VANDERBILT LAW REVIEW

VOLUME 56 NOVEMBER 2003 NUMBER 6

Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era

*Jim Rossi**

* Harry M. Walborsky Professor, Florida State University College of Law. Email: jrossi@law.fsu.edu. Thanks to Scott Baker, Jim Chen, Randy May, Thomas Merrill, Mark Seidenfeld, Joseph Tomain, and Phil Weiser for comments on an earlier draft, and Greg Goelzhauser for his research assistance. I am also grateful to workshop participants at the law schools of the University of Southern California (law and economics series), University of San Diego, and University of North Carolina – Chapel Hill, where drafts were presented in Fall 2002. To err on the side of full disclosure, in January 2003 the author submitted an expert report based in part on this Article in the Pacific Gas & Electric Company bankruptcy proceeding (pending in the United States Bankruptcy Court for the Northern District of California); the analysis presented in this Article preceded, and was developed independent of, any opinions submitted in that proceeding. Mistakes, of course, are mine.

I. INTRODUCTION

The filed tariff doctrine, a longstanding and fundamental precept of public utility and common carrier regulation, figures prominently in modern regulatory law. To most, the doctrine seems technical and arcane. But, by influencing when courts will hear cases involving regulated firms, the filed tariff doctrine has an alarmingly sweeping scope and effect beyond which few other legal doctrines can lay claim. Based on an examination of the filed tariff doctrine's history, as well as its purposes and economic and policy implications, this Article concludes that the doctrine should surrender its shield, which seriously limits judicial enforcement of competition and consumer protection norms affecting regulated firms.

Throughout the twentieth century, when natural monopoly regulation reigned supreme, price controls of utilities were a predominant tool for agency regulators.[1] In order to mitigate the effects of granting a service monopoly, agency regulators actively regulated the price of various utilities, such as transportation, telecommunications, and gas and electric power, based on the cost of providing service.[2] By statute or by regulation, many agencies required—and some still require—regulated firms to submit tariffs, including the prices, terms, and conditions under which they offered service. In the conventional scenario, the tariff represents the price of service (traditionally based on a cost-of-service determination) and often becomes effective by operation of law if not disapproved by the

1. *See generally* STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982); STEPHEN J. BROWN & DAVID S. SIBLEY, THE THEORY OF PUBLIC UTILITY PRICING (1986); ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1988).

2. Cost-of-service rates also included compensation for a fair rate of return to investors.

agency regulator within a certain time period, or following an evaluation and affirmative approval by the regulator.[3]

Traditionally, agency regulators have had the authority to police these tariffs to determine that their terms were reasonable and did not unjustly discriminate against consumers. In essence, the filed tariff doctrine treats a utility tariff as a firm-specific regulation, freezing in place the tariff's rates and other conditions and precluding their modification by anyone other than the agency or (with a new tariff filing) the regulated firm. For example, if an electric or telecommunications utility files a tariff for its services with the Federal Energy Regulatory Commission (FERC) or the Federal Communications Commission (FCC), the doctrine precludes the utility from offering certain customers discounts that deviate from the filed tariff's terms. Originally designed to protect consumers from discriminatory rate treatment by utilities, the scope of the doctrine's protection is not limited to rates, but extends also to service terms and conditions.[4]

The filed tariff doctrine also has the effect of ensuring that the federal judiciary or others, especially state regulators, do not exercise jurisdiction over utility conduct that is consistent with a firm-specific tariff filed with a federal agency. This Article focuses its analysis on this aspect of the filed tariff doctrine. I suggest that the filed tariff doctrine has become a "shield," providing a type of firm-specific immunity from antitrust and state law claims in federal courts.[5] As

---

3. For a discussion of price regulation by federal agencies such as the Interstate Commerce Commission (ICC), the Federal Communications Commission (FCC), and the Federal Power Commission (FPC), the Federal Energy Regulatory Commission's (FERC's) predecessor, see THE CRISIS OF THE REGULATORY COMMISSIONS (Paul W. MacAvoy ed., 1970). *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1361-63 (1998) (providing a recent evaluation of changes to the regulatory approaches of such agencies).

4. Hence, the terms "filed rate" doctrine and "filed tariff" doctrine are, as hereinafter, frequently used synonymously.

5. Although I believe tbat courts have come to treat the filed tariff doctrine, which often applies to antitrust claims, as a type of immunity, it differs doctrinally from implied antitrust immunity. Unlike the filed tariff doctrine, implied antitrust immunity is not firm-specific, but exempts from antitrust enforcement industry-wide conduct made pursuant to an industry's regulatory scheme. *See, e.g.*, United States v. AT&T, 427 F. Supp. 57, 59-60 (D.C. Cir. 1976) ("When faced with implied immunity questions, the courts have undertaken a case-by-case approach which analyzes the particular industry, the applicable regulatory scheme and procedures, and the statutory history to determine whether operation of the antitrust laws can be reconciled with the regulatory scheme."). Since the key judicial inquiry in assessing implied antitrust immunity is whether Congress's intended regulatory program presents a plain repugnancy to application of the antitrust laws, it operates predominantly as a rule of statutory construction. *See, e.g.*, United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719 (1975) (arguing that implied antitrust immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."); *see also* Martin

utility lawyers are well aware, a utility with a tariff on file with an agency such as FERC or the FCC can depend on the filed tariff doctrine to ensure that disputes regarding service under the tariff will be resolved, if at all, by federal regulatory agencies, not by courts or state regulators.

In this regard, the filed tariff doctrine continues to play a significant role in recent disputes surrounding the deregulation of telecommunications and electric utilities. For example, during California's now-infamous deregulation crisis, the doctrine was applied by a federal appellate court to bar the state's Governor from commandeering contracts to deliver wholesale electric power to utilities, favoring federal regulation over the state's approach to crisis management.[6] It also has been used as a full defense to state contract and tort suits[7] as well as to federal antitrust[8] claims brought against utilities operating in a deregulatory environment. In one of the most significant applications yet of the filed tariff doctrine in the deregulatory era, utilities have claimed that the California Public Utility Commission's refusal to increase retail rates as wholesale prices for purchased power skyrocketed is illegal under the filed tariff doctrine, since FERC had approved a deregulated market for wholesale prices.[9] The filed tariff doctrine remains central to the bankruptcy proceedings involving Pacific Gas & Electric Company

---

Flumenbaum & Brad S. Karp, *Implied Immunity from the Antitrust Laws*, N.Y. L.J., Jan. 22, 2003, at 3 (discussing recent court decisions and implied antitrust immunity); *cf. In re* Stock Exchanges Options Trading Antitrust Litig., 317 F.3d 134, 148 (2d Cir. 2003) (concluding, based on an assessment of congressional intent, that that a finding of implied immunity was necessary to preserve the Securities and Exchange Commission's listing and trading of equity options); Friedman v. Salomon/Smith Barney, Inc., 313 F.3d 796, 803 (2d Cir. 2002) (holding implied immunity bars an antitrust price fixing claim for re-sale of stock following an initial public offering, which the SEC also regulates, because otherwise the claim would present a "plain repugnancy" to Congress's intended regulatory program). Even where there is no implied antitrust immunity, the filed tariff doctrine may still bar an antitrust claim. As argued in this Article, the filed tariff doctrine is a firm-specific defense and focuses in its applications on variables beyond congressional intent, even though this Article also recognizes that courts increasingly treat the doctrine as a rule of statutory construction. *See* discussion *infra* Part IV.A.

6. *See* Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042, 1056 (9th Cir. 2001).

7. *See* Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918 (9th Cir. 2002), *cert. denied,* 123 S. Ct. 2272 (2003).

8. *See* Town of Norwood v. New England Power Co., 202 F.3d 408, 418-24 (1st Cir. 2000).

9. *See* Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1048-49 (N.D. Cal. 2002) (holding that the filed tariff doctrine precludes the state of California from setting retail rates below FERC-authorized wholesale rates, prohibiting the recovery of losses, and setting for hearing issues of fact regarding PG&E's claim for recovery). In one context, the court settled the issue (allowing the utility to recover $3.3 billion of its $6.3 billion claimed loss), but the utility's argument, if successful, would have prevented the state of California from limiting recovery in retail rates to costs incurred in accordance with FERC-approved tariffs. S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 801 (9th Cir. 2002).

(PG&E). PG&E has invoked the doctrine to bar objection to approval of its reorganization plan by rivals who allege that they are owed antitrust damages for PG&E's allegedly monopolistic conduct over power transmission, causing harm in the range of $1.2 billion.[10]

Given the repeated use of the filed tariff doctrine to determine regulatory forum—agencies vs. courts or federal vs. state regulation—the continued importance of the filed tariff doctrine in working out the appropriate balance between regulation and market-based solutions for industries, such as electric power, cannot be denied. Part II of this Article details how, long before deregulation, the filed tariff doctrine's rationales were intellectually suspect. One recent appellate panel describes its legal foundations as "extremely creaky,"[11] but it is best understood not as a single legal rule. Instead, the filed tariff doctrine is an amalgam of several distinct—though often interrelated—reasons for a court's refusal to consider a case. In this part of the Article, I unravel three constituent (often-confused) strands of the filed tariff doctrine—unjust discrimination, federal preemption, and deference—and discuss how each fails or is unnecessary. The unjust discrimination strand of the doctrine was concerned with protecting consumers, but the doctrine was hardly necessary for purposes of doing so, even under a rate regulation regime. Moreover, the consumer protection rationale was turned on its head as the filed tariff doctrine became a shield for regulated firms against litigation, including competitor and consumer suits in federal and state courts. Further, the filed tariff doctrine was not particularly necessary for, nor successful at, promoting the broader institutional goals of clarifying the scope of federal jurisdiction to provide uniformity (the federal preemption strand), or respecting the deference of expert regulators (the deference strand).

Part III addresses the incentive, welfare, and deterrence implications of the filed tariff doctrine. The doctrine creates incentives

---

10. *See In re* Pac. Gas & Elec. Co., 295 B.R. 635, 640-41 (Bankr. N.D. Cal. 2003). Today, California Independent Service Operator, which is constrained by PG&E's past anticompetitive transmission capacity decisions, sets transmission congestion charges, not PG&E. *See id.* at 655. The basic claim is that PG&E, which controlled substantial parts of California's transmission grid prior to its Chapter 11 proceeding, by making decisions about its expansion, has engaged in anticompetitive conduct, including monopolistic control of essential facilities and price squeeze, and should be liable for damages. *See id.* at 657. Although this antitrust claim has not yet been litigated, case law allows consideration of the recovery of judgments in the approval of a Chapter 11 plan. *See, e.g.*, Pizza of Hawaii, Inc. v. Shakey's, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985) (directing a bankruptcy court to consider as part of its feasibility analysis in approving the plan the possibility that an objector would recover a large judgment in a civil case); *In re* Dennis Ponte, Inc., 61 B.R. 296, 296 (B.A.P. 9th Cir. 1986) (requiring bankruptcy court to "tak[e] into consideration the merits of [the objector's] administrative claim").

11. *Town of Norwood*, 202 F.3d at 420.

for private firms to divulge information to federal regulators, but these incentives must be balanced against the prospect of private firms' strategic abuse of the tariffing process to secure the forum-shopping benefits of the shield. Courts have never been effective at monitoring this balance, resulting in a doctrine and an accompanying regulatory system that largely ignore the strategic behavior of private firms in tariffing. Put simply, application of the doctrine has allowed determination of the forum for enforcement of market remedies to hinge on firm-specific private behavior, rather than assessment of the public interest in deterrence of market abuses.

Deregulation—more accurately, "competitive restructuring"—makes this private forum selection a much more significant problem for regulatory law. The discord of enforcing filed tariffs in a truly competitive pricing environment is obvious. Deregulation of industries is transforming the role of tariffs in the regulatory process away from the traditional cost-of-service mandate, and towards the goals of structural market definition and information provision. The competition policies behind this transformation, which rely on flexibility in pricing, call into serious question the workability of a filed tariff as an effective mechanism for agency regulation of markets. In a competitive environment, the traditional principle of nondiscrimination in tariffs, applied with the rigor the filed tariff doctrine invites, is questionable and may even prove harmful.

But, in a deregulated environment, which may invite unfair and anticompetitive market conduct, the filed tariff doctrine presents a more nuanced and arguably more serious tension for regulatory law. As formerly regulated markets are deregulated, the filed tariff doctrine has implications for the way that the legal system deters violations of market norms. Because agencies often lack the authority or resources to implement effective regulation of competitive markets, the doctrine not only thwarts price flexibility on the part of regulators and private firms, but also precludes much contract, tort, fraud, and antitrust litigation against—as well as state regulation of—utilities. This creates an enforcement gap, given the limited reach of federal agency regulation. Congress, however, has been slow to expand the jurisdiction and resources of agencies to address deregulated markets. Thus, by encouraging firm-specific manipulation of tariffing as a forum-shopping strategy, the filed tariff doctrine contributes to a widening of the enforcement gap in deregulated markets. As formerly regulated industries move towards open market competition, establishing market norms becomes more important than ever. The filed tariff doctrine, however, can result in a type of radical deregulation—markets absent common law and antitrust protections.

Part IV discusses how the judiciary, whose published opinions are largely oblivious to the inconsistencies between the filed tariff doctrine and competition policies, continues to fail in monitoring the harmful effects of the filed tariff shield. In fact, courts have embraced the doctrine in ways that are inconsistent with its original design, affirmatively harming competition, which ultimately injures consumers through higher prices. The shield has become fortified, as courts mandate it even where regulators want its repudiation. Some decisions, for example, flatly contradict the agency deference strand of the filed tariff doctrine.[12] Even more recently, courts have invoked the shield to declare winners in jurisdictional battles surrounding electric power deregulation.[13] As these examples illustrate, fortification of the shield has become a refuge for regulated firms, leaving both regulators and courts with few affirmative tools to promote competition or deter and remedy market abuses.

Part V proposes some ways courts might more actively monitor the jurisdictional impacts of tariffs. I argue that courts should not afford firm-specific tariffs any independent, legally significant role. The filed tariff shield is frequently invoked as shorthand for more careful scrutiny of regulation under the federal preemption doctrine or as a type of antitrust defense or immunity. Direct analysis of dual jurisdictional problems under these alternative doctrines, rather than invocation of the filed tariff shield, provides an opportunity for courts to safeguard against strategic abuses of the regulatory process in a dual enforcement regime.

Today, the filed tariff doctrine is not only unnecessary, given other doctrines that federal courts can invoke to refuse to consider a claim. The doctrine also creates perverse incentives for private firms to forum shop by strategically over disclosing information to regulators, thus thwarting the ability of both regulators and courts to monitor and deter violations of market norms and ultimately causing considerable harm to consumers. It is time for the filed tariff shield to surrender to a dual enforcement regime that includes common law and statutory remedies enforced by courts. Doing so will inevitably increase uncertainty for firms in newly deregulated markets, but this uncertainty will simultaneously serve a deterrence function and encourage private firms to focus their lobbying efforts on Congress to expand agency jurisdiction and enforcement resources, rather than strategically disclosing information in the regulatory process to benefit from the ultra-immunity of the filed tariff shield.

12. *See infra* Part IV.A.

13. *See infra* Part IV.B.

II. FROM SWORD TO SHIELD

Throughout the twentieth century, courts invoked the filed tariff doctrine as an independent legal basis for refusing to modify, or allow modifications to, rates approved by agency regulators. Courts have extended the doctrine to apply not only to rates, but also to terms and conditions approved by regulators, such as service quality terms included in tariffs. The doctrine's original goals focused on consumer protection—in particular, protection against unjust discrimination in service pricing (the "unjust discrimination" strand). At the same time, institutional concerns of federalism (the "federal preemption" strand) and deference to regulators (the "deference" strand) helped to justify it. With time, this doctrine that began as a consumer protection sword evolved into a shield—a type of ultra-immunity for regulated firms from lawsuits designed to protect consumers and competition.

A. *Origins—Protecting Consumers from Unjust Discrimination*

The filed tariff doctrine affords the contractual rights of a firm-specific tariff the full legal force of other agency regulations. A "classic illustration" of an intermediate solution—neither purely in rem nor purely in personam—in which the law protects duties beyond mere contract but short of property, the doctrine was described by Professors Thomas Merrill and Henry Smith as follows:

> Under this doctrine, utilities and common carriers must establish their rates and services in standard form contracts called tariffs, which must be made available on equal and nondiscriminatory terms to all customers. Deviations from the filed tariff are not permitted, but the relevant regulatory agency is authorized to review and adjust the terms to ensure that they are "just and reasonable" to affected customers. In effect, the singular provider of services establishes an in personam right which is made available to a numerous class of customers, and the customers (who remain rationally ignorant of the details of the tariff) are then protected from exploitation by the provider through agency oversight.[14]

The traditional rate regulation process, which set rates based on an evaluation of the cost of providing service, provided a sufficient opportunity to protect the public interest in approved tariffs. As cost-of-service regulation was prevalent in the context of most regulated utilities, the judicially created doctrine persisted throughout the twentieth century and, as is discussed below, continues to apply to many regulated industries today.

One of the earliest cases discussing the legal impacts of a filed tariff arose in the context of the Interstate Commerce Act (ICA), which

14. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 808 n.112 (2002).

played a central role in regulation of railroad transportation rates. In 1906, only a year after *Lochner*[15] was decided, the Supreme Court interpreted the ICA to require enforcement of the "filed rate."[16] The Court reasoned that the statute's purposes were "to secure equality of rates as to all and to destroy favoritism," and noted that the latter purpose could be accomplished "by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination."[17] A year later, the Court concluded that a shipper seeking damages under the ICA based on the alleged unreasonableness of a carrier's rates must do so through the Interstate Commerce Commission (ICC), not the courts, because the agency alone "is vested with the power originally to entertain proceedings for the alteration of an established schedule."[18] Although adherence to the filed rate might, in some cases, create hardship, the Supreme Court has stated that this doctrine "embodies the policy which had been adopted by Congress in the regulation of interstate commerce in order to prohibit unjust discrimination."[19]

Without doubt, the nondiscrimination principle is historically the primary reason courts require adherence to a filed, published rate. In original design, the doctrine was intended to serve as a sword to protect consumers from monopolistic price discrimination, such as a railroad charging different rates to customers of different states, or charging the shipping companies with whom it competes exorbitant prices, without justifications based on the cost of providing service to the customer.[20] Unlike other exclusionary practices, price discrimination does not necessarily change the monopolist's output

15. Lochner v. New York, 198 U.S. 45, 45 (1905) (invalidating a state law setting maximum working hours for bakery workers on the ground that it exceeded state police power and infringed on individuals' liberty—the right to work). It seems ironic that the Court, in applying the filed tariff doctrine, enforced state regulation during a time when the Court was also viewed by many as imposing "Mr. Herbert Spencer's laissez-faire economics." *See id.* at 75-76 (Holmes, J., dissenting). Yet, this apparent paradox can be reconciled with the *Lochner* era's thirst for upholding contract and property rights, as the filed tariff doctrine gives legal status to these rights even where tbey were based in part on regulation.

16. New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n, 200 U.S. 361 (1906).

17. *Id.* at 391.

18. Tex. & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907).

19. Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97 (1915).

