. v. Abilene Cotton Oil Co. In Texas & Pacific a shipper, claiming that a carrier rate properly published under federal regulations was "unreasonable," sought to recover the excess amount paid. The Court considered the fundamental question to be

the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers.

The Court concluded that to allow courts and juries to determine whether an established rate was unreasonable would destroy the efficacy of the Interstate Commerce Act because courts would not always reach the same conclusion. The Court feared that the resulting fluctuation and variance in standards would make uniform rates impossible. Although it acknowledged that section 22 of the Interstate Commerce Act provided that nothing in the Act "shall in any way abridge or alter

9. See pp. 496-97 infra.
10. See F. Cooper, Administrative Agencies and the Courts 317 (1951); 3 K. Davis, Administrative Law Treatise ¶ 19.01, at 4 (1958); Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1042 (1964); Note, Primary Jurisdiction in Environmental Cases: Suggested Guidelines for Limiting Deferral, 48 Ind. L.J. 676 (1973).
11. 204 U.S. 426 (1907).
12. Id. at 436.
13. Id. at 440.
the remedies now existing at common law or by statute," the Court nevertheless concluded that the clause could not be reasonably interpreted to mean that shippers retained a common law right, "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such an interpretation, the Court reasoned, would have rendered the Act self-destructive.

Professor Davis suggests that the best judicial formulation of the doctrine appears in *Far East Conference v. United States:* "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by congress for regulating the subject matter should not be passed over." Unfortunately, the role that "administrative expertise" plays in the application of the doctrine is uncertain. Nonetheless, since 1907 courts have continued to invoke the doctrine, primarily in railroad shipping-rate cases involving the authority of the Interstate Commerce Commission. The doctrine has also been applied to cases affecting the authority of such agencies as the Civil Aeronautics Board, the National Labor Relations Board, the Federal Maritime Commission and the National Railroad Adjustment Board, and has been relied upon in antitrust cases.

The United States Supreme Court, in *Great Northern Railway Co. v. Merchants Elevator Co.*, limited application of the doctrine of

14. Id. at 446.
15. Id.
16. 3 K. Davis, supra note 10, ¶ 19.01, at 4.
17. 342 U.S. 570, 574 (1952).
18. See 3 K. Davis, supra note 10, ¶ 19.01, at 5. There the author states:

The principle reason behind the doctrine of primary jurisdiction is not, and never has been the idea that 'administrative expertise' requires a transfer of power from courts to agencies, although the idea of administrative expertise does to some extent contribute to the doctrine.

Many courts, however, apply the doctrine when they decide that an administrative agency has the special expertise or competence needed to settle the litigated issue. See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 (1963). The Supreme Court expressly disavowed any transfer of court jurisdiction to administrative tribunals when it stated that removal of a case to an administrative agency merely "postpones" the court's jurisdiction. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353 (1963). See note 30 infra for a discussion of another federal court "postponement" doctrine, that of "abstention."

primary jurisdiction to questions of fact and refused to apply it to questions of law. This decision should have prevented the application of the doctrine to a common law action to abate a pollution-caused nuisance because the determination of what constitutes a public nuisance is a matter of law. Courts unfortunately have had great difficulty in applying the decision; they have found the distinction between fact and law difficult to perceive.

It might be expected that authorities in a specific area of law would support a doctrine that perpetuates or enlarges the scope of that body of law. Indeed, Professor Davis highly approves of the doctrine of primary jurisdiction and has concluded that "[t]he cases on primary jurisdiction, both state and federal, form a coherent body of law, unusually free from confusion or inconsistency." Few authors agree with Davis' assessment of the primary jurisdiction doctrine as a body of law free from confusion or inconsistency. Many legal scholars now ques-

25. Id. at 290-91.
26. See notes 90-92 and accompanying text infra.
28. § K. DAVIS, supra note 10, ¶ 19.01, at 6 (emphasis added).
29. Jaffe fears that the doctrine "is in danger of becoming a stereotype, an automatic judicial response to an abstraction labelled 'expertise.'" Jaffe, supra note 27, at 603. Bernard Schwartz concludes that federal courts applying the doctrine have already gone "too far":

To require preliminary resort to a forum which cannot give the plaintiff the relief which he requests is to revert to artificial dichotomization of remedial justice, such as that which prevailed when law and equity were distinct and competing systems. Why should the plaintiff have to bring two actions on the one cause of action when the whole trend of our law, since the merger of law and equity, has been away from such factitious divisions of justice?