20. Discrimination in utility rates included "a wide variety of kickbacks, gratuities, and other devices that agitated much of the public." Kearney & Merrill, *supra* note 3, at 1333. The discontent over discrimination in rates in the railroad and other industries produced a rich and colorful contemporaneous literature. *See, e.g.*, FRANK NORRIS, THE OCTOPUS (Viking Press 1986) (1901); IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904).

level (though if imperfect it may); however, the practice is generally condemned to the extent it maximizes the monopolist's profits (representing a transfer from consumers to the monopolist), while also encouraging the monopolist to waste resources in maintaining its dominant market position.[21]

For price-regulated industries, such as infrastructure utilities, price discrimination can create a more specific problem. Unregulated price discrimination can lead to overcapacity and inefficient use of resources. Absent a prohibition on price discrimination, a utility may preferentially charge some customers, perhaps those who have substitutes for the utility's service (e.g., the large municipal or industrial customer), less than the average cost of providing service to them. To the extent that the utility does so, rate regulation would allow the utility to still recover the cost of providing service to the preferentially treated customers by increasing the rates it charges other customers. For instance, assume an electric utility has three municipal customers. The total cost to the utility of building a plant to serve the three customers is $660,000 annually, with each customer having an equal average cost of service of $220,000. Suppose that one of the municipal customers, *X*, also owns a hydroelectric plant, which it can operate to displace its demand for the utility's power at a cost of $200,000 annually, saving $20,000 a year over the cost of purchasing power from the utility. The utility can cover its total costs and also maximize its customer base by discriminating in its rates—charging *X*, say, $190,000 annually and charging each of the other customers $235,000 a year.

However, this is not efficient. The lower cost plant will not be built, but instead the utility will overinvest in its own capital facilities, using price discrimination as a strategy to foreclose competitors from using more efficient alternatives, such as the hydroelectric plant. Since price discrimination provides the utility little incentive to avoid over-investment in capital, it potentially leads to a higher than optimal capital-to-labor ratio in the industry.[22] By

21. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 569-70 (2d ed. 1999).

22. *See* Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052, 1052 (1962) (applying monopoly theory to the telephone and telegraph industry). Economists have found support for this problem, known as the "Averch-Johnson effect." *See* Leon Courville, *Regulation and Efficiency in the Electric Utility Industry*, 5 BELL J. ECON. & MGMT. SCI. 53 (1974) (supporting the Averch-Johnson effect with empirical data on electric power plants); H. Craig Peterson, *An Empirical Test of Regulatory Effects*, 6 BELL J. ECON. & MGMT. SCI. 111 (1975) (finding support); Robert M. Spann, *Rate of Return Regulation and Efficiency in Production: An Empirical Test of the Averch-Johnson Thesis*, 5 BELL J. ECON. & MGMT. SCI. 38 (1974) (verifying empirically the Averch-Johnson effect). The

contrast, prohibiting price discrimination would encourage the utility to more carefully expand capital to serve individual customers based on the cost of providing service to them individually, thus increasing efficiency in the use of capital resources.[23]

At the same time, since perfect price discrimination would allow the monopolist to expand output to include customers who otherwise would be priced out of the market, as a matter of economic theory this principle against nondiscrimination in rates is hardly uncontroversial.[24] While it may not be universally accepted by economists,[25] though, the "unjust discrimination" prohibition is a well-established standard for evaluating potential monopoly pricing abuses in public utility law.

The basic nondiscrimination principle arose in the context of judicial interpretation of statutes, such as the ICA. Two aspects of this history are significant for the modern filed tariff doctrine. First, even though the doctrine began with judicial or agency interpretation of statutes, the Supreme Court has come to treat it as a type of statutory precedent. As such, today the doctrine serves to bind both courts and agencies to the original judicial interpretation of regulatory

---

empirical results, however, seem mixed, at best, particularly if the expected rate of return is below the cost of capital. *See* William J. Boyes, *An Empirical Examination of the Averch-Johnson Effect*, 14 ECON. INQUIRY 25 (1976) (finding no empirical support for the Averch-Johnson effect); W. Davis Dechert, *Has the Averch-Johnson Effect Been Theoretically Justified?*, 8 J. ECON. DYNAMICS & CONTROL 1, 1, 16 (1984) (showing that regulated firms tend to undercapitalize—not overcapitalize, as Averch-Johnson would predict—in relation to unregulated firms). For a review of the evidence, see Paul Joskow & Roger G. Noll, *Regulation in Theory and Practice: An Overview*, *in* 1 STUDIES IN PUBLIC UTILITY REGULATION 10-14 (Gary Fromm ed., 1981).

23. A related, and more general, criticism of price discrimination in antitrust regulation is that it encourages the monopolist to leverage its primary market into a second market. *See* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 515-16 (1985); Lawrence A. Sullivan, *Section 2 of the Sherman Act and Vertical Strategies by Dominant Firms*, 21 SW. U. L. REV. 1227, 1235-38 (1992).

24. Ramsey pricing, or raising prices in inverse proportion to customer demand elasticity, provides a theory of value-based pricing that can minimize the deadweight loss associated with price discrimination. *See* STEPHEN J. BROWN & DAVID S. SIBLEY, THE THEORY OF PUBLIC UTILITY PRICING 41 (1986). Chicago-school theory sees price discrimination as bringing a monopolistic market closer to a competitive one and thus reducing the "misallocative effects" of monopoly. *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979) (discussing perfect price discrimination); *see also* HOVENKAMP, *supra* note 21, at 567-68.

25. A leading regulated industries treatise, for example, indicates that "undue discrimination is really not an efficiency issue; rather, it has to do with the fairness of the existing set of prices in the sense of whether one group may be 'subsidizing' another group." W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 377 (3d ed., MIT Press 2000). The treatise authors elaborate, however, that to the extent that price discrimination is evaluated in ratemaking, the average cost method for calculating rates will produce the most efficient result. *See id.* at 377-78. Further, the authors elaborate, the average cost method will promote least-cost production in circumstances where natural monopoly is sustainable. *Id.* at 378.

statutes, leaving Congress the primary responsibility for the filed tariff doctrine.[26]

Second, although the filed tariff doctrine is based in part on statutory interpretation, courts also historically drew on common law notions of contract—and to a lesser extent property—in fashioning this regulatory law principle. The doctrine allows courts to imply a firm-specific regulatory commitment from contracts approved by or filed with regulators.[27] Once a legitimately filed rate is established, customers can invoke the doctrine to preclude a utility from charging services to them or others that deviate from the filed rate. The firm too can invoke the doctrine to preclude variations from the filed rate by courts or state regulators. In this sense, the filed tariff doctrine facilitates regulatory commitment, binding and enhancing the predictability of the administrative state.[28] This commitment, which some commentators afford a quasi-property status,[29] encourages firms to make investments, even where government regulation and the prospect of its change are pervasive.

The filed tariff doctrine was originally intended to protect consumers, but to the extent the doctrine provides private firms an opportunity to forum shop—precluding federal court or state consideration of claims—the regulated firm is also a primary beneficiary. Once a rate is approved by federal regulators, a utility can invoke the filed rate as a basis for precluding federal or state courts from deviating from the approved tariff. Courts exercise their jurisdiction to allow deviation from the filed rate only if the tariff is invalid, which depends upon an affirmative showing of unreasonable terms—a difficult threshold given deference to regulators by the

26. For further discussion of this aspect of the doctrine, see *infra* Part IV.A.

27. On the significance of regulatory commitment to the development of the utility industry, see generally J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997).

28. *See, e.g.*, AT&T v. Cent. Office Tel., Inc., 524 U.S. 214, 221-24 (1998) (responding to regulated firms by invoking the filed tariff doctrine to preclude the FCC from moving away from its tariffing requirements); *infra* notes 55-60 and accompanying text. Typically, in the regulatory context, government agreements with private actors have been considered binding only insofar as they set out in clear terms that the state will not depart from the terms of the deal and that the state will bear damages if it does. *See* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (allowing a damages claim for change to a monopoly franchise only insofar as the state has expressly agreed to indemnify private firms against policy changes). While the filed tariff doctrine does not require the government to pay damages for changes in regulation, by giving a filed tariff preemptive legal status over other laws it constrains when regulators can change the conditions under which regulated firms operate.

29. *See* SIDAK & SPULBER, *supra* note 27, at 213 (arguing that that abrogation of tariffs is a compensable confiscation of utility property).

courts in judicial review of agency-determined rates.[30] Effectively, a utility can protect its expectations in the filed tariff, even though rates or other service conditions may be potentially fraudulent under state law principles or otherwise violate market norms, including consumer protection and federal antitrust laws. When the doctrine applies, utilities can be confident that the primary consumer protection and fraud requirements are imposed on them by regulators, not by courts. As a result, the rate regulation process becomes the central policy-making forum for establishing utility rates and most service terms and conditions. When the doctrine applies, courts are not completely irrelevant, but their primary role is one of reviewing agency decisions on appeal, not acting as the primary regulator of utility-customer, or utility-utility, relationships.

The filed tariff doctrine's benefit for regulated firms is further illustrated by the consistency of the protection of regulatory commitments, facilitated by the predictability of tariffs, with the *Lochner* era, during which courts created the doctrine. *Lochner*, of course, provided strong constitutional protections for property owners.[31] In the utility arena, *Lochner* is widely understood to have reaffirmed *Smyth v. Ames*, which held that regulators' failure to allow a utility to recover the fair value of its investment results is confiscation of the utility's property.[32] While utilities could benefit from the new constitutional order brought on by the *Lochner* era, the invocation of constitutional protections for investor property interests required resort to the judiciary and depended on factually complex and technical constitutional arguments. Put simply, courts were never very competent at assessing the fair value of utility property. As *Lochner* faded from the constitutional landscape, so too did the constitutional protections of utility property. By 1944, the Supreme Court reduced constitutional protections to an evaluation of the final product of the regulatory process: So long as the "end result" is just and reasonable, regulators can act with confidence that their rates and other decisions do not effectuate an unconstitutional taking.[33] Since then, the Supreme Court has not invalidated a single utility tariff on takings grounds.[34]

30. *See* Leigh H. Martin, Note, *Deregulatory Takings, Stranded Investments and the Regulatory Contract in a Deregulated Electric Utility Industry,* 31 GA. L. REV. 1183, 1206 (1997).

31. *See* Lochner v. New York, 198 U.S. 45 (1905).

32. Smyth v. Ames, 169 U.S. 466, 546-47 (1898).

33. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

34. *See* Jim Chen, *The Second Coming of* Smyth v. Ames, 77 TEX. L. REV. 1535, 1569 (1999) (predicting that the Supreme Court will no longer use *Smyth v. Ames* to invalidate takings); Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains,* 108 YALE L.J.

Although *Lochner*'s substantive constitutional constraints on the regulatory process were never particularly successful, almost completely dying out in the last half of the twentieth century, the filed tariff doctrine has lived on as a way for utilities to create a property right of sorts in an approved tariff. From the perspective of the regulated firm, since tariffs are almost always presumptively constitutional and are subject to judicial deference on appeal, it makes sense to focus lobbying and litigation resources on the agency regulatory process.[35] The filed tariff doctrine protects this investment by giving the product of the regulatory process a legal entitlement against intervention by the judiciary and state regulators. In 1951, for example, the Supreme Court held all tariffs filed with and accepted by the Federal Power Commission, FERC's predecessor, to be binding on the federal courts.[36] The Court reasoned that a party to the contracts "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even the court can authorize commerce in the commodity on other terms."[37] Though courts were not very successful in protecting utility property through constitutional doctrines, such as the takings clause and substantive due process, during the twentieth century, they did indirectly protect regulatory commitments through the filed tariff doctrine long after *Lochner* had been repudiated.

Also of significance, twentieth-century courts extended the doctrine beyond rates to include other terms and conditions in approved tariffs.[38] Since tariffs often regulate not only the price of service but also its terms and conditions, the filed tariff doctrine's

---

801 (1999) (examining regulatory policy and critiquing the Sidak/Spulber argument); Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1460-61 (2000) (discussing Sidak's and Spulber's arguments); Jim Rossi, *The Irony of Deregulatory Takings*, 77 TEX. L. REV. 297 (1998) (criticizing the Sidak/Spulber approach to regulatory takings). These works criticize the protection of regulatory commitments based on constitutional property norms, an argument advanced by Sidak and Spulber. *See* SIDAK & SPULBER, *supra* note 27.

35. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (requiring courts to give deference to administrative interpretations if the plain meaning of the statute is ambiguous and the administrative interpretation is reasonable); *infra* note 70. *Chevron* presumptively applies to interpretations adopted through notice and comment rulemaking and formal adjudication. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). In informal adjudication, where many tariffs are adopted, its application is more questionable, *see id.* at 234-35, but courts routinely uphold agency tariffs under a strong deference doctrine, perhaps because these agency decisions more likely involve complex issues of policy rather than pure issues of law.

36. Mont.-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251-52 (1951).

37. *Id.*

38. *See* N. Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 90-91 (1963) ("[O]ur inquiry is not at an end because the orders do not deal in terms with prices or volumes of purchases.").

scope eventually expanded to allow the entire regulatory process to produce decisions that have the force and effect of a contract (and arguably even property) in courts.[39] Inevitably, as is discussed below, this influences the behavior of regulated firms, since to invoke the shield a firm is first required to divulge information to regulators.

B. The Filed Tariff Doctrine in the Context of the Institutional Structure of Regulation

The unjust discrimination strand of the filed tariff doctrine is steeped in progressive, consumer protection rhetoric. Compared to these lofty aspirations, the doctrine's reality is grim: It echoes other *Lochner*-era doctrines by serving as a shield for regulated firms and enhancing regulatory commitments. However, given the nature of regulation in the United States, the filed tariff doctrine has two other strands. Its origins and purposes are not based entirely in consumer protection aspirations or the protection of regulatory commitments, but also are ensconced in the institutional structure within which regulation develops. In applying the doctrine, courts can avoid conflicts between national government and state regulators (the federal preemption strand) and promote judicial deference to agency regulators (the deference strand).

1. The Federal Preemption Strand

Because the filed tariff shield evolved first as a doctrine of federal courts, it is often invoked to bar state regulatory or common law claims.[40] Thus, much as federal regulation preempts state common law claims,[41] or admiralty law preempts state common law tort claims,[42] the doctrine has the general effect of precluding state law claims that might allow departures from the filed rate. Because successful state suits would allow service rates and conditions to vary across jurisdictions, the preclusive effect of the filed tariff doctrine promotes uniformity in tariff rates, terms, and conditions.[43]

---

39. *See, e.g.*, Duke Energy Trading and Mktg., L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001) (applying filed rate doctrine to effectively allow terms and conditions of FERC-approved tariffs to preempt state law claims).

40. *See* Ark.-La. Gas Co. v. Hall, 453 U.S. 571, 576-85 (1981).

41. *See* Paul E. McGreal, *Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 859 (1995).

42. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917); *see also* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 283 (1999).

43. In the electric power context, state regulators can set rates only for intrastate transactions, and these transactions also are largely off limits to federal regulators. *See* Fed.

The preemption origins of the filed tariff doctrine were acknowledged by courts before the doctrine took on independent status in the twentieth century. For example, in 1894 the Supreme Court held that, even where regulators had not approved a tariff, a rate limiting the liability of a telegraph company for erroneously transmitted messages was valid as a contractual limit on liability, so long as there was no willful misconduct or gross negligence.[44] Subsequently, in evaluating a rate that regulators had approved for the same telegraph company, the Court concluded that the limitation on liability was a part of the utility's filed rate.[45] The Court reasoned that the telegraph company "could no more depart from [the limitations of liability] than it could depart from the amount charged for the service rendered."[46]

This principle, along with the general prohibition of discrimination in rates, was broadened to give even tariffs which did not expressly limit liability preemptive effect over state law claims. In 1907, the Supreme Court applied this principle to common carriers, precluding a shipper from seeking damages outside of an ICC proceeding.[47] Even where customers had negotiated rates below the tariff price, the filed tariff doctrine was held to bar discounts. In one case, a passenger had negotiated a ticket with a railroad for a rate of $49.50, although the published rate for the route was $78.65.[48] After discovering this error, the railroad sued the passenger for the difference and the Supreme Court upheld an award against the

Power Comm'n v. Conway Corp., 426 U.S. 271, 271 (1976) (allowing the Federal Power Commission to consider evidence of retail rates in reviewing a nondiscrimination challenge to federally set wholesale rates, but also noting that "[t]he Commission has no power to prescribe the rates for retail sales of power companies"); N. States Power Co. v. FERC, 176 F.3d 1090, 1096 (8th Cir. 1999) (holding that FERC does not have the authority to regulate transmission for retail customers in its efforts to develop competitive wholesale power markets). Conversely, under the Supremacy Clause, states too are prohibited from regulating in ways that encroach upon the authority of federal regulators. *See* Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 859 (9th Cir. 1994) (holding that more restrictive California cogeneration monitoring program is preempted by FERC's cogeneration compliance program). Thus, the filed tariff doctrine reinforces the limited power of states to regulate the industry, applying similar restrictions as those it imposes on state courts and common law doctrines. But the filed tariff doctrine is not necessary to define these jurisdictional lines; federal preemption analysis suffices for these purposes and also safeguards against private forum shopping. *See* discussion *infra* Part V.A.

44. *See* Primrose v. W. Union Tel. Co., 154 U.S. 1, 21-34 (1894).

45. *See* W. Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921).

46. *Id.* The court recognized, however, that in other contexts, such as those involving common carriers, limitations on liability were unreasonable. *Id.* at 574 (citing Union Pac. R.R. v. Burke, 255 U.S. 317 (1921)).

47. *See* Tex. & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907).

48. *See* Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 96 (1915).

passenger, declining to allow any deviation from the filed rate—even if agreed to under state contract law principles.[49]

The doctrine not only limits state common law claims; it also narrows the jurisdiction of state regulators. For instance, in *Nantahala Power & Light Co. v. Thornburg*, a case addressing the scope of FERC's authority to regulate wholesale rates, the Supreme Court noted:

> [The] FERC clearly has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers. Once [the] FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give [the] FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.[50]

The doctrine, for example, precludes a state from "trapping" costs by exercising its "undoubted jurisdiction over retail rates to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate."[51] The Pike County exception to this doctrine allows a state to deny a utility the opportunity to recover costs incurred as a result of buying power at FERC-established wholesale rates if the specific purchase, apart from the rate that was paid, is deemed imprudent.[52] Although the United States Supreme Court has never squarely held that imprudence is an escape hatch from the filed tariff doctrine, many circuit and district courts,[53] as well as the FERC,[54] recognize the exception.

More recently, in *AT&T v. Central Office Telephone Co.*, the Supreme Court held that the tariff filing provisions of the Federal Communications Act, modeled after the nondiscrimination provisions of the ICA, require judicial enforcement of filed rates.[55] AT&T had

49. *See id.* at 94, 97.

50. 476 U.S. 953, 966 (1986) (citation omitted).

51. *Id.* at 970.

52. Pike County Light & Power Co. v. Pa. Pub. Util. Comm'n, 465 A.2d 735, 737-38 (Pa. Commw. Ct. 1983).

53. *See* Pub. Serv. Co. of N.H. v. Patch, 167 F.3d 29, 35 (1st Cir. 1998) (citing Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 373-74 (1988) and *Nantahala*, 476 U.S. at 972); Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n, 837 F.2d 600, 609 (3d Cir. 1988) ("Regarding the states' traditional power to consider the prudence of a retailer's purchasing decision in setting retail rates, we find no reason why utilities must be permitted to recover costs that are imprudently incurred."). *But see* Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1049-50 (N.D. Cal. 2002) (declining to apply the exception because a decision on the permissibility of a prudence review was not "meaningful" at the time of the decision).

54. *See* Palisades Generating Co., 48 F.E.R.C. 61,144, at 61,574 n.10 (1989) (noting that FERC's action in accepting a tariff filing does not preempt or otherwise effect state jurisdiction to review for prudence (citing Pa. Power & Light Co., 23 F.E.R.C. 61,325, 61,716 (1983) and Monongahela Power Co., 39 F.E.R.C. 61,350, 62,095-96 (1987))).

55. 524 U.S. 214, 227-28 (1998).

entered into a contract to sell long-distance service to a reseller, giving the reseller sufficient assurances to procure customers. Later, AT&T experienced problems with its network, including delays and mistakes in billing.[56] When the reseller was unable to meet its usage commitments to AT&T, AT&T terminated its service eighteen months prior to the end of the contract.[57] The reseller sued AT&T under state law for breach of contract and tortious interference with contract. AT&T mistakenly billed the reseller's customers, causing substantial damage to the reseller, but AT&T also had tariffs on file with the FCC specifically addressing some of the same subjects of the discounts.[58] Writing for the majority, Justice Scalia reasoned that "[r]egardless of the carrier's motive—whether it seeks to benefit or harm a particular customer—the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that antidiscriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.'"[59] Since Section 203(a) of the FCA required each common carrier to file tariffs with the FCC, the Court was compelled to enforce the tariff and "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."[60]

Following the Court's application of the filed tariff shield in *AT&T*, wholesale customers of long-distance service face a serious loss of remedy, and thus have scant means to deter wrongdoing by long distance carriers. For example, assume that a carrier enters into a

56. *Id.* at 218-19.

57. *Id.* at 220.

58. *See id.* at 219-20. Although some of the services were within the scope of the tariff, Central Office also claimed "that AT&T failed to provide untariffed services and engaged in willful misconduct, and therefore, the filed-rate doctrine does not apply and its claims are not preempted." Cent. Office Tel. Co. v. AT&T, 108 F.3d 981, 989 (9th Cir. 1997). Justice Scalia's majority opinion rejected this argument, drawing on several previous cases that had invalidated contracts that were at odds with the terms of filed tariffs in the ICC context. *See AT&T*, 524 U.S. at 224; Davis v. Cornwell, 264 U.S. 560, 562 (1924) (invalidating the carrier's agreement to provide the shipper with a number of railroad cars on a specified day, and stating that such a special advantage "is illegal, when not provided for in the tariff"); Chicago & Alton R.R. v. Kirby, 225 U.S. 155, 163, 165 (1912) (rejecting a shipper's breach-of-contract claim against a railroad for failure to ship a carload of race horses by a particularly fast train, and holding that the contract was invalid as a matter of law because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train," and therefore the shipper received "an undue advantage . . . that it is not one open to all others in the same situation."); *see also* Kansas City S. Ry. v. Carl, 227 U.S. 639, 653 (1913) (noting that a carrier cannot "legally contract with a particular shipper for an unusual service unless he makes and publishes a rate for such a service."); Wight v. United States, 167 U.S. 512, 517-18 (1897) (prohibiting a railroad from giving a rebate to a shipper to induce him to use their line).

59. *See AT&T*, 524 U.S. at 223 (quoting MCI Telecomm. Corp. v. AT&T, 512 U.S. 218, 229 (1994)).

60. *Id.* at 227 (quoting Keogh v. Chi. & Northwestern R.R., 260 U.S. 156, 163 (1922)).

contract promising a reseller a rate of 5 cents per minute for nationwide domestic switched terminations.[61] In return for this rate, the reseller commits to purchase a million minutes per month over a period of three years.[62] The reseller then enters into agreements with third parties to resell service for 6 cents per minute.[63] However, due to the negligence or fraudulent intent of the carrier, the underlying carrier's filed tariffs contain a 10 cent rate, rather than the 5 cent promised rate.[64] By law, the carrier is required to charge the reseller the 10 cent rate, even though this would require the reseller to sell to third parties below cost.[65] If the reseller remains liable to the carrier over the full three year contract, its losses could be substantial.[66]

The logic behind allowing a filed tariff to have an automatically preemptive effect against all state law claims for money damages is questionable. Allowing tort and contract claims to proceed to the stage of damages does not necessarily result in discounts or adjustments to rates that violate the general principle of nondiscrimination in rates. Modern civil procedure—in particular, the availability of class actions—makes uniform relief more likely. In the Second Circuit's decision in *Square D v. Niagara Frontier Tariff Bureau, Inc.*, the most sustained critique of the filed rate doctrine penned from the bench, Judge Friendly observed that consumers can (and, given lower net rates if successful in litigation, will face incentives to) band together to bring class actions for breach of contract, tort or fraud claims. To the extent that they do so, uniform relief among classes is more likely today than it would have been in the early twentieth century.[67] If appropriately structured, these class actions hold promise to minimize monopolistic abuses in pricing.[68]

---

61. Neil S. Ende, *Unholy Contract: The Legacy and Abuse of the Filed Rate Doctrine*, PHONE+, May 1999, http://www.phoneplusmag.com/articles/951feat3.html.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1352 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986). Elsewhere Judge Friendly and others have urged an expansive role for the federal judiciary in implementing regulatory programs. *See, e.g.*, Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (claiming that *Erie* "opened the way" for development of "specialized federal common law"); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799-800 (1957) (suggesting that the federal judiciary must be competent to declare law for proper implementation of congressional programs). Judge Friendly's revisiting of the filed tariff doctrine might be understood within this context that Mishkin discusses.

68. *See, e.g.*, Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1086-87 (2002)

Apart from general reference to the principles of nondiscrimination and uniformity, courts never fully explained why the filed rate doctrine requires preemption of state law contract, tort, and fraud claims. Independent of federal preemption law principles, however, the filed tariff doctrine rings hollow as an analytical basis for concluding that federal regulation has a preemptive effect on state regulation or a state law claim.

2. The Agency Deference Strand

Also ensconced in the history of the filed tariff doctrine is a strong tradition of judicial deference to agency regulators.[69] Even where federal law, such as the various doctrines of antitrust law, might provide a workable legal standard for evaluating the conduct of regulated firms, courts may invoke the filed tariff doctrine to bar jurisdiction over a claim. As such, the filed rate doctrine serves a function similar to *Chevron* deference:[70] out of respect for the expertise of agency regulators (as well as in the interests of promoting judicial economy and national uniformity), courts sometimes refuse to entertain the legal merits of a dispute related to an agency tariff.[71]

While the Supreme Court has stated that there is no general across-the-board antitrust immunity for transactions approved by regulators,[72] direct antitrust attacks to regulated rates and other terms and conditions have long been limited by the filed rate doctrine.[73] In the classic case on the issue, *Keogh v. Chicago & Northwestern Railway Co.*, the Court held that a private plaintiff

(discussing class action consumer cases and proposing a common currency for purposes of minimizing principal/agent problems during settlement).

69. *See infra* note 73.

70. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (finding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). For further discussion of broader *Chevron* aspects of the filed tariff doctrine, particularly the tension inherent in its judicial application, see *infra* Part IV.A.

71. *See infra* note 79 and accompanying text.

72. *See* California v. Fed. Power Comm'n, 369 U.S. 482, 490 (1962) (holding that the Federal Power Commission could not approve a merger application when an antitrust suit was pending in court regarding the same merger).

73. *See* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 375 (1988) (finding "the reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal court"); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423-24 (1986) (upholding the rule from Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922), that a private shipper cannot recover treble damages under the Sherman Act in connection with filed tariffs); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) (holding that "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable").

cannot recover treble damages against a carrier based on the claim that a tariff rate filed with the ICC was allegedly monopolistic.[74] Writing for the Court, Justice Brandeis emphasized the nondiscrimination principle,[75] but also grounded his decision in respect for an ongoing agency regulatory process. As he observed, the need for an antitrust remedy is questionable, given that section eight of the ICA gave shippers injured by illegal rates actual damages plus attorneys fees.[76] In addition, since an award of antitrust damages would depend on proof that the rate in fact paid exceeds the rate that would have prevailed in a competitive market (hypothetically, of course), this hypothetical rate would also have been approved by the ICC. Thus, Justice Brandeis reasoned, what the agency would have approved is a question better determined by the agency than the courts.[77]

A common, if controversial, example of the filed tariff doctrine's continued impact involves the traditional price squeeze scenario, in which a monopolist defendant supplies a plaintiff at wholesale (for resale), yet competes with the plaintiff at the retail level. The typical price squeeze claim is that the defendant engaged in illegal conduct by setting out to destroy the plaintiff by inflating the wholesale price to the plaintiff while artificially depressing the retail price to shared customers. Some courts have rejected a filed rate defense in the context where a monopolist supplier is subject to federal regulation at the wholesale level but not at the retail level,[78] because federal regulators would not necessarily be responsible for evaluating retail rates.[79] Where a federal agency regulates both of the rates in

---

74. 260 U.S. 156, 163-65 (1922).

75. *Id.* at 163 (noting that the filed rate is legal for all purposes and is not to be "varied or enlarged by either contract or tort of the carrier").

76. *Id.* at 162.

77. *Id.* at 163-64.

78. *See* City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (8th Cir. 1982) (finding that "courts may consider a price-squeeze claim without infringing on the regulatory jurisdiction of the FERC and PSC, because the question is not whether the rates themselves are anti-competitive, but whether the defendant utility acted illegally in proposing a certain anti-competitive combination of rates"); City of Mishawaka v. Ind. & Mich. Elec. Co., 560 F.2d 1314, 1321-22 (7th Cir. 1977) (holding that the Federal Power Commission does not have exclusive or primary jurisdiction over an antitrust claim). *But see* Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (reaching the same result as the filed rate doctrine based on an analysis similar to assessment of state action immunity at the state level).

79. As one commentator explains:

> The most effective way of eliminating all harmful price squeezes would be to place jurisdiction over both retail and wholesale service in a single agency. Not only is dual regulation directly responsible for those squeezes produced by regulatory inconsistency, it is indirectly responsible for those caused by deliberate utility

question, however, courts have more consistently invoked the filed rate doctrine as a bar to price squeeze antitrust claims brought by consumers.[80] For similar reasons, courts refuse to apply the filed tariff doctrine to claims for injunctive relief where an agency lacks injunctive authority.[81] Courts justify invocation of the filed rate shield from antitrust liability as a type of deference to agency regulators.

The deference strand of the doctrine is limited by the doctrine's primary and original purpose—protecting consumers from price discrimination. Courts generally refuse to apply the filed tariff doctrine to claims brought by competitors, since there is no real consumer to protect.[82] For example, in *Otter Tail Power Co. v. United States*, the United States Supreme Court refused to apply the filed tariff doctrine to bar essential facilities claims by competitors because the court perceived only "a potential conflict" with FERC's authority over transmission.[83] The Ninth Circuit has more explicitly recognized an exception to the doctrine for cases involving competitors.[84]

---

conduct. The latter variety, in essence, are possible because the utility may be able to manipulate the regulatory process.

John E. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 UCLA L. REV. 563, 638-39 (1984).

80. *See* Town of Norwood v. New Eng. Power Co., 202 F.3d 408, 419-20 (1st Cir. 2000) (recognizing the controversial nature of a filed rate bar and applying it to an antitrust claim).

81. For discussion of how the remedy should influence application of the shield, see Note, *The Sherman Act as Applied to Railroads Regulated Under the Interstate Commerce Act*, 36 HARV. L. REV. 456, 459-60 (1923) (arguing that the bar of *Keogh* should not apply to equitable remedies, such as injunctions, under the Sherman Act); Recent Case, *Primary Jurisdiction Applied in Action Against Members of Regulated Industry*, 101 PA. L. REV. 678, 682 (1953) (observing that "reason to withhold total relief should not compel withholding partial relief . . . in the form of an injunction . . .").

82. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, IA ANTITRUST LAW ¶ 247c, at 108-09 (2d ed. 2000). Areeda and Hovenkamp suggest that most courts have limited filed rate immunity from antitrust claims to suits brought by purchasers, often referred to as "overcharge" claims, and note that claims by competitors, based on lost profits rather than the claim that the competitor paid too much, have been more successful in overcoming the filed tariff shield. They further find that because an award of damages to a competitor (if the competitor is not also a wholesale or retail customer) does not risk discrimination to consumers, at least some of the rationales of *Keogh* do not apply. This distinction is not easy to apply in the real world, since frequently competitors are consumers, as often holds true in the context of wholesale markets.

83. 410 U.S. 376, 377 (1973).

84. *See* Cost Mgmt. Servs. v. Wash. Natural Gas Co., 99 F.3d 937, 944-45 (9th Cir. 1996) (endorsing an earlier version of AREEDA & HOVENKAMP, *supra* note 82); Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 684 (9th Cir. 1985). In practice, it is often difficult to distinguish between a competitor and a consumer. For example, wholesale customers of utilities are frequently also competitors. The competitor exception is ambiguous about how courts should treat claims by a competitor who is also a consumer. A Sixth Circuit case rejects the competitor exception to the filed tariff doctrine. *See* Pinney Dock & Transp. Co. v. Penn. Cent. Corp., 838 F.2d 1445, 1455-57 (6th Cir. 1988).

Consistent with the doctrine's nondiscrimination strand, some states have adopted their own state-law equivalent to the federal filed tariff shield, even though the filed rate doctrine is predominantly a principle that applies in federal courts.[85] A filed tariff has a preclusive effect on consumer, tort, fraud and even antitrust litigation in several states.[86] Other states, however, do not recognize as expansive a filed tariff doctrine for purposes of state law.[87] States that recognize the filed rate doctrine embrace it primarily out of deference to agency regulators.[88]

While courts commonly embrace deference as a goal of the filed tariff doctrine, this strand of the doctrine is also based on overbroad premises. Reluctantly invoking the doctrine to bar an antitrust claim, Judge Friendly observed in *Square D* that an award of antitrust damages (just as an award of money damages in common law claims) does not necessarily force a particular rate on an agency such as the ICC.[89] Instead, even if a court awards judgment to the plaintiff, an agency retains discretion to accept or reject this as a reasonable cost associated with the activity.[90] It may be necessary to make adjustments in a later rate case, but this is a decision for an agency, not a court. Thus, even before widespread availability of consumer class actions, the threat of money damages enforced by courts served the effect of deterring wrongdoing by utilities without necessarily stepping on the toes of regulators. If damages are awarded against a

---

85. *See, e.g.*, cases cited *supra* notes 6-8, 12, 15-17, 45, 50, 62, 69-70, 76.

86. *See, e.g.*, Teleconnect Co. v. U.S. W. Communications, 508 N.W.2d 644, 648-49 (Iowa 1993) (invoking state-created filed rate doctrine); N.C. Steel, Inc. v. Nat'l Council on Compensation Ins., 496 S.E.2d 369, 372-73 (N.C. 1998) (adopting filed rate under North Carolina law to preclude judicial consideration of complaint that insurers withheld information from regulators, thus forcing plaintiffs to pay more for insurance); Satellite Sys., Inc. v. Birch Telecom. of Okla., Inc., 51 P.3d 585, 587-88 (Okla. 2002) (adopting filed rate doctrine as a matter of state law, but recognizing an exception for fraud); Southwestern Elec. Power Co. v. Grant, 73 S.W.3d 211, 216-17 (Tex. 2002) (invoking filed rate doctrine to bar negligence claim against utility); Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 661-63 (Wis. 1993) (applying filed rate doctrine under state law).

87. *See, e.g.*, Pink Dot, Inc. v. Teleport Communications Group, 107 Cal. Rptr. 2d 392, 398 (2001) (noting limits in California's filed rate doctrine); Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224 (1993) (holding that the filed rate doctrine is not a bar to antitrust claims under California state law).

88. *See Satellite Sys., Inc.*, 51 P.3d at 588 (recognizing purposes behind Oklahoma's adoption of doctrine as "to prevent discriminatory rates and to vest an agency with authority to set reasonable rates"); Amundson & Assocs. Art Studio v. Nat'l Council on Compensation Ins., Inc., 988 P.2d 1208, 1213 (Kan. Ct. App. 1999) ("The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit.").

89. Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1352 (2d Cir. 1985)

90. *See id.* at 1353.

utility for its illegal conduct, then the regulated firm itself needs to decide whether to absorb the loss and pass it on to shareholders, or to attempt to pass it on to customers through regulated rates. But, by assessing monetary damages, courts do not force this determination onto regulators. Instead, under cost-of-service regulation, only once federal regulators find the conduct leading to damages in judicial proceedings "prudent" are utilities allowed to recover the costs associated with the conduct.[91] Prudence remains an independent finding within the expert judgment of regulators, not courts, and regulators retain the complete authority to make adjustments to the regulated firm's rates in future cases, as reasonableness demands.[92]

In *Square D*, Judge Friendly also observed that in many contexts treble damage remedies are permitted even where regulatory remedies are already available,[93] and that rules of procedure have developed to allow judicial proceedings to be stayed pending the outcome of agency procedures.[94] Since regulators are not coerced by courts to accept changes to the rate and courts have at their disposal other tools for respecting deference,[95] the filed tariff doctrine is hardly necessary to protect agency discretion.

On appeal of Judge Friendly's *Square D* decision to the United States Supreme Court, Justice Stevens, writing for a majority, acknowledged that the case at hand could be distinguished from *Keogh*, in that the tariffs at issue were not subject to an ICC hearing prior to going into effect, but instead were merely filed with the agency.[96] However, noting the "established guidepost" of the longstanding filed tariff doctrine, the Supreme Court also upheld the filed tariff bar.[97] According to Justice Stevens, the various developments mentioned by Judge Friendly "seem to undermine some of the reasoning in Justice Brandeis' *Keogh* opinion."[98] Nonetheless, in *Square D* the Court followed *Keogh*, noting that the reasoning of

91. *See* CHARLES F. PHILLIPS, THE REGULATION OF PUBLIC UTILITIES 340-42 (3d ed. 1993) (discussing the prudence standard).

92. *See id.* (providing examples of adjustments).

93. *See Square D*, 760 F.2d at 1354 (noting that "[t]he Court has subsequently found that activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity").

94. *See id.* at 1353 (contrasting "the many later cases in which the Supreme Court has directed the suspension of judicial proceedings pending the referral of similar issues to the ICC" with *Keogh's* concern about the need for the ICC to determine rates). For further discussion, see discussion of primary jurisdiction *infra* Part V.B.1.

95. As are discussed *infra* Part V.

96. Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417 (1986).

97. *Id.* at 423.

98. *Id.*

Judge Friendly's "characteristically thoughtful and incisive opinion"[99] did not "overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute."[100] The Court failed, however, to come to grips with the tension in the deference rationale for the filed tariff doctrine. Given the preservation of agency discretion to change rates, as well as an agency regulatory process that often fails to carefully examine rates, respect for agency deference alone simply cannot justify the filed tariff doctrine's continuation.

The filed tariff doctrine has had an enormous effect on the development of twentieth century regulatory law, but its application is not always automatic. When courts apply it, they are often careful to avoid extension of the doctrine to cases involving competitors or cases seeking injunctions against firms where the regulator itself lacks such remedy. Courts have also created an exception for claims of price squeeze where regulators lack jurisdiction to remedy allegedly illegal conduct. Even outside of these exceptions, however, the filed tariff doctrine is unnecessary, and sometimes unsuccessful in achieving its major purposes, as revealed in its unjust discrimination, federal preemption and deference strands. Despite these doctrinal faults, the filed tariff shield was strongly endorsed and applied by courts during the era of traditional utility regulation.