Ralph Nader apparently disagrees with the view expressed by Ginsburg. supra. See Green & Nader, Economic Regulations v. Competition: Uncle Sam the Monopoly Man, 82 Yale L.J. 871, 881 (1973), in which the authors point out that the primary jurisdiction doctrine means that "regulatory agencies, and not the Antitrust Division or the courts, make the decisive policy decision on proposed mergers."
tion the continued usefulness of the doctrine, even within the limited area of federal rate cases in which it first appeared.50

How, then, did the Supreme Court of New Mexico come to rely in Norvell51 upon the doctrine to bar civil action for an injunction to abate a public nuisance? The opinion does not supply much insight. The court observed that in most cases it had studied, administrative procedures created to regulate environmental control did not abrogate longstanding court remedies.52 The court even concluded that “[f]act situations may arise in which the nuisance statutes ought to remain available,” and added that the wisdom and efficacy of its disposition of the issue on appeal would be tested by time and conceivably found

State courts usually have been less eager than federal courts to invoke the primary jurisdiction doctrine. See, e.g., Southern Bell Tel. & Tel. Co. v. State ex rel. Transradio Press Serv. Inc., 53 So. 2d 863, 866 (Fla. 1951) (where either court or administrative agency could have heard case, court would dispose of it “rather than impose the burden on litigants of litigating the case in another forum”); Northeast Airlines, Inc. v. Weiss, 113 So. 2d 884, 888 (Fla. 3d Dist. Ct. App. 1959) (airline rate discrimination case in which court, refusing to apply the doctrine, stated that its application is appropriate only when uniformity or particular expertise is required, or when there are factual intricacies “generally regarded as being beyond the capacity of a court to grasp and determine”); Central R.R. v. Culpepper, 76 S.E.2d 482, 485 (Ga. 1953) (under the Federal Railway Labor Act the doctrine does not apply where facts present a wrong which would result in irreparable injury); Main Realty Co. v. Blackstone Valley Gas & Elec. Co., 193 A. 879 (R.I. 1957) (rejecting the doctrine in an action for damages brought by a customer against the state public service commission since state agency had no authority to award damages, and therefore court ultimately would have to hear the case); Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 415 (Tex. 1961) (refusing to apply the doctrine where the issue (trespass) was inherently judicial in nature and where the legislature had not vested exclusive jurisdiction in an administrative agency); Houston Compressed Steel Corp. v. State, 456 S.W.2d 768, 772 (Tex. Civ. App. 1970) (if the issue is one inherently judicial in nature, courts are not ousted from jurisdiction unless legislature has granted exclusive jurisdiction to an administrative body).

The primary jurisdiction doctrine shares many of the characteristics of the doctrine of “abstention,” another doctrine instituted by federal courts to avoid hearing certain disputes. The abstention rule requires that a federal forum avoid hearing a cause more appropriately decided in the state forum. Reetz v. Bozanich, 397 U.S. 82 (1970); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 689 (1959); Railroad Comm’n v. Pullman Co., 312 U.S. 496 (1941).

Like the primary jurisdiction doctrine, the abstention rule places upon plaintiffs the burden of litigating in two forums. The doctrine almost inevitably compels the complainant to maintain one part of his claim in state court and to reserve the remainder of his grievance for subsequent resolution by the federal courts. See, e.g., England v. Board of Medical Examiners, 375 U.S. 411 (1964). This situation arises only because the courts consider application of the doctrine not an “abdication” of federal jurisdiction, but rather a “postponement” of the exercise of that jurisdiction. See, e.g., Hill v. El Paso, 437 F.2d 352 (5th Cir. 1971). Clearly the Supreme Court’s admonition that the better practice is to retain jurisdiction rather than to dismiss the action has not affected the courts’ fondness for the abstention doctrine. See, e.g., Zwickler v. Koota, 389 U.S. 241 (1967).

32. Id. at 102.
wanting. The court did not decide whether the pollution control statutes of New Mexico repealed by implication the public nuisance statutes; instead, it held that the problem was not one of remedy but rather one of coordination between the judicial and administrative arms of government. From its analysis of cases, the court found that it possessed the discretion to accept or reject the primary jurisdiction doctrine. Still, it chose to create a firm, non-discretionary bar to public nuisance actions to abate pollution.

In reaching its decision the court was influenced by the fact that the administrative scheme established by the state, as evidenced by its environmental laws, regulated the same field as that in which the plaintiffs wanted the trial court to act. The state supreme court believed that the trial court could not solve the problem either more quickly or better than could the administrative agencies, and expressed its concern that the trial court's intervention would "even hamper" the agencies' finding a solution to the problem. The court was influenced by the language of the Federal Clean Air Act defining "secondary ambient air quality standards." The defendants were not complying with these standards and had merely "committed themselves" to the installation of additional air quality devices. Yet the court found it more important that the defendants were spending $21,500,000 to control emissions. The court refused to face the only real issue—whether human beings were being threatened with irreparable physical injury and required the injunction sought to protect their health. This central issue was nowhere mentioned in the court's lengthy opinion. The opinion did include, however, an elaborate discussion of the need for giving the administrative agency exclusive jurisdiction to adjudicate such disputes under its rules and regulations. Leaving the plaintiffs no meaningful redress in the administrative process, the court reversed the trial court's order denying dismissal. By this act the court of equity lost its traditional jurisdiction over public nuisance actions.

33. Id. at 103.
34. Id. at 104.
35. Id. at 105.
37. 510 P.2d at 102.
38. Id.
39. Id. at 101.
40. The court found that even though there was no procedure by which plaintiffs could apply to the agency for relief, plaintiffs could refer their claims to the agency. In an analogous, yet distinct, area of law, it has been held that the courts do not require exhaustion of administrative remedies when to attempt such exhaustion obviously would be futile, or where irreparable damage is likely to occur in the meantime. See, e.g., People
III. THE TRADITIONAL DUTY AND AUTHORITY OF GOVERNMENT AND THE COURTS TO ABATE NUISANCES

The elimination of a state government’s authority to seek court relief to abate a public nuisance, coupled with simultaneous restriction of the equity courts’ powers, is of legal and social importance. The power and responsibility of every government to petition its own courts to prevent injury to the public welfare was well recognized by the end of the nineteenth century.41 This right of the state as parens patriae to receive the assistance of the courts through injunctive relief to prevent such injury has been unchallenged.42 The proper state officer to seek abatement of public nuisances is the state’s attorney general,43 whose authority to act arose in most states under the common law.44 Suits by a state in its sovereign capacity and instituted by its chief legal officer can be maintained without showing a special injury to the state.45

The common law concerning nuisances and their abatement has existed for centuries, and courts have recognized that air pollution con-


41. See In re Debs, 158 U.S. 564, 584 (1895).


44. See, e.g., State ex rel. Landis v. S.H. Kress & Co., 155 So. 829, 827 (Fla. 1934); State ex rel. Davis v. Love, 126 So. 374, 376 (Fla. 1930); Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 827 (Ky. 1942); People ex rel. Castle v. Daniels, 132 N.E.2d 507, 509 (Ill. 1956); State ex rel. Young v. Robinson, 112 N.W. 269, 272 (Minn. 1907); Kennington-Saenger Theatres v. State ex rel. Dist. Att’y, 18 So. 2d 483, 486 (Miss. 1944). New Mexico’s supreme court, however, has held that the New Mexico Attorney General has no inherent common law powers, but only the powers expressly conferred upon him by statute or the state’s constitution. See State ex rel. Att’y Gen. v. Reese, 430 P.2d 399, 406 (N.M. 1967).

stitutes a nuisance at least since *Aldred's Case* in 1610. By the middle of the nineteenth century the United States Supreme Court had concluded that “[t]he suppression of nuisances injurious to public health or morality is among the most important duties of government.” In the landmark zoning case, *Euclid v. Ambler Realty Co.*, the Court defined a nuisance as “the right thing in the wrong place, like a pig in the parlor instead of the barnyard.”

The common law offers no support for a doctrine that bars a state, acting through its chief legal officer and its courts, from exercising its historical authority to protect its citizens’ welfare. It is doubtful that this application was contemplated by the Supreme Court when it created the doctrine of primary jurisdiction in 1907.