III. REASSESSING BATTLE STRATEGY

The filed tariff shield not only influences the course of litigation, but also affects the behavior of private firms and agencies in the regulatory process. Institutionally, agencies and courts have never been very effective at monitoring tariffing as a private forum-shopping strategy. With the introduction of competition to formerly regulated industries, market norms are emerging to expose a gap in regulatory agency ability to deter wrongdoing by private firms. To the extent the filed tariff doctrine encourages strategic manipulation of the tariffing process to foreclose judicial enforcement, it widens this gap and may even result in more radical deregulation than either Congress or agencies intend.

A. The Influence of the Shield on Institutional Choice

In addition to its doctrinal shortcomings, the filed tariff shield affects the behavior of both regulated firms and regulators in ways

99. *Id.*
100. *Id.* at 424.

that pose hidden, but sometimes significant, social welfare costs for the regulatory process. In assessing the effects of the shield, it is important to focus on the behavior of private firms, regulators, and courts. For purposes of conceptualizing the basic effects of the doctrine, a few simplifying observations about the behavior of these actors are in order. First, assume that a private firm is motivated by its ability to avoid substantial penalties for its market decisions (along with other goals, such as maximizing profits). Next, assume that an agency is motivated by sustaining and expanding its jurisdiction (among other goals, perhaps even including regulating in the public interest). Finally, assume that reviewing courts are concerned with sustaining their independence and institutional posture (along with other goals, perhaps even including promoting sound governance by other branches of government, as deference to an agency might reinforce).

Against the backdrop of these various actors, the issue of regulation can be understood through the lens of institutional choice.[101] When managing an industry, such as electric power, three main institutional fora are available. First, and most prevalent throughout the twentieth century, regulatory agencies (federal or state) can set prices, structure, and service terms and conditions for firms in an industry.[102] Second, courts can regulate structure and service terms and conditions in an industry through the application of statutory standards, such as the antitrust laws, and common law doctrines (including the law of fraud and contract).[103] Third, spontaneous ordering of the market can regulate the prices, structure, and service terms and conditions in an industry.[104] Of course, in most industries, some mixture of these three options regulates the conduct of private firms. For instance, in most unregulated industries, a mix of the second and third options serves to govern private behavior: prices are determined through the market, but courts also apply

101. This analysis thus draws on the insights of neo-institutional economics. For a good survey, see EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS (1998) and OLIVER WILLIAMSON, THE MECHANISMS OF GOVERNANCE (1996).

102. *See* Kearney & Merrill, *supra* note 3, at 1325 (describing the "original paradigm," in which regulators monitored entry and exit and set prices based on cost of service); *id.* at 1365-69 (discussing role of agencies in managing industry structure).

103. *See id.* at 1369-77 (describing role of courts as a catalyst for change and arhiter of regulatory structure).

104. *See id.* at 1383-1403 (acknowledging that no one institution of government is the primary architect of regulatory ordering, and discussing "deep-seated economic and social forces" which have contributed to regulatory change and structure).

antitrust laws and common law doctrines in order to enhance overall social welfare in a competitive marketplace.

By contrast, in the context of twentieth century natural monopoly regulation, industry governance banked most of its promise on the institutional choice of the regulatory agency.[105] The other approaches—courts and competitive markets—were largely ignored. Focusing on how the regulatory agency affects private conduct, public choice theorists[106] and other economists[107] have chronicled the potential problems of the agency-dominated approach to managing regulatory problems. Most of this literature, however, cynically attributes any adverse welfare consequence of this regulatory process to regulation itself.[108]

Under-acknowledged in the literature is the impact of specific legal rules, such as the filed tariff doctrine, on the successes or failures of the regulatory process. Recently, however, political scientists and economists have begun to analyze how interest groups, including regulated firms, decide to allocate their resources between various types of regulation, congressional, agency, or judicial.[109] A worthy candidate for similar analysis, the filed tariff doctrine has serious and unique implications for the behavior of regulated firms. Since the doctrine is only available on a widespread basis if a utility has filed its tariff with federal regulators, the doctrine creates an incentive for private firms, such as regulated utilities, to invest more heavily than otherwise in lobbying regulators ex ante to accept or approve tariffs. By engaging in such conduct ex ante, firms avoid the uncertainty of ex post judicial enforcement. The doctrine thus encourages a type of forum shopping, triggered primarily by private decisions to provide information in the regulatory process. If a private firm desires the

105. *See id.* at 1325 (discussing agency rate regulation).

106. *See generally* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (presenting a theory of competition analysis of pressure groups vying for political influence); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976) (analyzing theory of regulation from a "producer protection" view); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971) (creating a theory of regulation that shows demand for regulation and supply of regulation based on analysis of public resources, political power, political process, and economic groups).

107. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 21 (2002) (discussing incentives for ex ante behavior in the regulatory relationship).

108. *See* JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE 23-25 (1997) (discussing the cynical turn in public choice theory); ROGER NOLL, REFORMING REGULATION: STUDIES IN THE REGULATION OF ECONOMIC ACTIVITY (Brookings 1971).

109. *See, e.g.*, Paul H. Rubin et al., *Litigation Versus Legislation: Forum Shopping by Rent-Seekers*, 107 PUB. CHOICE 295 (2001); JOHN M. DE FIGUEIREDO & RUI J.P. DE FIGUEIREDO, JR., THE ALLOCATION OF RESOURCES BY INTEREST GROUPS: LOBBYING, LITIGATION AND ADMINISTRATIVE REGULATION (Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 364, Apr. 2002), www.law.harvard.edu/programs/olin_center/papers/pdf/ 364.pdf.

protection of the shield—immunity from state and antitrust law suits for its market behavior—it has a strong incentive to divulge information to regulators ex ante, in anticipation that this information will be included in published tariffs and will minimize unpredictable, ex post judicial meddling.

As a matter of regulatory theory, additional information is generally regarded as a positive good for the regulatory process.[110] Additional information for regulators has proved helpful to regulators as they determine and monitor cost-of-service rates and related terms and conditions. The filed tariff doctrine is consistent with a view of regulation based on active monitoring of an industry by regulators. Information is seen as a necessary good for regulators to perform their assigned tasks. More information improves the regulatory climate to the extent that it allows regulators to sort through issues and problems while also acting as a check, of sorts, on capture of the agency.[111]

At the same time, however, the filed tariff shield encourages regulated firms to strategically divulge information unrelated to the anticipated regulatory actions of the state. For instance, a tariff filed with FERC may include information regarding transmission and distribution activities over which federal and state regulators have concurrent potential jurisdiction, but which neither federal or state regulators may choose to regulate. Blanket application of the filed tariff doctrine would create a regulatory gap, in which both regulators and courts do not attempt to evaluate conduct. Where there is no check on the accuracy and relevance of the information submitted in the regulatory process, opportunities for manipulation of regulation—and in particular institutional choice—are present.[112] To the extent regulated firms engage in such conduct ex ante, an institutional bias in favor of regulatory agencies, and away from courts and markets, is likely to result. The prospect of strategic over-divulgence of information—as well as more affirmative rent seeking as firms lobby regulators to include in tariffs terms and conditions unrelated to

---

110. For general discussion of how information can be a positive good in this regard, see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 185-87 (1997).

111. *See* Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 284-85 (1984).

112. Using more formal modeling, commentators warn of similar behavior in other information-disclosure contexts. *See, e.g.*, Tracy Lewis & Michael Poitevin, *Disclosure of Information in Regulatory Proceedings*, 13 J.L. ECON. & ORG. 50 (1997) (mentioning examples of drug approval and merger applications); Douglas Lichtman et al., *Strategic Disclosure in the Patent System*, 53 VAND. L. REV. 2175 (2000) (discussing intellectual property license applications).

expected regulatory action—presents a potential cost to be balanced against the information provision incentives created by the filed tariff doctrine. In the context of asymmetric information disclosure of non-verifiable information in contractual bargaining, Professor Eric Talley has observed a need for judicial monitoring or verification.[113] Similarly, at a minimum, there is a need for increased judicial intervention in monitoring the application of filed tariff, although in considering the role of such judicial monitoring, I ultimately conclude that the filed tariff doctrine is wholly unnecessary, given other doctrines available to courts.[114]

In other legal contexts, safeguards are in place to protect the public interest from the adverse institutional implications of over-disclosure of information ex ante to manipulate ex post enforcement. Elsewhere, the balance between disclosure, on the one hand, and institutional decisions to regulate, on the other, is monitored by the oversight of a third party who has the ability to protect the public interest. For example, in the context of securities regulation and witness immunity from criminal prosecution, each of which rely on information disclosure to make a regulatory choice, third party oversight plays an important role in monitoring the divulgence of information to ensure that the choice is welfare enhancing.

The Securities and Exchange Commission (SEC), in its regulations, requires companies to disclose the risks associated with their investments, but does not allow disclosure of these risks to preclude agency enforcement proceedings against companies.[115] In fact, disclosure of information may spur the SEC to take enforcement action against companies. The regulations of the SEC envision the agency itself, as well as courts, monitoring such information disclosure to ensure that it is not materially misleading (or reckless), and thereby does not have a negative effect on the operation of securities markets.[116] Thus, the agency evaluates the appropriateness of disclosure to ensure that the effects on the market are not adverse.

---

113. *See* Eric Talley, *Disclosure Norms*, 149 U. PA. L. REV. 1955, 1992-93 (2001).

114. *See* discussion *infra* Part V.

115. Under SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2003), private causes of action are available against companies where "in connection with the purchase or sale of securities, the misstatement or omission of a material fact, made with scienter, upon which the plaintiff justifiably relied and which proximately caused the plaintiff's injury." *See In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 548 (6th Cir. 1999).

116. *See In re Comshare, Inc.*, 183 F.3d at 548; Allan Horwich, *The Neglected Relationship of Materiality and Recklessness in Actions Under Rule 10b-5*, 55 BUS. LAW. 1023, 1033 (2000) (arguing that in order to assess whether a defendant acted recklessly in failing to disclose facts a court should consider "whether the defendant knew that the facts were material").

Disclosure also plays an important role in influencing institutional choice in the criminal procedure context. Prosecutors routinely provide incentives for disclosure by witnesses by offering immunity in exchange for disclosure. Where federal prosecutors offer immunity in exchange for disclosure, however, the prosecutor must determine that immunity is "in the public interest," and a judge must approve the grant of immunity.[117] The specific determination that the public interest is served by the prosecutor, along with independent approval by the judge, serves a third-party monitoring role, helping to ensure that the institutional choice influenced by disclosure does not thwart social welfare.

In the context of many price-regulated industries, however, third-party monitoring of strategic disclosure is ineffective. Third-party monitoring of information disclosure in the utility regulation context depends on the actions of either regulators, as in the context of the SEC, or courts, as in the context of criminal immunity. To the extent that the filed tariff shield applies, however, both regulators and courts are ineffective at policing this balance ex ante to ensure that the application of the shield is not harmful to social welfare ex post.

A regulatory agency will hardly be opposed to gaining new information from the firms it regulates, particularly since the submission of tariff terms and conditions invites the prospect of future expansion of agency jurisdiction. Since regulatory agencies have limited resources to allocate to monitoring, in most instances agencies are required to acquiesce in, rather than refuse, tariff filings. In some instances, filed tariffs become effective by operation of law after the passage of time, with little or no scrutiny by agencies.[118] So the filed tariff bar curiously aligns the incentives of both private firms and regulators to include as many terms and conditions as possible in tariffs—even when these terms and conditions are sham, in the sense that agencies often lack the power to seriously enforce them.

Courts are likewise ineffective at monitoring the costs associated with the filed tariff bar. To the extent the interests of regulators and firms align in the direction of expansive tariffs, judicial appeals rarely, if ever, may focus on the appropriateness of inclusion of information in a tariff. When tariffs are appealed on other grounds, courts are highly inclined to uphold tariffs under general principles of

---

117. *See, e.g.*, Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 TEMP. L. REV. 171, 183-84 (2000) (describing the respective roles of the judge and prosecutor under the Federal Witness Immunity Act).

118. *See, e.g.*, 16 U.S.C. § 824d(e) (2000) (allowing proposed changes to FERC tariffs to go into effect after a 5-month period).

deference to agency regulators.[119] Indeed, given principles of deference to agency regulators in the late twentieth century,[120] the judiciary has played very little role in policing private behavior in the tariffing process and its relationship to the filed tariff shield. Since the interests of regulators and firms converge, and courts have little institutional capacity to police the bargains and information reflected in tariffs, there are no effective safeguards against strategic use of the regulatory process to forum shop.

B. The Enforcement Gap in the New Tariffing Environment

Private forum shopping bias in the direction of the agency regulator does not present an enforcement problem if federal regulators fully evaluate tariffs prior to approval and have the jurisdiction and resources to adequately deter market abuses. However, changes in the regulatory approach to tariffing, along with limited agency jurisdiction and resources, substantially undermine the agency regulator's ability to deter market abuses. Thus, the forum shopping bias of the filed tariff doctrine can result in more radical deregulation—markets absent even antitrust or common law enforcement—than either Congress or agencies would prefer.

With deregulation of electric power and other traditionally regulated industries, tariffing is no longer a process in which the approval of a rate imposes firm-specific terms, such as prices. Instead, tariffing has become a process for holding firms to market expectations regarding industry structure, particularly network access, and for providing information to competitors and consumers.[121] Tariffs, along with agency regulations, increasingly set general standards for the operation of a competitive market. In contrast to cost-of-service regulation, "[u]nder the new paradigm, the regulator plays a far more limited role. Instead of comprehensively overseeing an industry in order to protect the end-user, its principal function is to maximize competition among rival providers, in the expectation that competition will provide all the protection necessary for end-users."[122]

---

119. Kearney & Merrill, *supra* note 3, at 1369 (acknowledging that courts routinely act in a review capacity); *see, e.g.*, Richard Goldsmith, *Utility Rates and "Takings,"* 19 ENERGY L.J. 241, 243 (1989) (noting that the balance struck by regulators in tariffs is subject to judicial deference); Richard J. Pierce, Jr., *Pubic Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 20310, 1046 (1989) (observing that the judiciary lacks the institutional capacity to engage in review of ratemaking).

120. *See supra* notes 64-65 and accompanying text.

121. *See* Gerald Norlander, *May FERC Rely on Markets to Set Electric Rates?*, 24 ENERGY L.J. 65 (2003) (describing the general trend).

122. Kearney & Merrill, *supra* note 3, at 1361.

In light of recent problems with deregulated markets, particularly well-publicized problems with deregulation of electric power,[123] this account seems to glorify the promise of competition. Nevertheless, it aptly describes the approach federal regulators have taken in restructuring public utility industries, such as electric power and telecommunications. As one former FERC Commissioner has stated:

> The new prevailing theory for disclosure is that where an industry is competitive, consumers are better served by the results of working market processes. Consequently, the focus of regulatory reporting and disclosure obligations should shift from what is needed for setting cost-based rates to what is needed for maintaining a competitive market and preventing an individual competitor from exercising market power.[124]

Regulators increasingly announce their approach through generally applicable rules—not in firm-specific tariff filings.[125] To the extent that regulators continue to address firm-specific information in tariffs, they are predominantly concerned with industry structure and market information disclosure, rather than protecting consumers from price discrimination in the setting of firm-specific rates.[126]

For example, in the context of electric power deregulation, regulators have significantly relaxed the scope of their tariff filing requirements. FERC's Order No. 888 deregulates wholesale electric power markets and promotes competition in electric power supply by requiring each utility to file a standard form ("pro forma") open access transmission tariff, subject to FERC's approval.[127] FERC's jurisdiction is limited to wholesale transactions, so these tariffs primarily govern the relationships between utilities and other utilities and wholesale suppliers, not utilities and retail customers.[128] Each utility is required to file its own standard form transmission service tariff.[129] For some utilities, who voluntarily turned management of their transmission

---

123. *See, e.g.*, Severin Borenstein, *The Trouble with Electricity Markets: Understanding California's Restructuring Disaster*, J. ECON. PERSP., Winter 2002, at 191.

124. Donald F. Santa, Jr., *Who Needs What, and Why? Reporting and Disclosure Obligations in Emerging Competitive Electricity Markets*, 21 ENERGY L.J. 1, 2 (2000).

125. *See* Norlander, *supra* note 121.

126. A good example is a filing PG&E Corp. made with FERC, shielding millions of dollars in unregulated assets from creditors when PG&E declared bankruptcy. *See* Cal. *ex rel.* Lockyer v. FERC, 329 F.3d 700, 704-05 (2003); *9th Circuit Court of Appeals Upholds FERC Order Blessing Reorganization of PG&E Corp. to Create Corporate Shield for Credit-Hungry National Energy Group*, FOSTER NAT. GAS REP., May 22, 2003, at 7, 2003 WL 9809692.

127. *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 75 F.E.R.C. 61,080 (1996). As a part of its rule, FERC provided the standard tariff, which it expected each transmitting utility to file. *Id.*

128. The scope of FERC's authority to regulate electricity markets was recently addressed by the United States Supreme Court in *New York v. FERC*, 535 U.S. 1, 6-7 (2002) (noting FERC's jurisdiction over wholesale sales under section 201 of the Federal Power Act).

129. 18 C.F.R. §§ 35.1, 385.205 (2003); 75 F.E.R.C. 61,080 (rule requiring all jurisdictional utilities to file open access transmission tariffs).

networks over to independent operators, FERC attempted to dispense with its tariff filing requirement, instead allowing an Independent Service Operator to file transmission tariffs on behalf of its members. The D.C. Circuit reversed, holding that Section 205 of the Federal Power Act requires FERC to allow each individual, jurisdictional utility to file a tariff.[130] Thus, for the time being, FERC continues to require the filing of transmission tariffs by individual utilities, subject to its industry-wide open access policies.[131]

At the same time, FERC's regulatory authority over utilities is far from plenary. Although FERC would like to implement a uniform national policy for transmission access and pricing,[132] the scope of FERC's legal authority over transmission is limited: FERC regulates wholesale sales, but has no jurisdiction over retail transmission sales.[133] This creates a jurisdictional gap which regulated utilities might seek to fill by filing unenforceable, firm-specific tariff terms with FERC. For example, a utility may file an open access tariff with FERC, using this tariff filing to specify how it will treat its retail customers in making transmission decisions; if a court is not careful about its decision to apply the filed tariff doctrine, the treatment of retail customers could then fall within the scope of a defense to application of the antitrust laws. FERC does not have jurisdiction over retail sales, however, so retail service could escape the scrutiny of both FERC regulation and the antitrust laws in many instances. State regulators may or may not have picked up the slack in addressing retail sales, but courts would need to consider this all as well as the scope of regulation under the federal tariff. FERC has significantly moved away from cost-of-service rate regulation of both transmission and bulk power supply;[134] even in this context, however, FERC's

130. *See* Atl. City Elec. Co. v. FERC, 295 F.3d 1, 10 (D.C. Cir. 2002). *Atlantic City* does not address the filed tariff doctrine, but instead focuses on a regulated utility's procedural right to agency review and consideration of its tariff changes. *See id.* at 9-10. Even though the court held that FERC could not dispense with these procedures, it also acknowledged that "FERC plays 'an essentially passive and reactive' role under section 205." *Id.* at 10 (citing City of Winnfield v. FERC, 744 F.2d 871, 876 (D.C. Cir. 1984)).

131. It is unclear whether, and how, nondiscrimination will be protected in the context of open access to bottleneck facilities. In the telecommunications context, Jean-Jacques Laffont and Jean Tirole argue that the optimal access prices to hottleneck facilities are discriminatory, since they are usage based. *See* JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS 105-07 (2000) (noting conflict between usage-based pricing and nondiscrimination provisions in United States and European legal regimes).