**IV. THE COUNTERCURRENT**

*The Attitude of the United States Supreme Court.* The decision of the New Mexico Supreme Court represents a countercurrent against the continuing trend to expand legal remedies for environmental protection. In *Illinois v. City of Milwaukee* the United States Supreme Court *broadened* federal law to include a remedy against public nuisances to supplement remedies already provided by federal pollution control statutes. In its unanimous opinion the Court expended con-

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A public nuisance is one which affects an indefinite number of persons, or all the residents of a particular locality, or all people coming within the extent of its range of operation, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

**BLACK'S LAW DICTIONARY** 1215 (rev. 4th ed. 1968). Public nuisances, particularly those pollution-caused, can become private nuisances simultaneously when an individual's right to the reasonable use of his property is impaired. Costas v. City of Fond du Lac, 129 N.W.2d 217, 220 (Wis. 1964). The Supreme Court recognized the *raison d'être* for nuisance law long ago:

There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the familiar maxim: *Sic utere tuo ut alienum non laedas.* His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since *Aldred's case*, 9 Coke, 57, it has been the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.

Camfield v. United States, 167 U.S. 518, 522-23 (1897).
siderable effort discussing the web of federal laws enacted to prevent water pollution, including regulations promulgated by the Corps of Engineers to control, through issuance of permits, discharges and deposits into navigable waters.  The Court found a federal common law of public nuisance to exist; the opinion stated that the federal environmental protection statutes did not necessarily mark the outer bounds of the federal common law, but instead provided useful guidelines to fashion such rules of decision. Most important, however, was the Court's statement that "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act." The Court concluded that future federal laws might preempt the federal common law of nuisance but, until such time, federal courts possess the power to assess the equities in public nuisance actions based on water pollution.

The Position of Congress. The Federal Water Pollution Control Act, substantially amended in 1972, clearly states that it shall not be construed to supersede or to limit the functions of any federal agency controlling water pollution. The Act also reserves primary jurisdiction for pollution control to the states, and preserves all common law and statutory rights of any person to seek pollution abatement.

At least one acknowledged purpose of the Act is to encourage state and interstate action to abate pollution; to accomplish this the Act authorizes citizens' suits to enforce its provisions. The Clean Air Act includes analogous provisions. The National Environmental Policy Act of 1969 encourages state and citizen participation in the evaluation of federal actions which might significantly affect the environment.

50. Id. at 101-02.
51. Id. at 103. The decision, in effect, overruled an 1888 holding that there was no federal common law of nuisance with respect to navigable waters. See Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888).
52. 406 U.S. at 103 n.5. Congress provided in § 10(b) of the Water Pollution Control Act, 33 U.S.C. 1160(b) (1970), that, except as a court might otherwise decree in an enforcement action, "[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action."
53. 406 U.S. at 107.
The View of Legal Scholars. Legal scholars recently have encouraged reliance upon common law remedies, especially those arising under the theories of trespass and nuisance, to abate pollution.63 These writers and scholars agree with the United States Supreme Court and Congress that legal methods to seek abatement of environmental pollution should be cumulative, not exclusive.64

V. ZONING, PERMITS AND "DUE CARE"

Closely related to the law delineating the historic rights and duties of the courts and the chief state legal officers is the case law holding that nuisances cannot be authorized by zoning, permits or licenses, or by the offender's use of "due care" or the best available technology. The United States Supreme Court itself has noted, "It is a principle of the common law, that the king cannot sanction a nuisance."65

Zoning. Zoning generally has not prevented a court determination that an abatable nuisance exists in fact.66 It has been held that a court


64. See materials cited in note 63 supra.


66. In Eaton v. Klimm, 18 P.2d 678 (Cal. 1933), the California Supreme Court held that a zoning ordinance authorizing the continued operation of an asphalt mixing plant did not preclude closing the plant as a public nuisance:

It is also to be noted that the fact that, by the zoning ordinance which zoned the district as a light industrial district, the appellants were permitted to continue the operation of their plant, is not an absolute defense to proceedings for the abatement of such business on the ground that it constitutes a nuisance. "It has been held a number of times in this court that a license, permit, or franchise does not authorize the creation or maintenance of a nuisance." People v. City of Reedley, 66 Cal. App. 409, 413, 226 P. 408, 409. This rule is not only applicable to private nuisances (Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 P. 484; Fendley v. City of Anaheim, 110 Cal. App. 731, 294 P. 769; Vowinckel v. N. Clark & Sons [Cal. Sup.])
can enjoin as a nuisance construction of a funeral home or a gasoline station in a residential neighborhood, although in each case the neighborhood was zoned to permit such construction. Courts that have found that zoning is a defense against actions to abate a public nuisance have held that the operation of a business in a suitably zoned area cannot be a public nuisance per se. Such decisions do not eliminate the possibility that any business can become either a public or a private nuisance because of improper operation.