132. *See Electric Shock*, WASH. POST, Sept. 2, 2003, at A20, 2003 WL 62212314.

133. *FERC*, 535 U.S. at 22-23 (noting that states retain jurisdiction over retail sales, which are outside of FERC's jurisdiction).

134. For instance, FERC has evolved its power supply jurisdiction from cost-of-service ratemaking to so-called "market-based rates," for which FERC waives certain filing requirements altogether. For discussion of FERC's early market-based rate filings, including its

jurisdiction does not include retail sales. In contrast to wholesale transmission and power supply sales, which are regulated by FERC, the relationship between utilities and retail customers is largely regulated at the state level, and many states continue to require the filing and approval of tariffs governing power transmission and distribution, if not supply.[135] As a result, the emergence of wholesale competition at the federal level, along with differing—and sometimes conflicting—approaches to deregulation at the state level (where state law consumer protections become most relevant), has led to some of the fiercest battles in the history of the electric power industry.[136]

Like FERC, many other regulatory agencies maintain their filing requirements in the current deregulatory environment, but today these filings serve predominantly general market structure functions, informational and evaluative, rather than firm-specific right-creating functions.[137] Nondiscrimination, central to rate regulation throughout the twentieth century, has evolved to incorporate the general norms of consumer protection laws, including notions of comparability.[138] Yet this is a far more general standard—aimed at defining network access and industry structure—than the traditional unjust discrimination standard—which was adjudicated in firm-specific cases. Put simply, in regulated industries the regulator no longer perceives its role as monitoring firm-specific costs to guarantee each customer the same rate.[139] Further, as FERC's exercise of jurisdiction exemplifies, with deregulation many agencies have waived some or all of their jurisdictional filing requirements with respect to entities that lack market power.[140]

Against this backdrop, use of the filed tariff shield to bar consumer protection litigation in the context of deregulated

---

waiver of various jurisdictional requirements, see Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 799-801 (addressing the role of courts in reviewing final agency orders).

135. *See supra* note 133.

136. *See* discussion *infra* Part IV.B.

137. For a discussion of FERC, see Norlander, *supra* note 121. Other agencies moving in this direction include the FCC. *See* Charles H. Helein et al., *Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the "Self" Interest*, 54 FED. COMM. L.J. 281 (2002).

138. For example, under FERC's comparability standard: "'an open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its [own] system.'" Alliant Energy Corp. v. FERC, 253 F.3d 748, 751 n.3 (D.C. Cir. 2001) (quoting Transmission Pricing Policy Statement, 59 Fed. Reg. 55,031, 55,034 (Nov. 3, 1994) (codified at 18 C.F.R. pt. 2)).

139. *Cf.* LAFFONT & TIROLE, *supra* note 131, at 107 (arguing that usage-based pricing is a "transposition of standard marketing techniques to a regulated firm").

140. *See* Norlander, *supra* note 121, at 73-75 (discussing market-based rates).

telecommunications or electric power service is problematic. Competitive markets will, as they have in the telecommunications context, invite opportunities for service providers to offer discounts and rebates to customers. As a principle of economics, flexibility in pricing is key to effective operation of a competitive market. This allows regulators more discretion in implementing competition policy. More importantly, in the competitive environment it allows private firms flexibility in pricing and service. Without flexibility, private firms lack the ability to respond to market conditions, including changes in supply and demand. As courts traditionally apply the filed tariff doctrine, however, changes to prices are not allowed unless they are specifically envisioned by a previously approved tariff.[141]

Even where a tariff does envision flexibility in pricing—as is often intended for market-based rates—the filed tariff doctrine can lead to problems. Because, under the filed tariff doctrine, service providers are not bound (in any judicially enforceable way) to the terms of contracts they have entered into with customers unless the specific contracts have been approved by regulators, providers face no disincentive for engaging in misrepresentation or even fraudulent contracts in attempting to secure customers. In addition, consumer suits under the antitrust laws, designed to protect and encourage competition, are not allowed to reach the conduct of providers to the extent that conduct is consistent with an approved tariff. However, just as with other commodities, the evolution of successful markets in formerly regulated commodities, such as electric power, depends on the articulation of clear rules governing contracts, trading, and the regulation of market manipulation.

In the cost-of-service environment that dominated during the twentieth century, manipulation of the filed tariff shield by regulated firms posed little harm to the extent that regulation of the firm's costs was the norm and regulators actively used the rate-making process to protect consumers from injury. In the current environment, where competitive markets have displaced traditional rate regulation, invocation of a filed tariff shield poses a more serious risk of harm. The doctrine would be relatively harmless if regulators, in approving and monitoring tariffs, were willing and able to monitor breach of contract, fraud and other torts, and antitrust misconduct. In several ways, however, the willingness and ability of federal regulators to monitor and sanction such conduct is seriously limited. Since federal regulators do not have plenary authority, by filing overbroad tariffs

141. *Cf. id.* (arguing that, under the filed tariff doctrine, all prices changes are required to be filed with FERC).

regulated firms may be able to escape scrutiny altogether in their control of essential facilities, such as electric transmission. For example, FERC does not regulate retail transmission sales (e.g., how a utility allocates the costs of transmission to its retail customers), but a firm may still seek FERC's acquiescence in its retail cost allocation, thus inviting a court to apply the filed tariff shield to conduct related to retail pricing.[142]

Even assuming that an agency has jurisdiction over the tariff terms, in initially approving tariffs regulators are not likely to have an opportunity to fully assess every potential violation of the public interest. As was the case with FERC's Order No. 888, federal regulators may approve tariffs with only a perfunctory review of their terms and conditions, rubberstamping standard tariffs en masse.[143] Further, once a violation of a tariff's terms is alleged, if a complaint is filed, an agency has a broad degree of discretion—more so than courts—in deciding whether to investigate and prosecute alleged violations; this discretion may be influenced by under-funded enforcement budgets and competing priorities. Many alleged violations will simply never be investigated, pursued, or heard.

Finally, absent specific grants of authority, agencies such as FERC and the FCC, unlike the now-defunct ICC (whose powers were at issue in *Keogh*), do not have significant powers to assess and enforce penalties against wrongdoers.[144] In a deregulated market, enforceable remedies for misconduct are important to deter fraud and other types of strategic market manipulation. However, the agencies implementing deregulatory policies themselves frequently lack the authority to pursue or impose such remedies. For example, FERC's remedial powers are limited to refund authority and nationwide license revocation.[145] In its initial report on potential manipulation of electric and natural gas prices in the West, focused on misconduct associated with California's deregulation conduct, FERC's staff recommended refunds. In addition, FERC's staff noted the possibility of FERC's imposition of penalties through tariff monitoring and

142. Retail pricing issues are regularly implicated in wholesale tariff filings. *See, e.g.*, Fed. Power Comm. v. Conway Corp., 426 U.S. 271 (1976) (holding that FERC's consideration of wholesale rates may include the relationship between wholesale and retail rates, but stopping short of requiring FERC to consider retail rates).

143. *See supra* note 122 and accompanying text.

144. *See supra* Part II.B.2.

145. *See* FERC, Initial Report on Company-Specific Separate Proceedings and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices 3-6, (Aug. 2002), *available at* http://www.ferc.gov/legal/staff-rep-elec.asp.

suspension.[146] Companies such as Enron, alleged to have engaged in strategic manipulation of California's market (which in Enron's case, the Commission staff alleged, arose to the level of "deceit, including the submission of false information"),[147] would thus be subject to refunds and, possibly, the threat of losing the ability to participate in deregulated markets.[148]

Yet neither of these powers is sufficient to deter misconduct in deregulated markets. Refund authority is not adequate to deter wrongdoing beyond normal breach of contract remedies, and even then it merely approximates the deterrence of the restitution remedy.[149] Nationwide license revocation authority may be an overly blunt tool for deterring wrongdoing. If federal regulators lack the authority to impose penalties directly, they must rely on their permitting and licensing powers, attempting to do indirectly what they are not authorized to do directly. For instance, as FERC's staff noted in its report, FERC does not have the authority to directly impose penalties.[150] In addition, no agency can specify every market rule ex ante. Agencies also frequently lack jurisdiction over every transaction in an industry, as well as every actor participating in a market.[151]

The jurisdictional gap is even more pronounced when agencies have waived jurisdictional requirements, as FERC has done in order to encourage the growth of competition. FERC's staff acknowledged the significance of this problem when it recommended that "all market-based rate tariffs include standard provisions so that the Commission can go beyond simply refunding profits and impose penalties on violators."[152] Clearly, FERC had not anticipated the market abuses that evolved when it initially approved market-based

146. *See id.*

147. *Id.* at 5.

148. *Id.* at 3-5.

149. A restitution remedy might deter misconduct adequately if courts were concerned with inducing efficient behavior in plaintiffs, but the main deterrence concern in this context is the defendant. *See* George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1233-39 (1994) (advocating a fault-based economic theory of contract damages in place of strict liability principles in order to provide the correct incentives to contracting parties). Automatic restitution would under-deter wrongdoing where the defendant's conduct is at issue. Choice of a remedy is best evaluated under contract law or other legal principles that the filed tariff shield completely forecloses.

150. "Staff is aware that Congress is considering expanding the Commission's currently very limited civil penalty authority, and we strongly endorse expanded civil penalty authority that applies to jurisdictional companies that violate the Commission's orders and regulations, as a means to deter the types of conduct we have encountered in this investigation." FERC, *supra* note 145, at 6.

151. FERC's jurisdiction, for example, is limited in such respects. FERC lacks jurisdiction over retail sales and suppliers participating in only retail sales markets. *See supra* note 128.

152. FERC, *supra* note 145, at 6..

tariffs. Its failure to do so left FERC with little remedy against wrongdoers. Even if FERC did have a remedy that it could legally exercise under its licensing powers, to the extent it is procedurally more difficult to revoke an existing license than to regulate its terms and conditions without revocation, due process restrictions make it more difficult to take away a license than to impose a penalty. To the extent that grounds for revocation can be established, the remedy is draconian: nationwide in scope (thus excessively harsh in its consequence), harmful to consumers to the extent it over-deters, and costly for regulators. Conditioning license approval at the front end may prove simpler, but once licensed it is difficult to impose new conditions on some, but not others, without facing protracted legal challenges.

Indeed, to the extent that an agency, such as FERC, does not even assert jurisdiction over deregulated market actors in compliance with filed rates, the agency may lack any remedies at all for abuses of deregulated power markets. It is not surprising that California Governor Gray Davis (himself facing an election year run-off when FERC's report was issued) issued a stinging criticism of FERC's report, calling it "whitewash, pure and simple."[153] Governor Davis chastised FERC because it "hasn't sanctioned anybody, it hasn't issued any refunds to us, it's done nothing to stop the manipulation which everyone agrees occurred here in California."[154]

When agency oversight possesses such negative characteristics, whether due to limited jurisdiction or inadequate resources, judicial enforcement of remedies has much to offer. In many instances, courts will have distinct comparative institutional advantages over agencies in defining standards and deterring violations of market norms. Courts, unlike most regulatory agencies, are not constrained by Congress' delegation of authority as expressed in enabling or more specific statutes. Moreover, the judicial forum offers complex cases many benefits that the agency forum routinely lacks: broader discovery, since courts can seek discovery in the context of litigation absent express delegations from Congress; wider remedial authority, since courts can draw on their injunctive and equitable powers as well as common law and statutory grounds for damages; and greater political independence, since courts are not beholden to the executive branch or Congress.

153. *See* Richard A. Oppel, Jr., *Energy Pricing Suspicious, Report Says*, N,Y. TIMES, Aug. 14, 2002, at C1, 2002 WL 25401596.

154. *Id.*

Common law and antitrust remedies are not perfect at effectuating deterrence, but absent a clear indication that regulation is intended to preempt or supersede them, these remedies play a central role in deterrence regimes for competitive service markets. Put simply, to the extent that common law or antitrust remedies are sought against service providers, absent a comprehensive regulatory scheme, courts are an essential enforcement vehicle for consumer protection norms, particularly in the context of deregulation.[155] Unless Congress expands the powers of federal agencies to directly enforce penalties against wrongdoers in deregulated markets, the filed tariff shield will invite even further strategic abuse of the regulatory process and thwart effective deterrence of market wrongdoing. More radical deregulation than either Congress or agencies envision will result.

IV. MISPLACED FORTIFICATION OF THE SHIELD

As a matter of economic theory, the introduction of competition to infrastructure utility industries could be expected to tarnish the armor of the filed rate shield, perhaps even leading courts to abandon it. Ironically though, as markets have developed in formerly regulated industries, courts have increasingly turned the filed tariff doctrine into a mandate for regulators, flatly contradicting the agency deference rationales behind the doctrine. Further, when courts have applied the doctrine in the battles surrounding electric power deregulation they have done so in ways that are demonstrably overbroad and potentially harmful to consumers and competition. Effectively, a doctrine that once lent flexibility to regulators is now binding for both regulators and courts, providing little hope for the enforcement of market norms where a regulated firm has submitted tariffs to regulators. To the extent the shield once might have allowed flexibility, depending on the policy choice of regulators, today the doctrine has become more like a fortress—expansive and rigid in scope and structure.

155. While deregulation may make the problem more salient, the enforcement gap arguably existed under cost-of-service regulation as well. *See* G.E. Hale & Rosemary Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 58-59 (1962) (arguing for broad antitrust exemption for regulated industries, but also urging an exception "when the regulatory burden is so great that effective control cannot be achieved.").

A. Fortification

It is odd enough that in its short history the filed rate doctrine has become a shield for regulated utilities against consumer protection litigation, much to the chagrin of the initial intended beneficiaries of the doctrine. Even more curious is tbat the doctrine, once institutionally justified as a type of deference to agency regulators, has been co-opted by the judiciary to preclude regulators from exercising their discretion to repudiate the shield.

At first blush, the agency deference rationale for filed tariff shield[156] nicely converges with the modern *Chevron* approach to judicial review of agencies.[157] *Chevron* set forth a test that has become the predominant paradigm for judicial review of agency interpretations of statutes.[158] The *Chevron* test distills the judicial review task into two distinct steps. At step one, a court inquires into "whether Congress has directly spoken to the precise question at issue."[159] If Congress has—and has done so clearly—the court "must give effect to the unambiguously expressed intent of Congress."[160] If, on the other hand, the statute is silent or ambiguous with respect to the specific question at issue, a court is to move on to *Chevron*'s step two. Here, the court defers to the agency, giving the agency's interpretations "controlling weight, unless they are arbitrary, capricious, or manifestly contrary to the statute."[161]

By Ieaving all tariff matters entirely within the realm of the agency's regulatory choices, rather than in the courts, the filed tariff shield converges with the approach of step two of the *Chevron* framework. It also seems consistent with *Chevron*'s goals.[162] In

156. *See supra* Part II.B.2.

157. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984).

158. *Chevron* remains good law in most cases involving formal adjudication and notice and comment rulemaking, but a recent lines of cases has limited the scope of *Chevron* deference. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 227-31 (2001) (refusing *Chevron* deference to an informal adjudication, but leaving the doctrine's future applicability to evaluation of a series of ad hoc factors); Christensen v. Harris County, 529 U.S. 576, 586-88 (2000) (refusing to apply *Chevron* to a Department of Labor opinion letter). Nevertheless, the basic principle that an agency's interpretation is entitled to great weight is well established, even for proceedings that lie beyond *Chevron*'s doctrinal pale. For further discussion of *Chevron* deference, see Thomas W. Merrill & Kristin E. Hickman, Chevron'*s Domain*, 89 GEO. L.J. 833 (2001); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105 (2001).

159. *Chevron*, 467 U.S. at 842.

160. *Id.* at 843.

161. *Id.* at 844.

162. For the argument that relying on agencies to resolve regulatory disputes is a salutary and intentional development linked to *Chevron*, see Philip J. Weiser, *Federal Common Law,*

Chevron, Justice Stevens defended deference for reasons of agency expertise and political accountability.[163] Commentators have continued to embrace these goals, understanding *Chevron* as a doctrine that legitimates reasoned decision making by administrative agencies.[164] The filed tariff doctrine, understood in this context, also respects the sphere of agency discretion to make regulatory and policy choices, thus protecting both agency expertise and political accountability.[165]

However, recent case law applying the filed tariff doctrine casts doubt on the doctrine's compatibility with *Chevron* deference. Rather than deferring to agency decisions regarding the impact of filed tariffs, recent decisions treat the filed tariff doctrine as a *Chevron* step one issue.[166] This approach has transformed the filed tariff doctrine into what Professor William Eskridge refers to as a "statutory precedent," which courts believe only Congress has the authority to change.[167] Courts have even more firmly cast the filed tariff doctrine as a *Chevron* step one issue as agencies have moved away from traditional cost-of-service filing requirements in their initial efforts at deregulation. As a result, the filed tariff doctrine has been elevated to a principle of statutory precedent, leaving courts and agencies little option but to treat tariff-related matters as jurisdiction defining for courts.

As discussed above, deregulation of utility industries has led many agencies to experiment with detariffing, in which the agency

Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. REV. 1692, 1715-17 (2001).

163. *See Chevron*, 467 U.S. at 865.

164. *See, e.g.*, Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 486 (1990) (explaining that *Chevron* is justified by the agency's superior political accountability); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96-97 (1994) (arguing that agencies are institutionally superior to courts in their capacity for making politically accountable decisions).

165. Also like *Chevron*, the filed tariff doctrine promotes uniformity. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1113-14 (1987) (recognizing that adjudication by specialist, national agencies rather than the geographically organized courts promotes centralized national determinations of legal and policy questions).

166. *See, e.g.*, AT&T v. Central Office Co., 524 U.S. 214 (1998); MCI v. AT&T, 512 U.S. 218 (1994).

167. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362-63 (1988). As Professor Eskridge argues, if courts adopted an "evolutive" approach to statutory interpretation, allowing them to overrule interpretations at *Chevron's* step one, courts would be far less wed to the filed tariff doctrine. *See id.* at 1377-78. For example, Professor Eskridge argues that under the evolutive approach, the Supreme Court would, in reviewing Judge Friendly's *Square D* opinion, have overruled *Keogh*. *See id.* at 1415-21. For discussion of *Square D*, see *infra* Part II.B.2.

itself no longer even processes tariffs, or with market-based or open access tariffs, which are designed to enhance industry-wide competition. Federal agencies have almost completely moved away from the traditional cost-of-service tariff, in which regulators determine firm-specific rates.[168] This movement contrasts sharply with the cost-based approach to tariffing, in which utility rates and tariffs were approved in an ad hoc fashion based on an individual utility's circumstances. Since the 1980s, the electric power industry has undergone a remarkable, if controversial, transformation, but the trucking and telecommunications industries have also undergone transformations in the direction of developing competitive markets in formerly regulated services, leading regulators to expressly repudiate the filed tariff doctrine.[169]

Where regulators have attempted to repudiate the filed tariff doctrine, however, courts stand firmly by the doctrine, rather than deferring to the regulator. Recognizing changes to the motor carrier industry, the ICC was the first agency to attempt to repudiate the filed tariff doctrine,[170] only to have its decision reversed by the Supreme Court in *Maislan*.[171] In 1986, the ICC determined that, given the need for flexibility from the harshness of the filed rate doctrine, it would allow carriers and shippers to negotiate rates. The agency reasoned that "the passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry, justified the change in policy, for the new competitive atmosphere made strict application" of the filed tariff doctrine "unnecessary to deter discrimination."[172] In invoking the filed tariff shield to allow a bankruptcy trustee's claim against a shipper to recover the difference between a filed rate and a lower negotiated rate (a classic "undercharge" claim), the Supreme Court rejected the ICC's policy as inconsistent with the ICA, precluding the ICC from releasing a shipper from liability for undercharges.[173] The Court observed that

168. *See, e.g.*, Kearney & Merrill, *supra* note 3; Richard Cudahy, *Whither Deregulation: A Look at the Portents*, 58 N.Y.U. ANN. SURV. AM. L. 155 (2001).