Permits. A permit for a particular operation may be no defense to a company in a suit to enjoin that operation as a nuisance. This same principle has been applied to enjoin a city from discharging improperly treated sewage constituting a public nuisance although the state had approved emission of the pollutants. City, county or other governmental bodies cannot transform a nuisance into a non-nuisance merely by adopting zoning ordinances or issuing permits and licenses.

13 P. (2d) 735, but to public nuisances as well. (People v. City of Reedley, supra). Id. at 681. When a business complying with local zoning ordinances is attacked as a public nuisance, California now statutorily imposes upon the complainant the burden of proving that the defendant employed "unnecessary and injurious" methods. CAL. CIV. PROC. CODE § 731a (West Supp. 1974); Gelfand v. O'Haver, 200 P.2d 790, 791 (Cal. 1948) (injunction upheld); accord, Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (Ct. App. 1971).

Pennsylvania's supreme court adopted reasoning similar to that of the California court when it ruled that a manufacturing firm in a district zoned for manufacturing must install its machinery in a way to avoid depriving surrounding residents of the degree of quiet to which they were entitled as homeowners. See Quinn v. American Spiral Spring & Mfg. Co., 141 A. 855, 857 (Pa. 1929). In 1972, Colorado's highest court upheld issuance of an injunction against keeping horses on the defendant's property, although county zoning ordinances permitted this, the defendant had exercised all reasonable skill and care in maintaining the property, and the defendant had violated no health regulations. Hobbs v. Smith, 493 P.2d 1352 (Colo. 1972). The court found that the noxious odors and flies attracted to the horses made the horses a nuisance in fact. See also Ferreira v. D'Asaro, 152 So. 2d 736 (Fla. 3d Dist. Ct. App. 1963); Robichaux v. Huppenbauer, 245 So. 2d 385 (La. 1971); Ellis v. Blanchard, 45 So. 2d 100 (La. Ct. App. 1950).

68. Appeal of Perrin, 156 A. 305 (Pa. 1931).
70. See Howard v. Etchieson, 310 S.W.2d 473 (Ark. 1958); Jones v. Kelly Trust Co., 18 S.W.2d 356 (Ark. 1929); State ex rel. Parker-Washington Co. v. City of St. Louis, 105 S.W. 748 (Mo. 1907).
72. First Nat'l Bank v. Tyson, 32 So. 144 (Ala. 1902); People v. City of Los Angeles,
Use of "Due Care." Several court decisions hold that negligence is not an element of an action for nuisance; the use of the most modern methods of technology is no excuse for creating a nuisance.\footnote{73} Always the issue to be decided is whether the "business as conducted seriously disturbs persons of normal and ordinary sensibilities in the comfort, use and enjoyment of their homes and interferes with their property rights."\footnote{74} The right of habitation has been held superior to the rights of trade. Thus the operation of a business conducted in a proper manner and with the most modern equipment may still be enjoined if it detrimentally affects citizens' right of habitation.\footnote{75}

VI. THE FOX WON'T GUARD THE CHICKENS

The creation of pollution control agencies to regulate the polluters does not necessarily result in less pollution. Continuing pollution is almost assured if one bureaucracy (the pollution control agency) becomes established to control other bureaucracies (primarily large corporations and municipalities). Professor Levitt has observed:

Once their priorities are established, private and public bureaucracies operate about the same. . . . [I]t is precisely because they are basically so alike that one is an unreliable overseer of the other: bureaucratic professionals will not generally question or attack each other's basic security.\footnote{76}

Legal scholars share this opinion and recognize the need for legal remedies which circumvent public bureaucracies.\footnote{77} They fear the symbiotic relationship that usually develops between the regulator and the


73. Pearson v. Kansas City, 55 S.W.2d 485 (Mo. 1932); cases cited in note 75 infra.


regulated. The sheer number of public bureaucracies, usually operating at cross purposes, is another serious problem. The author, in his experience with both federal and state litigation and administrative procedures, has continually found control of the most dangerous pollutants to be within the jurisdiction of the same agencies which support the use of that pollutant. The Atomic Energy Commission, for example, controls radiation but encourages the use of nuclear energy. The Army Corps of Engineers dredges, fills and pollutes while the Environmental Protection Agency tries to stop pollution. State and federal agriculture departments encourage the use of chlorinate hydrocarbons (for example, DDT or Mirex) while state and federal pollution-control agencies seek to prevent the spread of toxic substances, including pesticides.

Chief Justice Warren Burger, when he was circuit judge on the Court of Appeals for the District of Columbia Circuit, expressed doubt that the Federal Trade Commission could be relied upon to act in the public interest without the prodding of "private attorneys general." His mistrust of federal agencies was echoed by federal Circuit Judge Tamm, who believed that the courts must continue to review the decisions of federal agencies in suits brought by aggrieved parties until this country adopts an ombudsman system that will act as a watchdog of such agency activity.

The unresponsive nature of government enforcement agencies requires that immediate access to the courts be available to provide relief from the irreparable injury caused by pollution. It is not enough to rely solely upon agencies that are sympathetic to the polluters they have the duty to control and are so crippled by internecine warfare that they are impotent. Legal scholars, judges and social commentators


79. For a brief discussion of the problems of pollution control and a description of federal agencies operating at cross purposes, see Reitze, Pollution Control: Why Has It Failed?, 55 A.B.A.J. 923, 926 (1969).


81. For a discussion of the pollution caused by federal agencies, see 1 A. REITZE, ENVIRONMENTAL LAW 4-104 to -107 (1972).


have seen the danger of leaving war to the generals. Hopefully others will follow their signal.

VII. CASE LAW ON THE ISSUE OF PUBLIC NUISANCE AUTHORITY VS. ADMINISTRATIVE CONTROL OF POLLUTION

A Survey of Cases in Which the Doctrine of Primary Jurisdiction Has Been Rejected. Most courts have refused to apply the doctrine of primary jurisdiction or similar doctrines in actions to abate pollution as a public nuisance. The United States Supreme Court has implicitly refused to apply the doctrine to cases involving the federal water pollution control laws, and a federal district court ruled that Oregon's air pollution law does not preempt the field and prohibit suits to abate private or public nuisances. Several state courts also have refused to deprive their courts of equity of their traditional jurisdiction over nuisance actions.

84. See notes 49-54 and accompanying text supra.
86. In Delaware, it has been held that the courts can not be deprived of their constitutional jurisdiction unless an equivalent remedy is provided by the legislature and unless that remedy is expressly or by necessary implication made exclusive. The courts refused to apply the doctrine of primary jurisdiction, although the state air pollution law created an equivalent remedy, because the legislature had not given exclusive authority to the air pollution authority. See, e.g., Webb v. Diamond State Tel. Co., 237 A.2d 143 (Del. Ch. 1967); Pottock v. Continental Can Co., 210 A.2d 295 (Del. Ch. 1965). In a breach of contract action, the Delaware Supreme Court held that at best the primary jurisdiction doctrine contemplated a "temporary abstention" in deference to the expertise of the administrative agency, but this abstention was to be only a noncommittal referral to seek the benefit of the agency's views while "at the same time avoiding any suggestion of abdication of the jurisdiction of that court." Eastern Shore Natural Gas Co. v. Stauffer Chemical Co., 298 A.2d 322, 325 (Del. 1972).

The Georgia Supreme Court has held that Georgia's air quality control act does not vest exclusive jurisdiction in the Board of Health in matters concerning air pollution, and does not prevent a district attorney from instituting an action to enjoin a public nuisance. J.D. Jewell, Inc. v. Hancock, 175 S.E.2d 847 (Ga. 1970). In the court's opinion, establishment of a legislative program for air quality control did not repeal or preempt the state prosecutor's authority to seek such relief. That the law had not explicitly indicated legislative intent to preserve other remedies for suppressing air pollution-caused nuisances seems to have had no effect on the court's decision.

Kentucky's highest court also has ruled that a state pollution control law that is to be construed as ancillary and supplementary to existing pollution control and conservation laws has not abrogated the common law actions against public nuisance. See City of Lexington v. Cox, 481 S.W.2d 645 (Ky. 1972); Ohio River Sand Co. v. Commonwealth, 467 S.W.2d 347 (Ky. 1971). New York courts too have upheld the attorney general's right to seek abatement of a public nuisance. Finding state pollution control programs not the exclusive remedy for ending air pollution, the courts have ruled that it is proper for the attorney general to seek injunctive relief on behalf of the people of New York. See State v. Town of Huntington, 325 N.Y.S.2d 674, 675 (N.Y. Sup. Ct.), aff'd, 326 N.Y.S.2d 981 (App. Div. 1971).
A recent opinion of the Wisconsin Supreme Court perhaps offers the best analysis of the primary jurisdiction doctrine and reasons for rejecting it.87 That state's attorney general had commenced a suit in equity on behalf of the state to abate a public nuisance. The defendants raised three major defenses: (1) that a law granting the state's Department of Natural Resources broad authority to control air and water pollution had repealed by implication the attorney general's authority to bring such a suit; (2) that the attorney general had failed to exhaust his administrative remedies; and (3) that the doctrine of primary jurisdiction barred the state from seeking relief in court.