169. *See infra* notes 170-189 and accompanying text.

170. *See* Michael A. Rouse, *A Re-Evaluation of the "Filed Rate" Doctrine in Light of Revised Regulatory Policy and Carriers' Practices*: INF, Ltd. v. Spectro Alloys Corp., 23 CREIGHTON L. REV. 669, 678 (1990) (endorsing Eighth Circuit opinions upholding the ICC's 1986 policy to repudiate the filed tariff doctrine).

171. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 119 (1990).

172. *Id.* at 121 (observing that "the ICC concluded that changes in the motor carrier industry 'clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases'" (quoting Nat'l Indus. Transp. League, Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99, 106 (1986))).

173. *See id.* at 131.

the filed rate doctrine has long governed the legal relationships between shippers and carriers and is essential to preventing price discrimination.[174] Given the plain meaning of the statute's prohibition of price discrimination, Justice Brennan, writing for the majority in *Maislin*, reasoned that it must "read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff."[175] Deviation from this statutory requirement could only be made by Congress, the Court noted:

> Congress has not diverged from this interpretation and we decline to revisit it ourselves. Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.[176]

Following the Supreme Court's rejection of the ICC's repudiation of the filed tariff doctrine, Congress addressed the issue in the Negotiated Rates Act of 1993, which overturned *Maislan's* invalidation of the ICC's negotiated rates policy.[177]

Maislan is significant for its approach to applying the filed rate doctrine in the context of the ICA. The majority did not invoke the filed rate doctrine as a type of deference to regulators, precluding courts from exercising jurisdiction because in the agency's judgment judicial remedies were unnecessary. Instead, the majority reasoned that Congress, by adopting the ICA and its prohibition on price discrimination, had precluded the courts from exercising jurisdiction over other common law and statutory claims.[178] In his *Maislin* dissent, Justice Stevens, who had previously endorsed some criticisms of the filed tariff doctrine,[179] noted that a "recurring theme" in the cases that developed the filed tariff doctrine "is that the Commission, rather than the courts, should have primary responsibility for

174. *Id.* at 126.

175. *Id.* at 127.

176. *Id.* at 131 (citation omitted).

177. Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044. For a discussion of tbe potential liability that shippers and carriers face without the filed rate doctrine, see William W. Pugh, *From the Frying Pan into the Fire: Shipper Liability Absent the Filed Rate Doctrine*, 58 TRANSP. PRAC. J. 309, 321-28 (1991) (advising against the reversal of *Maislin* by Congress, since shippers will be subject to greater civil and criminal penalties, including penalties for violation of the antitrust laws and tbe Racketeer Influence and Corrupt Organization Act).

178. *See Maislin*, 497 U.S. at 130-32. The case, in other words, is a classic *Chevron* step-one application of what the majority deems clear and unambiguous statutory language, precluding agencies and courts from making a contrary interpretation. One author characterizes *Maislin* as the first case in a trilogy of Supreme Court cases using judicial precedent to preclude agency deference. *See* Paul A. Dame, Note, *Stare Decisis,* Cbevron *and* Skidmore*: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405, 420-21 (2002).

179. *See Square D. Co.*, 476 U.S. at 423-24 (Stevens, J., dissenting).

administration of the statute."[180] To this extent, *Maislin* illustrates the potential for a full *Lochner*-ization of the filed rate doctrine—a principle the majority, and Justice Scalia's concurrence, allows in order to protect tariff expectations of regulated firms not only vis-à-vis courts and state regulators, but also vis-à-vis federal agencies, which face the risk of judicial rejection if they attempt to repudiate the filed rate doctrine.[181]

Consistent with this approach, the Supreme Court has steadfastly required adherence to filed rates in the telecommunications context, even when the FCC itself had decided to repudiate the doctrine. Initially, in *American Broadcasting Cos. v. FCC*, the Second Circuit held that the FCC's failure to reject a tariff filing was unreviewable by the court when third parties sought to challenge the tariff under the FCA.[182] Later, the FCC itself attempted to detariff in order to allow customers to enter into enforceable contracts that would not be superseded by the tariff filing. In *MCI v. AT&T*, the United States Supreme Court, aided by use of a dictionary, relied on Congress' clear and unambiguous language to invalidate an FCC detariffing policy, which prohibited nondominant carriers from filing tariffs.[183] *AT&T v. Central Office Telephone, Inc.* similarly barred federal courts from hearing state law contract and tort claims that conflicted with filed tariffs approved by the FCC, even where the

180. *Maislin,* 497 U.S. at 146 n.12. Justice Stevens argues that a reasonable agency interpretation is subject to judicial deference. *Id.* at 151-52 (noting majority's failure to heed *Chevron* deference). Justice Stevens noted that the most notable exception to this agency deference theme in the ratemaking context is *T.I.M.E., Inc. v. United States,* 359 U.S. 464 (1959), a 5-4 decision prohibiting district courts from staying collection proceedings pending agency review of the filed rate. *Id.* at 147 n.12. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88-89 (1962), greatly limited *T.I.M.E., Inc.* and Congress later repudiated it. *Id.; see also* Interstate Commerce Act Amendment, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 648, 651-52 (1965) (codified at 49 U.S.C. §§ 11705(b)(3), 11706(c)(2) (1982)).

181. *See Maislin,* 497 U.S. at 136 (Scalia, J., concurring) ("Whatever else may qualify as an unreasonable practice, under no sensible construction of that term could it consist of failing to do what the statute explicitly *prohibits* doing–viz., charging or receiving a rate different from the rate specified in a tariff."). Hence, Justice Scalia believes the Court is required to apply the clear and unambiguous statutory language under *Chevron* step one analysis, rather than afford a reasonable agency interpretation deference under step two, as would Justice Stevens. *Id.* A defense of *Maislin* is provided in Howard R. Rubin, Reiter v. Cooper *and Unreasonable Rates: Are Reports of the Filed Rate Doctrine's Death Greatly Exaggerated*?, 42 DUKE L.J. 905, 940-42 (1993) (proposing doctrinal coexistence of the filed rate doctrine and an unreasonable rates defense).

182. ABC v. FCC, 662 F.2d 155, 157 (2d Cir. 1981).

183. 512 U.S. 218 (1994).

tariffs did not cover the services that were the subject of the judicial dispute.[184]

With little help from the courts, federal telecommunications regulators subsequently repudiated the filed tariff doctrine—at least insofar as it had a preemptive effect on state law claims. In its mandatory detariffing order, the Federal Communications Commission required long distance carriers to withdraw their paper tariffs on file, and replace them by posting "rates, terms, and condition[s]" on each carrier web site or at some other central location.[185] By January 2001, carriers were no longer allowed to rely on the published tariff.[186] Effectively, this opens up each carrier's relationship with customers to the scrutiny of state authorities, including contract and other consumer protection laws.[187] Carriers are also subject to direct scrutiny of federal antitrust law, since allegedly anticompetitive conduct would no longer qualify for regulated industry immunity from antitrust enforcement.[188] Both *MCI* and *AT&T* required the FCC to adhere to the filed tariff doctrine to common carriers under Section 203 of the FCA. However, in the context of interchange carriers which do not exercise market power, the FCC has successfully implemented detariffing, largely due to Congress. Congress' intent to enhance competition in telephony in the 1996 Telecommunications Act, which the FCC claims does not contain an express filing requirement, provides sufficient statutory basis to bring the issue into the realm of agency policy making, providing the FCC the authority that the *Maislin* majority determined that the ICC lacked.[189]

---

184. 524 U.S. 214, 225-26 (1998). Justice Scalia wrote the majority opinion in *AT&T*, echoing the majority opinions in *Maislin* and *MCI*. *See id.* at 216. Justice Stevens dissented from all three opinions. *See id.* at 231; *MCI*, 512 U.S. at 538; *Maislin*, 497 U.S. at 138.

185. *See* Helein et al., *supra* note 137, at 282-83.

186. *Id.*

187. *See id.* at 289-95 (noting that the filed tariff doctrine had a principal effect of overriding certain consumer protection laws).

188. Under the emerging *Goldwasser* doctrine, portions of the filed tariff doctrine may survive as antitrust claims that overlap with alleged violations of the Telecommunications Act of 1996. *See* Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000); *infra* note 249.

189. The Telecommunications Act of 1996 authorizes the FCC to forbear from applying Section 203 tariffing requirements if it concludes that: (1) enforcement of the tariffing requirement is not necessary to ensure that carrier rates remain just and reasonable; (2) enforcement is not necessary for consumer protection; and (3) eliminating the tariffing requirement serves the public interest. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128 (codified at 47 U.S.C. § 160(a) (2000)). *See generally* Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMM. L.J. 367 (1997).

Against the backdrop of these recent cases, it is clear that courts today do not see the filed tariff doctrine as a matter of agency choice. It also is not considered a matter of judicial choice. Courts today consider themselves bound by previous cases which interpret the clear and unambiguous choices of Congress in regulatory statutes to require filed tariffs and preclude judicial enforcement of antitrust and common law claims. This has invited courts to conflate the distinction between the filed tariff doctrine, the applicability of which should depend on firm-specific agency regulatory choices, and implied antitrust immunity, which is not firm-specific and applies where applications of the antitrust laws present a plain repugnancy to a congressionally sanctioned regulatory program.[190]

To be sure, such fortification of the filed tariff shield enhances the relative institutional authority of agencies vis-à-vis courts in considering tariff-related matters. If, however, the agency lacks statutory authority or resources to fully implement and enforce a regulatory model, the expertise and accountability values promoted by *Chevron* could be thwarted, rather than enhanced, by courts mandating the acceptance of tariffs and refusing to exercise jurisdiction in enforcement cases against firms. This is particularly problematic to the extent that the filed rate doctrine is a firm-specific defense, making the institutional forum dependent on private, as opposed to public, decisions about enforcement.

B. *Weathering New Battles*

With electric power deregulation, not only regulators have refused to relax the filed tariff shield. Courts have also vigorously embraced the filed tariff doctrine, primarily to keep state law consumer claims from proceeding in federal courts. As these cases exemplify, the filed tariff doctrine has evolved far beyond its consumer protection origins, and continues to allow regulated firms to benefit from the federal tariffs, even in instances where federal regulators lack the ability to deter fraud or remedy harm to consumers.

The filed tariff doctrine has become central to the jurisdictional battles surrounding electric power deregulation, particularly in the state of California. Cases arising from these battles illustrate how, within the judiciary, the doctrine retains its vigor even in a deregulatory environment. Further, they illustrate how courts often overreach in applying the doctrine, effectively invoking a shield against any serious protections for consumers in the context of

---

190. *See supra* note 5.

deregulated markets. Courts are consistently sweeping in their invocation of the doctrine, in ways that infer preemption from trivial regulatory actions or strained, tenuous connections between federal regulation and the potential result of allowing the claim to go forward in court.

Even before the California deregulation crisis, the filed tariff shield was invoked to bar antitrust claims in the context of wholesale power deregulation. For example, the City of Norwood, Massachusetts brought a price squeeze claim against New England Power Company, alleging, among other claims, that the defendant offered Norwood affiliates preferential treatment as customers over Norwood.[191] The claim was based on the combined effect of two tariffs—one, imposing a contract termination charge on Norwood; the other, a wholesale standard offer rate that was extended to Norwood affiliates but not to municipalities such as Norwood.[192] FERC had approved these terms as "just and reasonable" as a part of New England Power Company's restructuring plan, which included approval of market-based tariffs.[193]

Since both tariffs were on file with FERC, the United States Court of Appeals for the First Circuit invoked the filed rate doctrine as a complete bar to the price squeeze claim. The court observed that "[h]ere, any meaningful relief as to the price squeeze would require the *alteration* of tariffs—and not merely tariffs subject to regulation but tariffs actually scrutinized repeatedly by FERC . . . ."[194] Because "the rationale for the filed rate doctrine is to protect the exclusive authority of the agency to accept or challenge such tariffs,"[195] in the view of the First Circuit, "this is not a case that calls out for revisiting the filed rate doctrine or for strenuous efforts to carve out exceptions . . . ."[196]

In fact, the First Circuit explicitly refused to revisit the doctrine in light of the emerging deregulated wholesale market for electric power, stating:

> Of course, if New England Power's rates were truly left to the market, with no filing requirement or FERC supervision at all, the filed rate doctrine would by its terms no longer operate. But unlike some other regulatory agencies, FERC is still responsible for ensuring "just and reasonable" rates and, to that end, wholesale power rates continue to be filed and subject to agency review.[197]

---

191. *See* Town of Norwood v. New Eng. Power Co., 202 F.3d 408, 418 (1st Cir. 2000).
192. *Id.*
193. *Id.*
194. *Id.* at 420 (emphasis in original).
195. *Id.* (citing Ark.-La. Gas Co. v. Hall, 453 U.S. 571, 577-78 (1981)).
196. *Id.* at 421.
197. *Id.* at 419 (citations omitted).

The First Circuit's reluctance to abandon the doctrine has echoed throughout the federal judiciary, as courts have increasingly been requested to intervene in disputes surrounding deregulation in the United States. Federal courts continue to vigorously endorse the filed tariff shield, keeping competitor and consumer claims almost completely out of the hands of both state regulators and federal courts.

For example, in *Duke Energy Trading and Manufacturing, L.L.C. v. Davis*, the United States Court of Appeals for the Ninth Circuit applied the filed tariff doctrine to imply federal preemption of the California Governor's effort to protect consumers against strategic manipulation of its power market. In response to California's electric power deregulation crisis, in January 2001, California Governor Davis declared a state of emergency after concluding that "'the imminent threat of widespread and prolonged disruption of electrical power . . . constitutes a condition of extreme peril to the safety of persons and property within the state.'"[198] Following this declaration, the state obtained a temporary restraining order against the California Power Exchange (CalPX), which managed a market for block forward contracts to deliver electricity through the end of 2001, including contracts between Duke Energy, a wholesale supplier, and utilities, such as Southern California Edison and Pacific Gas & Electric Company.[199] Later, it was alleged that Duke Energy and other suppliers and marketers, such as Enron, were strategically manipulating the market to reap massive profits.[200] As the state's restraining order expired, Governor Davis, acting pursuant to the California Emergency Services Act, issued two executive orders that purported to "commandeer" block forward contracts "'to be held subject to the control and coordination of the State of California.'"[201]

Duke Energy filed a suit seeking injunctive relief against Governor Davis and alleging that his commandeering orders were preempted by federal law.[202] Since the case was for injunctive relief, not monetary damages, it is not at all clear how the filed tariff doctrine would have served to protect customers against unjust

198. Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042, 1047 (9th Cir. 2001).

199. *Id.*

200. *See* FERC, FINAL REPORT ON PRICE MANIPULATION IN WESTERN MARKETS: FACT-FINDING INVESTIGATION OF POTENTIAL MANIPULATION OF ELECTRIC AND NATURAL GAS PRICES (Mar. 2003), *available at* http://www.ferc.gov/legal/staff-rep-elec.asp. In August 2003, however, FERC's staff cleared Duke Energy of any wrongdoing in manipulating the market. *See* FERC, STAFF'S INITIAL REPORT ON PHYSICAL WITHHOLDING BY GENERATORS SELLING INTO THE CALIFORNIA MARKET AND NOTIFICATION TO COMPANIES (Aug. 2003), *available at* http://www.ferc.gov/industries/electric/indus-act/wem/2003/WithholdingReport8-1-03.pdf.

201. *Duke Energy*, 267 F.3d at 1047.

202. *Id.*

discrimination. Nevertheless, after deciding that the case should not be dismissed on sovereign immunity grounds,[203] the Ninth Circuit panel applied the filed rate doctrine, which led the court to an inference of preemption. In the court's view, "'interstate power rates filed with FERC . . . must be given binding effect'" by state regulators, even when regulating in areas subject to state jurisdiction.[204] Thus, the court stated with a sweeping confidence, "FERC-approved rates preempt conflicting regulations adopted by the States."[205]

While the case contains broad claims about how a filed rate creates an inference of federal preemption of California Governor Davis' commandeering order, the analysis in the opinion is wanting. The Ninth Circuit observed that, "[b]y preventing CalPX from liquidating the IOUs' block forward positions to cover their defaults in the CalPX markets, Governor Davis's commandeering orders effectively rewrote the terms of the CTS rate schedule [approved by FERC], depriving wholesale suppliers such as Duke of their bargained-for collateral and default mitigation rights."[206] Since FERC had previously refused to allow CalPX to amend its tariff to lower the short-term credit ratings of market participants, and since the effect of Governor Davis' commandeering order was to deprive wholesale suppliers of this financial protection, the court concluded that the Governor's actions conflicted with federal law. The court, however, provided little analysis to support this conclusion.[207]

In another case related to California's deregulation crisis, municipal utilities in the state seeking an expansion of transmission capacity sued several regional utilities, including Bonneville Power Administration, a federal agency, seeking monetary damages for breach of contract, tort, conversion, trespass, nuisance, and, in one instance, fraud.[208] The basic claim was that the regional utilities had

---

203. Normally, a suit against a state is subject to sovereign immunity, but under *Ex parte Young* a suit challenging the legality under federal law of a state official's action enforcing state law is not a suit against the state. 209 U.S. 123, 159-60 (1908). In *Idaho v. Coeur d'Alene Tribe*, the United States Supreme Court recently limited *Ex parte Young* suits where "special sovereignty interests" are implicated, such as the state's regulatory authority over submerged lands within its geographic territory. 521 U.S. 261, 281 (1997). The Ninth Circuit held that the Duke Energy's suit (requesting an injunction against a specific decision) did not implicate these "special sovereignty interests," since it did not permanently deprive California's Governor of his emergency powers, and thus did not invoke the exception to *Ex parte Young* recognized in *Couer d'Alene*. *See Duke Energy*, 267 F.3d at 1052-55.

204. *Id.* at 1056 (quoting Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962, 966 (1986)).

205. *Id.*

206. *Id.* at 1056-57.

207. *Id.* at 1058.

208. Transmission Agency v. Sierra Pac. Power Co., 295 F.3d 918, 928 (9th Cir. 2002).

run afoul of an agreement with the plaintiffs to jointly construct and operate the interconnection of two large electricity inter-ties by operating another inter-tie constructed and operated by the defendants and approved by FERC.[209] Observing that FERC's jurisdiction over wholesale transmission is exclusive, the Ninth Circuit concluded that the plaintiffs "cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity inter-tie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval."[210] In a sweeping statement, characteristic of other courts invoking the doctrine, the Ninth Circuit analogized, "allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by FERC would be akin to allowing an airline to sue under state law for economic damages caused by another airline's FAA-approved flight plans."[211] The court could not be saying that, by the very fact of federal approval of a flight plan, airlines are somehow immune from all state law claims, including negligence. Instead, what the court seems to be suggesting is that federal approval of a flight plan supersedes any previous private contractual agreement between airlines that conflict with the plan. The court did not, however, explain why this result is required, particularly since the effect of such a rule is to encourage regulated firms to lobby regulators to indirectly invalidate contracts—a particularly disturbing practice in a deregulatory environment. More troubling, as in the *Duke Energy* case, the court failed to explain why the tort, fraud and other property claims were preempted as a matter of implied or conflict preemption jurisprudence.[212] Notwithstanding its expansive invocation of the filed rate doctrine, the Ninth Circuit did take the care to mention a recent United States Supreme Court case which clarified the hypothetical reach of FERC's jurisdiction, using the case to potentially narrow the application of the filed tariff doctrine in future cases.[213]

---

209. *Id.* at 922.