After thoroughly dissecting and rejecting these arguments, the court, perhaps taking its cue from the opinion of Great Northern Railway Co. v. Merchants Elevator Co.,88 ruled that the doctrine was inapplicable because issues of law rather than of fact were paramount in the case. The relief to be granted the plaintiff was to be treated as a question of policy and law, thus lying within the special expertise of the circuit court, not of the administrative agency.89

In Florida, at least one district court of appeal has ruled that the doctrine of primary jurisdiction does not prevent Florida's attorney general from seeking an injunction to abate a public nuisance created by air pollution, although the state has a law vesting authority for pollution control in the Department of Pollution Control.90 The court found that determination of whether a public nuisance exists historically has been a judicial function, which did not necessarily require reliance upon technical criteria for its resolution.91 The court found that, when factual conditions can be easily established, the decision that these conditions constitute an abatable nuisance, together with the selection of the most appropriate remedy, is a matter of law, within the "special competence of judicial expertise."92

These cases indicate that the satisfaction of pollution control standards established by a legislature does not create a defense to an action for abatement of a nuisance. In support of this interpretation, one com-

88. 259 U.S. 285 (1922); see notes 24-26 and accompanying text supra.
89. 187 N.W.2d at 884. Other state courts in non-pollution cases have refused to apply the doctrine of primary jurisdiction if points of law, and not factual problems within the special expertise of an agency, were involved. See, e.g., Morrison-Knudsen Co. v. State Tax Comm'n, 44 N.W.2d 449 (Iowa 1950); Campbell Sixty-Six Express, Inc. v. J. & G. Express, Inc., 141 So. 2d 720 (Miss. 1962); Illinois Cent. R.R. v. M.T. Reed Const. Co., 51 So. 2d 573 (Miss. 1951); cases cited in note 29 supra.
91. 291 So. 2d at 47.
92. Id.
mentator has compared the effect of these standards to that of statutory standards in negligence actions.\(^9\) Without realizing it, these courts have accepted Justice Holmes' admonition in the famous air pollution case, *Georgia v. Tennessee Copper Co.*:\(^9\) "Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be."

**A Survey of Cases Invoking the Primary Jurisdiction Doctrine.** With rare exception, the cases in which the doctrine has been applied have been private nuisance actions in which the plaintiff sought damages. One federal district court invoked the doctrine to dismiss an action at law brought to recover damages to oyster beds caused by the alleged polluter.\(^9\) In a subsequent case involving the same polluter, the same judge, indicating that the former plaintiff had chosen to ignore the judge's strong suggestion to appeal the decision, again applied the doctrine to bar the action.\(^9\)

Another federal district court applied the doctrine to what was ostensibly an air pollution case.\(^9\) The appellate court affirmed this decision; it did not, however, agree that the case was barred by a theory of abstention or by administrative jurisdiction, but rather held that the complaint failed to state a claim under Illinois products liability law.\(^9\) Plaintiffs had claimed that the defendants' motor vehicles were defective because they emitted dangerous air pollutants. The relief sought was: (1) that defendants be ordered to cease the sale of motor vehicles within Chicago unless equipped with tamper-proof emission control

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> It must be borne in mind that statutory regulations relative to the conduct of drivers of motor vehicles do not attempt to define what reasonable care is. They set up certain rules of conduct, violation of which carries a presumption of negligence, but a compliance with which does not necessarily fulfill the obligation to exercise reasonable care under given circumstances.

96. *Olympia Oyster Co. v. Rayonier, Inc.*, 229 F. Supp. 855, 856 (W.D. Wash. 1964). *But see Urie v. Franconia Paper Corp.*, 218 A.2d 360, 362 (N.H. 1966). In *Urie* landowners sought injunctive relief to end water pollution that the state pollution control agency had authorized to continue for another three years. The court granted the relief sought, stating: "It seems doubtful if the Legislature has constitutional power to permit the defendant to continue to commit private nuisances until September 1, 1969, since such legislation would constitute taking private property for a non-public purpose." *Id.* at 362.
98. *City of Chicago v. General Motors Corp.*, 467 F.2d 1262, 1267 (7th Cir. 1972).
devices; and (2) that defendants give emission control devices to all Chicago motor vehicle owners with autos manufactured between 1960 and 1967. The trial and appellate courts noted that the plaintiffs had not attempted to enforce the federal law, but rather had tried to establish standards under Illinois common law for products liability. Both courts agreed that the Federal Air Quality Act specifically preempted control of pollutants emitted from automobiles beginning with the 1968 models. Both decisions reveal the courts' preoccupation with the problems of federal preemption and of the unique status of the automobile industry.