210. *Id.* at 928.

211. *Id.* at 929.

212. Noting that "the Supreme Court has yet to resolve the issue of whether a claim based upon fraud before an agency can be preempted by the filed rate doctrine," the Ninth Circuit sided with two other circuits which found filed rate preemption under such circumstances. *Id.* at 933; *see* Taffet v. S. Co., 967 F.2d 1483, 1494-95 (11th Cir. 1992); H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 494 (8th Cir. 1992).

213. As the court stated:

> We have grounded our decision in the filed rate doctrine, despite the existence of separate FERC authority over transmission capacity, because no court has yet determined whether the rule against courts assuming hypothetical allocations of transmission capacity would apply if the hypothetical allocations of transmission

Consistent with the sweeping filed tariff doctrine embraced in these Ninth Circuit cases, a federal district court in California recently invoked the doctrine to bar state regulators from limiting a utility's ability to recover the costs of power in the deregulated wholesale market.[214] California electric utilities have consistently claimed that the refusal of the California Public Utility Commission to increase retail rates as wholesale prices for purchased power skyrocketed during the state's deregulation crisis is illegal under the filed tariff doctrine, since FERC had approved wholesale prices based on deregulated market conditions.[215] In *Pacific Gas & Electric Co. v. Lynch*, a federal district court agreed, holding that the filed tariff doctrine precludes the state of California from setting retail rates below FERC-authorized wholesale rates and prohibiting the recovery of losses, and setting for hearing issues of fact regarding PG&E's claim for recovery.[216] Like the other Ninth Circuit cases applying the filed tariff doctrine in the deregulatory environment, the court in *Lynch* embraced a preemption analysis, rather than the analysis applied to antitrust claims in *Keogh*. Also like the other Ninth Circuit cases, the federal district court in *Lynch* made several broad-brush statements regarding the scope of the filed tariff shield. For instance, the court stated that "across all regulated industries to which it pertains, the filed rate doctrine has been strictly and rigidly applied, without concern for the equities of application."[217] Although the court in *Lynch* was clear that it was applying the federal preemption strand of filed tariff cases—rather than the deference strand that can be traced to *Keogh*—it noted that arguments that "the introduction of competition into a regulated industry brings into question the continuing application of the filed rate doctrine" have been "uniformly rejected by courts in the regulatory contexts in which they have been raised."[218]

> capacity did not affect FERC-controlled rates. We note, however, that as the Supreme Court has recently explained, FERC's jurisdiction of electricity transmission, unlike its jurisdiction over sales (i.e. rates) can reach intrastate transmissions. Hence, we reserve for future resolution the question whether federal law preempts claims that assume a hypothetical allocation of intrastate transmission capacity, notwithstanding FERC's lack of authority over intrastate sales.

Sierra Pac., 295 F.3d at 931 n.9 (citing New York v. FERC, 535 U.S. 1, 25 (2002)).

214. Pac. Gas & Elec. v. Lynch, 216 F. Supp. 2d 1016 (N.D. Cal. 2002).

215. In one context, the issue was settled (allowing the utility to recover $3.3 billion of its $6.3 billion claimed loss), but the utility's argument, if successful, would have prevented the state of California from limiting recovery in retail rates costs incurred in accordance with FERC-approved tariffs. *See* S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 801 (9th Cir. 2002).

216. *See Lynch*, 216 F. Supp. 2d at 1038-40, 1049.

217. *Id.* at 1038.

218. *Id.* at 1039.

The *Duke Energy* case ignores established limits on the application of the filed tariff doctrine by applying it in a context involving injunctions, not awards for money damages.[219] Beyond that defect, the Ninth Circuit's decisions in these cases are otherwise consistent with courts' invocations of the filed rate doctrine as a bar to claims, even in the context of electric power deregulation.[220] Even after California's deregulation crisis, which has challenged the traditional jurisdictional battle lines in the electric power industry, the shield remains steadfast, its armor untarnished. Where invoked, courts have turned it into a fortress, beyond the power even of federal regulators to abandon.

V. INVASION

Since the filed tariff doctrine's inception, federal courts have evolved more sophisticated doctrines for assessing jurisdiction. Yet courts continue to invoke the filed rate shield as a shorthand way of bypassing these other doctrines, inviting federal courts to overreach in refusing jurisdiction, often at the cost of protections for consumers and competition. Modern federal preemption analysis or a careful assessment of antitrust defenses and immunities provides a greater opportunity to protect the public interest in robust enforcement of market abuses, safeguarding against strategic uses of the regulatory process to forum shop while also addressing the issue of dual enforcement.

A. Federal Preemption Analysis

Federal preemption doctrine, if explicitly and carefully analyzed in the context of the specific federal approval and monitoring actions at issue, holds great promise to deter violations of market norms, providing a safeguard for consumers and competition. In order for a complete analysis of preemption to occur, however, courts should avoid inferring preemption from the mere act of tariff acceptance, as the filed tariff shield invites. Courts also should be careful in making tenuous, sometimes hypothetical, connections between federal

---

219. *See supra* note 81 and accompanying text.

220. *See, e.g.*, Campbell v. San Diego Gas & Elec. Co., 2001 WL 1860381 (E.D. Wash. Sept. 19, 2001) (invoking the filed rate doctrine as a bar to breach of contract claims even where, due to the timing of the plaintiff's complaint, FERC does not have statutory authority to allow a refund); Indeck Me. Energy, L.L.C. v. ISO New Eng., Inc., 167 F. Supp. 2d 675, 690-92 (D. Del. 2001) (allowing the filed tariff doctrine to bar a claim for breach of contract against an Independent Service Operator, where the primary basis for the breach claim was a challenge to the spot energy market as operated within the discretion of the ISO, endorsed by FERC).

regulation and a potential state law claim that has deterrence purposes.

Article VI, clause 2 of the United States Constitution states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." As a matter of black letter law, federal preemption jurisprudence is well established. Of course, Congress can expressly preempt state or local law by using explicit statutory language. Courts may also infer preemption in one of two ways: first, where federal regulation occupies the field, leaving no room for supplemental regulations by the states; second, where state or local law poses an actual conflict with federal law.[221] Although established as a matter of black letter law, federal preemption analysis remains highly controversial, often resulting in split judicial decisions. Perhaps not surprisingly, despite the Supreme Court's general acknowledgement of a "'presumption against the preemption of state police power regulations,'"[222] most commentators characterize the case law as exhibiting a strong bias in favor of finding federal preemption.[223]

Nevertheless, federal preemption analysis provides a useful framework for evaluating the implications of using the existence of a filed rate as a shorthand for reaching a preemption conclusion. In regulatory contexts such as telecommunications and electric power, Congress has envisioned a dual regulatory structure that allows federal and state regulation to coexist. Given this, rarely, if ever, will a federally approved tariff so occupy the field as to allow no room for state regulation. Thus, it is certainly not appropriate to treat tariff cases as "occupation of the field" preemption cases. Instead, if anything, tariff cases are best characterized as actual preemption

221. English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984). For criticism of the development of federal preemption jurisprudence, see Stephen A. Garbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 809-10 (1994) (arguing that the Supremacy Clause was intended to create only "conflict" preemption); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290-91 (2000) (urging that courts place focus on whether federal law preempts state law, in a sense similar to how one statute might supersede another, rather than on traditional "obstacle" preemption analysis).

222. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 523 (1992)).

223. *See, e.g.*, Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1015 (2002) ("The Court is skeptical of the benefit of common law actions as a proper element of a regulatory regime and enamored by federal regulatory uniformity and the certainty and predictability for those regulated that comes with it."); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Analysis: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1153 (1999) ("A great deal of scholarly criticism has been directed at the courts' apparent strategy of reserving the balance of regulatory power for the national government . . . .").

cases, in which the general claim is that state regulation poses a barrier to effective federal regulation of the same activity.

The conflict between federal tariffs and state contract, tort or fraud claims, however, is frequently hypothetical, not actual. For example, as discussed above,[224] the relationship between an award of contract damages and an approved rate is contingent on the disallowance of litigation awards by federal regulators. Regulators retain the power to adjust rates, even retroactively, to allow firms to recover prudently incurred costs. For courts to imply preemption in such contexts invites a seriously overreaching preemption analysis.

For instance, as Justice Stevens observed in his dissent to the Court's holding that the filed tariff doctrine barred state common law claims against long distance carriers in *AT&T*, an assessment of the connection between the allegedly illegal conduct and the relationship governed by the tariff is central to a full assessment of the preemptive effect of a tariff.[225] Such an analysis must evaluate the extent to which a regulatory structure is designed to allow specific conduct—in the case of AT&T, allegations of slamming—and whether the tariff approval and monitoring process conflicts with the potential remedies provided under state law.

Applying a similar analysis, the rationales for the Ninth Circuit's inference of preemption in *Duke Energy* are shaky, if not completely wrong. In approving the California Power Exchange tariff, FERC also approved the operation of the market subject to California law. California still had specific responsibilities to protect retail customers from abuses by suppliers, such as those who strategically manipulated California's newly deregulated market, and these responsibilities included the potential exercise of the Governor's emergency order authority, as well as state contract and consumer protection laws. In addition, the sole basis for the Ninth Circuit's inference of preemption was that state regulation would cause an effect—a hypothetical reduction in Duke Energy's credit rating—conflicting with a term of an approved tariff.[226] However, the relationship between the state regulation that was preempted by the federal tariff (Governor Davis' commandeering), and the conduct approved by the federal tariff (retention of Duke Energy's credit rating), was tenuous, at best.

224. *See supra* Part II.B.2.

225. "[W]e have never before applied that harsh doctrine [the filed rate doctrine] to bar relief for tortious conduct with so little connection to, or effect upon, the relationship governed by the tariff." AT&T v. Cent. Office Tel., Inc., 524 U.S. 214, 233 (Stevens, J., dissenting).

226. *See supra* notes 208-209 and accompanying text.

Sometimes the Supreme Court has found implied obstacle preemption even in the absence of any federal regulation. Yet, when it does so it has expressed a strong concern for uniformity in national law or policy.[227] With competition in formerly regulated industries, concerns with nondiscrimination in pricing are fading; therefore, uniformity in pricing, terms, and conditions is not likely to be a useful standard for evaluating the legality of state regulation.[228] To the extent that uniformity remains important, as Judge Friendly recognized in *Square D*, the opportunity for plaintiffs to join as a class provides a sufficient safeguard for uniformity interests in rates and tariff terms and conditions.[229]

Assessment of the preemption issues reveals that courts often invoke filed tariffs as giving rise to implied preemption without careful analysis of the issue of dual regulatory enforcement in the regulatory environment.[230] Many of the instances in which courts historically inferred preemption based solely on the existence of a firm-specific filed tariff simply would not survive the appropriate preemption analysis, for which establishment of an actual obstacle to state regulation is necessary.[231] When applying correct preemption analysis, courts must focus on the extent to which the agency itself considered the matter[232]—an issue which the filed tariff doctrine completely ignores.[233] Federal preemption analysis, though, provides

227. *See, e.g*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959) (holding that even in the absence of a finding that the NLRB's determination that bargaining-related conduct was protected, state law affecting that conduct was prohibited). Expressing fear of non-uniformity, the Court states "[o]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left [unchanged]." *Id.*

228. For a similar criticism of admiralty preemption, see Young, *supra* note 42, at 357 (arguing against automatic admiralty preemption and concluding that "federal maritime interests should prevail only when they are somehow related to the 'special' nature of admiralty"; that is, federal interest should prevail only in those instances where uniformity is necessary to comply with the Admiralty Clause of the Constitution).

229. *See supra* notes 67-68 and accompanying text.

230. Likewise, Robert Rabin criticizes invocation of a regulatory compliance defense in tort cases as ignoring the issue of risk, given multiple enforcement levels. *See* Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2082 (2000) ("[S]tructural flaws in the system are best addressed directly, rather than through an overbroad regulatory compliance defense that fails to encompass the range of circumstances giving rise to drug-related injuries.").

231. Where an agency has not evaluated conduct, a court should fail to find a preemptive effect. *See* Ting v. AT&T, 182 F. Supp. 2d 902, 937-38 (N.D. Cal. 2002) (refusing preemption defense based on filed tariff and finding contract provisions substantively unconscionable and void for public policy, in context of consumer class action).

232. *See* McGreal, *supra* note 41, at 874-75 (stressing the importance of agency deliberation in finding regulatory preemption based on an obstacle analysis).

233. "It is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine." Town of Norwood v. New Eng. Power Co., 202 F.3d 408,

a more complete picture of the regulatory problem, and thus should be used by courts in considering the appropriateness of judicial enforcement against the backdrop of dual regulatory problems, such as the claim by Southern California Edison that the state of California cannot cap retail prices in its state retail deregulation scheme, given a deregulated wholesale market.[234] Federal preemption analysis also provides a more solid rationale for evaluating the rate structure in *Lynch,* which invoked a sweepingly broad filed tariff argument to invalidate application of the same retail price cap to Pacific Gas & Electric.[235]

B. Antitrust Defenses and Immunities

Modern antitrust defenses and immunities provide courts an opportunity to safeguard the public interest in deterrence—largely ignored by the filed tariff shield—in the context of federal antitrust litigation. To be sure, per se defenses provide an important set of protections against judicial overreaching on the basis of antitrust law into competitive markets.[236] However, allowing the filed tariff doctrine to become an independent, firm-specific antitrust defense—as courts have—is unnecessary and harmful, given other doctrines that protect agency discretion and state jurisdiction while also providing courts the flexibility to evaluate dual enforcement issues. Courts should independently assess whether tariffs qualify for immunity from antitrust enforcement, using traditional antitrust law doctrines, rather than using filed tariffs as a shorthand way of bypassing the antitrust laws. In contexts in which in the filed rate bar has been raised, antitrust defenses arise in two distinct scenarios: 1) horizontally, in instances where federal regulators, rather than federal courts, might assert jurisdiction over allegedly anticompetitive conduct; and 2) vertically, in instances where federal regulators approve one tariff and state regulators approve another tariff, and hence a jurisdictional conflict arises because the allegedly

---

419 (1st Cir. 2000); *see supra* Part III.B (discussing the enforcement gap and FERC's inability and failure to evaluate the firm's conduct in approving structural tariffs).

234. *See supra* note 215 and accompanying text.

235. *See* supra note 216-218 and accompanying text.

236. *See* Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 403 (1986) (observing that antitrust law is complex and courts often look for simplifying doctrines, such as metaphors, per se rules, or easy exits that assist more difficult factual and analytical inquiries); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21-23 (1984) (discussing the use of presumptions in antitrust law to screen out cases in which the loss to consumers and the economy is likely outweighed by the costs of inquiry and the risks of deterring "procompetitive" behaviors).

anticompetitive conduct is arguably within the realm of state regulators or falls into a jurisdictional gap. In both scenarios, antitrust law already provides ways to respect the agency regulatory process, making the filed tariff doctrine redundant.

1. Horizontal Jurisdictional Conflicts: Regulatory Compliance and Primary Jurisdiction

In the horizontal scenario, courts since *Keogh* have invoked the filed tariff shield to bar most antitrust claims, but do recognize certain exceptions.[237] Nearly twenty years ago, Judge Friendly called the doctrine into question in this context.[238] Although in *Square D* the Supreme Court refused Judge Friendly's invitation to overturn *Keogh*, Justice Stevens and a majority of the Court were notably sympathetic to his critique.[239] Given the more prevalent emergence of market norms, Judge Friendly's critiques resound even more clearly today. Although recent Ninth Circuit cases refuse to allow deregulation to threaten the application of the filed tariff doctrine, these cases are solidly preemption cases rather than cases applying the basic principles of *Keogh*.[240] Federal courts have yet to fully assess *Keogh*'s fate against the backdrop of electric power and telecommunications deregulation.

Where federal regulators have approved all tariffs related to allegedly anticompetitive conduct, the continued rationale for allowing the filed rate doctrine to bar antitrust liability is questionable. The strongest rationale for invoking the filed rate doctrine in this context is out of respect for the expertise of agency regulators, reflected in the deference strand of the filed tariff doctrine. In *Town of Norwood*, the First Circuit characterized the legal foundations of the filed rate doctrine as "extremely creaky,"[241] but when invoked as a bar to antitrust enforcement, the filed rate doctrine is also incoherent. To begin, as with state contract and tort law claims, if misconduct requires modification of tariff terms, regulators could easily accommodate this need in future rate cases.[242] But also, as the court

237. They recognize exceptions particularly in the contexts of price squeeze, requests for injunctive relief, and suits by competitors seeking lost profits. *See supra* Part II.B.2.

238. *See supra* Part II.B.

239. *See supra* notes 98-100 and accompanying text.

240. *See supra* Part IV.B.

241. Town of Norwood v. New Eng. Power Co., 202 F.3d 408, 420 (1st Cir. 2000).

242. *Cf.* Andrew G. Humphrey, *Antitrust Jurisdiction and Remedies in an Electric Utility Price Squeeze*, 52 U. CHI. L. REV. 1090, 1107 n.73 (1985) (asserting that the filed rate doctrine is "inapplicable in the price-squeeze context" as it is not "an attempt to relitigate a rate-setting

itself noted in *Norwood*, in the context of the tariff approval action, FERC had waived requirements that filed rates or tariffs be accompanied and justified by cost-of-service data.[243] Such data would be necessary for the agency itself to evaluate the price squeeze claim.

Notwithstanding the fact that the agency lacked sufficient data to evaluate a claim of price squeeze, the court in *Norwood* concluded that "[i]t is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine."[244] This is dangerously broad language. By focusing on the filing of tariffs by regulated firms, the court privileges private behavior rather than the actual or anticipated actions by regulators that traditional deference concepts evaluate. It is difficult to reconcile invocation of the filed rate doctrine in the context of price squeeze claims—as the court struggled with in *Norwood*—with other antitrust claims, in which the filed rate doctrine has not been successfully invoked as a bar to litigation. For example, mergers and sales of assets by utilities have been subject to antitrust challenge even though the resulting rates were subject to federal regulation and the merger or sale had been approved by regulators.[245] Since *Otter Tail*, which allowed antitrust claims when an agency had some jurisdiction, the simple filing of tariffs has not precluded antitrust claims, even where regulators have partial jurisdiction over conduct.[246] In a deregulated market, courts have a particular responsibility to carefully assess tariffs in order to help ensure that anticompetitive and otherwise illegal private conduct does not "escape scrutiny" of applicable legal standards.[247] Otherwise, as Judge Boudin (who penned *Town of Norwood*) warned in an earlier-published article, through the repeated use of the filed tariff doctrine the "metaphor is likely to exhaust itself,"[248] undermining the very competitive process it is designed to protect.

It is questionable whether the filed tariff doctrine adds to the less intrusive tools available to courts in the horizontal context as grounds for declining to consider a case. In the context of cases such as *Norwood*—in which all of the allegedly anticompetitive conduct is subject to federal regulation—two extant legal doctrines apart from

---

which is subject to agency discretion." (citing City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (8th Cir. 1982))).