In the most recent federal court decision in which the doctrine has been applied, the Court of Appeals for the Eighth Circuit, reversing the district court's decision, ordered that the case be referred to the United States Forest Service for a determination of whether certain proposed mining activities were compatible with the wilderness character of the Boundary Waters Canoe Area in Minnesota. While not questioning that the construction of the Wilderness Act is a legal issue, the court found that factual issues remained, such as the effect of mining upon the wilderness, and whether mining permits could be issued with restrictions protecting the wilderness character of the area. The Forest Service should determine factual issues, the court reasoned, and a record should be built at that agency's hearing. Pending the agency's hearing, the district court should stay its proceedings.

State courts also have invoked the primary jurisdiction doctrine in private nuisance actions. One Florida appellate court, although not specifically naming the doctrine, has even applied it to justify dismissing without prejudice a public nuisance action. The plaintiffs had al-

100. See 332 F. Supp. at 290-91; 467 F.2d at 1264.
103. 497 F.2d at 852-53.
104. A Michigan court has applied the doctrine to a private nuisance action brought by a nonprofit conservation association. See White Lake Impr. Ass'n v. City of Whitehall, 177 N.W.2d 473 (Mich. Ct. App. 1970). The plaintiffs, hoping to protect their riparian interests, sought an injunction to prevent the discharge of inadequately treated waste into lake waters. Because the pollution was not new and because the plaintiffs had failed to show that a proceeding before the water resources commission could not result in effective relief, the court thought its reliance upon the doctrine justified. Id. at 484.
leged that a public nuisance was created by the defendant's trains operating between the hours of 8:00 p.m. and 4:00 a.m. The court held that, if the plaintiff had a remedy, it lay with the Public Service Commission, charged by statute with control of railroad operations.

The courts applying the primary jurisdiction doctrine to common law actions seeking pollution abatement or damages have emphasized the problems of the polluter and the pollution control agencies, ignoring or minimizing the problems of the persons suffering the effects of pollution. The judges involved apparently have not yet attained the level of enlightenment (or disillusionment) reached by Chief Justice Burger, and still believe that governmental enforcement agencies will fulfill their role as protectors of the public interest.

VIII. Conclusion

The historic right and duty of the chief legal officers of state government to protect the public welfare, and the traditional jurisdiction of the equity courts, are directly challenged whenever the doctrine of primary jurisdiction is applied to actions for abatement of pollution-caused nuisances. The doctrine was created because the Supreme Court substituted its wisdom for that of Congress in 1907. This judicial attempt to legislate was improper then; its subsequent application, particularly to actions arising because irreparable injury to public health and welfare is threatened, has compounded the initial abuse of judicial power. The result is a nightmarish situation in which access to the courts may be delayed until it is too late to help the citizens suffering from the effects of uncontrolled pollution.

It is doubtful that Kafka, a Czechoslovak, was aware of the Supreme Court's decision in Texas & Pacific Railway when he wrote The Trial. It is also unlikely that he could have predicted that the doctrine of primary jurisdiction would be applied to an action for abatement of a pollution-caused nuisance. But, if Kafka had foreseen and understood these occurrences, perhaps the parable of the man from the country would end as the man lay before the closed doors of the court of equity, while the lights of the Law burned brightly within. Dying

107. 257 So. 2d at 89. Noise, however, may now be considered a pollutant, and thus its control is within the jurisdiction of the Florida Department of Pollution Control. Fla. Stat. § 403.03(2) (1973). Because Fla. Stat. § 403.191 (1973) explicitly permits a public nuisance action to abate pollution, it would appear that this case would be decided differently today. See note 90 and accompanying text supra.
108. See note 82 and accompanying text supra.
109. 204 U.S. 426 (1907).
from emphysema induced by polluted air,110 the man would find the entrance barred by a great steel door, upon which is inscribed "Primary Jurisdiction Doctrine."