243. *Norwood*, 202 F.3d at 419.

244. *Id.*

245. *Id.* at 422 (citing Northeast Util. Serv. Co. v. FERC, 993 F.2d 937, 947 (1st Cir. 1993) and California v. Fed. Power Comm., 369 U.S. 482 (1962)).

246. *See supra* text accompanying notes 83-84.

247. Colum. Steel Casing Co. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1446 (9th Cir. 1997).

248. *See* Boudin, *supra* note 236, at 404.

the filed tariff assess the appropriateness of judicial intervention: 1) a doctrine of regulatory compliance, which has emerged in recent years as a type of antitrust defense; and 2) the doctrine of primary jurisdiction, a general doctrine used by courts to refuse jurisdiction over agency claims. Although these are not antitrust immunities, in the sense of functioning as airtight and absolute defenses, they provide adequate safeguards for preserving agency discretion to evaluate claims of anticompetitive conduct (as the deference strand of the filed tariff doctrine also purports to safeguard), making the filed tariff shield in such circumstances completely unnecessary.[249]

Even if conduct is not expressly immune from the antitrust laws, good faith regulatory compliance can form a defense to a jury. When a defendant is attempting to comply with regulatory policy, "'something more than general intent should be required to establish a Sherman Act violation.'"[250] In addressing AT&T's rules for interconnecting other long distance carriers with its local service network, the Seventh Circuit stated, "[i]n the particular context of an industry subject to extensive and rapidly changing regulatory demands, we believe that an antitrust defendant is entitled both to raise and to have a jury consider its good faith adherence to regulatory obligations . . . ."[251]

249. Where a plaintiff alleges violation of statutory provisions enforced by a federal agency, an emerging doctrine of telecommunications law would seem to preclude a federal court from considering the antitrust claim. *See* Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) (refusing antitrust jurisdiction where the FCC has enforcement authority under the 1996 Telecommunications Act). However, where a plaintiff has adequately pled an independent antitrust claim, the Supreme Court has held that the 1996 Telecommunications Act's antitrust savings clause preserves the claim, notwithstanding separate FCC interconnection regulation. *See* Verizon v. Law Offices of Curtis V. Trinko, L.L.P., 124 S.Ct. 872 (2004) (exercising jurisdiction over essential facilities claim but rejecting the claim on its merits). For discussion of this emerging doctrine for refusing antitrust enforcement, see Philip J. Weiser, Goldwasser, *The Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003) (discussing *Goldwasser* but arguing against a categorical rule that would favor dismissal of all cases and urging analysis of overlap between regulatory agency remedies and remedies available under antitrust laws); RANDAL C. PICKER, UNDERSTANDING STATUTORY BUNDLES: DOES THE SHERMAN ACT COME WITH THE 1996 TELECOMMUNICATIONS ACT? (Univ. of Chi. John M. Olin Program in Law & Econ., Working Paper No. 177, Dec. 2002), (suggesting that increased standing eligibility for breach of access violations under the Telecommunications Act of 1996 makes analytical sense, but noting that limiting standing eligibility might be justified due to increased administrative and error costs that could arise as a result), http://www.law.uchicago.edu/Picker/Papers/Manhattan200.pdf.

250. City of Groton v. Conn. Light & Power Co., 662 F.2d 921, 931-32 (2d Cir. 1981) (quoting City of Mishawaka v. Am. Elec. Co., 616 F.2d 976, 985 (7th Cir. 1980), and arguing that since overall effect of utility's rates and practices suggested good faith behavior, utility was not acting unlawfully).

251. MCI Comm. Corp. v. AT&T, 708 F.2d 1081, 1109-10 (7th Cir. 1983).

The Seventh Circuit concurred with this general standard for evaluating interconnection standards, elaborating:

> An ideal instruction would very briefly explain . . . that a carrier has an obligation under the Communications Act to interconnect, but may deny interconnections if it determines that the public interest is to the contrary; and that if the carrier at the time had a reasonable basis in regulatory policy to conclude, and in good faith concluded, that denial of interconnections is required by concrete, articulable concerns for the public interest, then there is no liability under the antitrust laws.[252]

The Supreme Court has yet to endorse this specific way of accommodating antitrust and regulatory law, but language in the Court's opinions is not inconsistent with it.[253] In the context of complex regulatory scenarios, in which careful evaluation of subjective intent as well as the objective standard for complying with the public interest is necessary, this defense holds greater promise for ensuring that competitive safeguards are in place than does the short-hand invocation of a field tariff shield.

In addition to the regulatory compliance jury defense, the doctrine of primary jurisdiction already provides a sufficient safeguard for those situations in which regulators actively monitor rates, terms and conditions of service. Under the doctrine of primary jurisdiction, in "cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion,"[254] a court defers to the agency on regulatory matters in order to allow the agency to consider them first. The Supreme Court has observed:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[255]

---

252. *Id.* at 1138.

253. *See, e.g.*, Nat'l Gerimed. Hosp. v. Blue Cross of Kan. City, 452 U.S. 378, 393 n.19 (1981) (noting, in the context of potential regulation of hospital's conduct by cooperative agencies, that on remand "the court should give attention to the particular economic context in which the alleged conspiracy and 'refusal to deal' took place"); *see also* Phonetele, Inc. v. AT&T, 889 F.2d 224 (9th Cir. 1989) (concluding that defendant's good faith was established); Phonetele, Inc. v. AT&T, 664 F.2d 716, 737-38 (9th Cir. 1981) (Kennedy, J.) (stating that if a defendant can establish "it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws").

254. Far East Conference v. United States, 342 U.S. 570, 574 (1952).

255. *Id.* at 574-75. For further discussion of practical aspects of applying this doctrine, see Robert B. von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954).

As Judge Friendly recognized,[256] a court has the power to stay a judicial proceeding pending agency decisions in such a case, although it may also decide to dismiss a case altogether for present purposes.[257] In comparison to the filed tariff doctrine, the assessment of primary jurisdiction allows courts more discretion in its application.[258]

Unlike the filed tariff doctrine, which bars present and future claims, primary jurisdiction does not confer complete immunity to the allegedly anticompetitive conduct; rather, in applying the doctrine, courts traditionally stay any judicial enforcement pending agency regulation. As Professor Louis Jaffe recognized long ago, the application of doctrine of primary jurisdiction emphasizes that referral of a matter from a court to an agency is not based solely on agency expertness, but on the entire statutory scheme.[259] Thus, a court's inquiry is more suited to the problem courts routinely address in asserting or declining jurisdiction in the horizontal context—whether the exercise of judicial power unduly trespasses onto agency expertise and decision-making authority.[260] Primary jurisdiction provides a less blunt tool for courts to respect agency deference in a dual jurisdiction enforcement context. The sweep of per se immunity can be left entirely with implied antitrust immunity, which is not firm-specific, and to the extent its applications are based in congressional intent,

---

256. *See* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1353 (2d Cir. 1985).

257. In *Nader v. Allegheny Airlines, Inc.*, the Supreme Court recognized that stays may be important for two distinct reasons. 426 U.S. 290, 303-04 (1976). The agency may not have the statutory power to confer immunity, but still may pass judgment on the matter. *Id.* Or, as *Far East* envisioned, a court may believe the agency is in a superior position to make findings of fact or judgments about reasonableness. *Id.* at 305-06 (noting that common law misrepresentation not within special competence of the agency); *see also* GE v. M.V. Nedlloyd, 817 F.2d 1022, 1027 (2d Cir. 1987) (finding it unnecessary for a court to yield jurisdiction where the issue to be resolved rests on general common law principles).

258. The doctrine itself has been criticized for lacking consistency in application. *See, e.g.*, Hale & Hale, *supra* note 155, at 49 ("It cannot, however, be said that the courts have been wholly consistent in their application of the primary jurisdiction doctrine.").

259. *See* Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1057 (1964) (observing that "[a] special problem arises where the administrative agency is not given jurisdiction to award reparations," specifically mentioning the FPC, FERC's predecessor).

260. The doctrine of primary jurisdiction can also play this role in lieu of the filed tariff shield in bankruptcy claims. In the cases that preceded the United States Supreme Court's decision *Maislin*, the United States Court of Appeals for the Eighth Circuit invoked the doctrine of primary jurisdiction in evaluating jurisdiction over undercharge claims, but concluded that the ICC could best address the claims. *See* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 879 F.2d 400, 403 (8th Cir. 1989) (stating that "the doctrine of primary jurisdiction should be exercised if the issues in a proceeding 'turn on a determination of the reasonableness of a challenged practice'"); INF, Ltd. v. Spectro Alloys Corp., 881 F.2d 546, 548-50 (8th Cir. 1989) (relying on Eighth Circuit's *Maislin* decision and addressing concerns in ICC policy); *see* Rouse, *supra* note 170, at 688.

minimizes the opportunities for manipulation by private firms and judicial overreaching.

2. Vertical Jurisdictional Conflicts: State Action Immunity

Modern antitrust jurisprudence also potentially extends the filed tariff doctrine's reach to a second context, vertical, in which both federal and state regulators have approved tariffs relating to allegedly anticompetitive conduct. In this context, it is conceivably the state-approved tariff that makes antitrust enforcement unnecessary. Some states do not explicitly endorse the filed tariff doctrine, as a matter of state law,[261] but, regardless of whether a state independently does so, state action immunity serves functions similar to those the filed tariff doctrine purports to serve, again making it unnecessary.

State action immunity is designed to accommodate the federal antitrust interest in promoting competition with state interests in regulation. When state regulation works to restrict competition, these two interests may collide. In *Parker v. Brown*, the United States Supreme Court addressed this conflict in reviewing the potential antitrust liability of state officials enforcing a program that fixed raisin prices and restricted competition between growers.[262] The Court held that the Sherman Act was not intended to restrain "state action," effectively creating absolute immunity for pure state actors, but the Court did not address the potential liability of private parties operating under the auspices of state law.[263]

Later cases extended state action immunity to private parties whose allegedly anticompetitive acts were the product of, or approved by, state action. As the Supreme Court stated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, immunity for private actors exists only if the challenged restraint is taken pursuant to a "'clearly articulated and affirmatively expressed . . . state policy'"[264] and is subject to active state supervision.[265] The clear articulation requirement does not require a defendant to show that state law compelled the challenged actions,[266] but instead only that the state

261. *See supra* note 87.

262. *See* 317 U.S. 341, 346 (1943).

263. *Id.* at 351.

264. 445 U.S. 97, 105 (1980) (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978)).

265. *See id.* at 105-06.

266. *See* S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 60-61 (1985) ("[W]e do not read [previous case law] as making compulsion a prerequisite to a finding of state action immunity"); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 43-44 (1985) (holding that

affirmatively contemplated the type of activity challenged.[267] Given this low threshold, the active supervision requirement does most, if not all, of the heavy lifting in determining whether state action immunity applies to private actors.[268] Courts have held that this requirement is not automatically met when the state "simply authorizes price setting and enforces the prices established by private parties" because such a broad authorization would merely "cast[ ] . . . a gauzy cloak of state involvement over what is essentially a price-fixing arrangement."[269]

In the context of dual rate regulation schemes, state action immunity can have the same effect as the filed rate doctrine at the state level, while also providing courts flexibility to evaluate the deterrence implications of declining jurisdiction. In *Town of Concord v. Boston Edison Co.*, then-Judge Breyer assessed a price squeeze claim brought under these circumstances.[270] FERC regulated Boston Edison's wholesale electric power rates, while its retail rates were regulated by state authorities.[271] Municipal utilities, such as the Town of Concord, challenged Boston Edison's wholesale prices as anticompetitive, on the grounds that the utility's wholesale price increases, approved by FERC, had not been matched by corresponding retail price increases at the state level.[272] The municipality claimed that the disparity between the two rates put the towns in a price squeeze, making retail customers more likely to purchase directly from Boston Edison and thus placing the municipal customer base at risk.[273] Properly declining to apply the filed rate shield—because this basis for refusing jurisdiction is particularly problematic in the context of price squeeze claims, where sometimes neither the federal

---

state statutes satisfied the clear articulation requirement, where the state delegated to its cities "the express authority to take action that foreseeably will result in anticompetitive effects").

267. *See Town of Hallie*, 471 U.S. at 42 ("It is not necessary. . . for the state legislature to have stated explicitly that it expected . . . anticompetitive effects. . . . [I]t is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.").

268. An exception to this is cases involving municipalities and other subordinate state entities, which must affirmatively show state authorization to enjoy state action immunity but do not have to show active state supervision of their actions. *See Town of Hallie*, 471 U.S. at 46-47 & n.10.

269. 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344-45 (1987) (quoting *Midcal*, 445 U.S. at 106)).

270. 915 F.2d 17, 20 (1st Cir. 1990).

271. *See id.*

272. *See id.* at 20-21.

273. *See id.* at 21.

nor state regulator has authority to rectify an antitrust violation[274]—Judge Breyer reasoned that Boston Edison enjoyed no express immunity from the application of the antitrust laws, but recognized that careful analysis of the price squeeze claim is necessary in the context of regulated industries.[275] Regulators continue to monitor the reasonableness of rates, as well as the relationship between utilities and their competitors.[276] In addition, Judge Breyer noted that regulation makes it less likely that a price squeeze would drive independent distributors from the marketplace, since the permission of regulators is required to take on new customers.[277] He further observed that supporting a price squeeze claim in such circumstances is at odds with the goals of price competition to the extent that it would encourage greater retail rates, and that there were potential institutional concerns with courts telling regulators what rate to apply under the circumstances.[278] Judge Breyer concluded that "a price squeeze in a fully regulated industry such as electricity will not normally constitute 'exclusionary conduct' under [the] Sherman Act . . . ."[279]

Judge Breyer's analysis addressed the price squeeze claim on its merits. This is understandable given that, in the context of this specific price squeeze claim, it was unclear whether the anticompetitive conduct was the wholesale rate, the retail rate, or both.[280] However, on similar facts—where the state regulates retail rates and the allegedly anticompetitive conduct is at the retail level

274. *See* Town of Concord v. Boston Edison Co., 721 F. Supp. 1456, 1460-61 (D. Mass. 1989) ("[E]nforcing the antitrust laws is not the FERC's paramount objective, and the only remedy the FERC can grant is to reduce the wholesale price to the lower end of the 'zone of reasonableness,' . . . which, depending on where the retail price is set, may or may not be enough to eliminate the price squeeze." (quoting City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1178 (8th Cir. 1982) and Fed. Power Comm'n v. Conway Corp., 426 U.S. 271, 279 (1976))).

275. *See Town of Concord,* 915 F.2d at 21-22 ("Even though Boston Edison is a regulated firm, it has no blanket immunity from the antitrust laws. . . . [W]here regulatory and anti-trust regimes coexist, antitrust analysis must sensitively 'recognize and reflect the distinctive economic and legal setting' of the regulated industry to which it applies." (citations omitted)).

276. *See id.* at 25-26.

277. *See id.* (noting that regulators maintain prices at "reasonable levels" and have the authority to prevent monopolists from "improperly disadvantaging" new competitors).

278. *Id.* at 27 ("A rule that penalizes the filing of wholesale rate increases would not necessarily lead firms to abandon wholesale rate increases; it could, instead, simply lead them to seek a retail rate increase whenever they seek a wholesale rate increase. . . . [A]n anti-price-squeeze rule . . . presents special administrative difficulties in the regulatory context.").

279. *Id.* at 28. Other circuits, however, reject *Town of Concord*'s limiting price squeeze analysis. *See, e.g.,* City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1378 (9th Cir. 1992) (rejecting *Town of Concord*'s price squeeze analysis as "too restrictive").

280. *See Town of Concord,* 915 F.2d at 27 ("Much electricity investment is used to serve *both* wholesale and retail services.").

only—state action immunity might allow a more complete analysis of the deterrence benefits of allowing an antitrust claim to go forward.[281] If a state actively supervises the regulation of retail rates, for example, this could implicate state action immunity in price squeeze and other antitrust claims.[282] Thus, if courts are satisfied with the monitoring provided by state regulators (including their ability to deter wrongdoing by regulated firms), there may be no need to address the merits of antitrust claims, creating the same effect as the filed tariff shield—even in instances where a state lacks its own state-law version of the doctrine.

Such an approach has significant advantages over the filed rate doctrine, as it focuses on the degree and effectiveness of overlapping state supervision, rather than on the simple act of filing or approving a tariff. Courts have yet to fully determine how state action immunity will apply in a full or partially deregulated environment. It is fair to predict, though, that as market norms emerge in formerly regulated industries, state action immunity will likely be available less often than was previously the case.[283] For example, in a recent case involving a utility's offer of a discounted rate to a customer that was conditioned on the customer's agreement to forego development of its own generation plant, a United States District Court agreed with the Department of Justice's Antitrust Division that such conduct was not protected from antitrust attack by state action immunity.[284] Although the New York state legislature had authorized reduced rates to "prevent loss of . . . customers," and the New York Public Service Commission had approved the reduced rate contract, the court held that the state legislature did not foresee or intend the anticompetitive

281. This analysis is not limited to price squeeze claims, but includes other allegations of antitrust law violations in a deregulated environment as well. *See* Ray S. Bolze et al., *Antitrust Law Regulation: A New Focus for a Competitive Energy Industry*, 21 ENERGY L.J. 79, 97-112 (2000) (addressing other claims likely to develop in competitive power markets, including tying and market allocation and collusion).

282. *See, e.g.*, Keith A. Rowley, Note, *Immunity from Regulatory Price Squeeze Claims: From* Keogh, Parker *and* Noerr *to* Town of Concord *and Beyond*, 70 TEX. L. REV. 399, 416-20 (1991) (discussing the state action doctrine and regulatory price squeeze claims).

283. *See, e.g.*, Jefferey D. Schwartz, *The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry*, 48 AM. U. L. REV. 1449, 1477-89 (1999) (discussing the future application of the state action doctrine in a deregulated market place).

284. *See* United States v. Rochester Gas & Elec. Corp., 4 F. Supp. 2d 172, 175-76 (W.D.N.Y. 1998). Other cases, however, have continued to find state action immunity, even where competition has begun to change the industry. *See, e.g.*, N. Star Steel Co. v. MidAmerican Energy Holdings Co., 184 F.3d 732 (8th Cir. 1999) (a local utility's refusal to transport cheaper power from other power generators to a steel mill located in its exclusive territory was subject to antitrust immunity since the state had clearly established retail service areas); TEC Cogeneration Inc. v. Fla. Power & Light Co., 76 F.3d 1560 (11th Cir. 1996) (finding state action immunity in cogenerator's refusal to deal claim), *modified*, 86 F.3d 1028 (11th Cir. 1996);.

features of this arrangement, particularly to the extent it resulted in the removal of a competitor.[285]

None of these doctrines—robust federal preemption, primary jurisdiction, or state action immunity from antitrust enforcement—was available early in the twentieth century, when federal courts first developed the filed tariff doctrine to help protect customers against discrimination in rates.[286] The filed tariff doctrine was questionable even before these doctrines developed, but today it is even more unnecessary. Further, by encouraging perverse behavior by private actors that is largely beyond the reach of the judiciary—thus widening the jurisdictional gap in enforcement of market norms—the doctrine is harmful. Using the filed tariff doctrine as an independent legal reason to preempt state law claims, or refuse jurisdiction over antitrust and other federal claims, gives short shrift to the public interest in the context of dual regulatory enforcement. In a dual enforcement regime, the jurisdictional inquiry must focus on the relationship between the agency and the courts, or the agency and state law, rather than on the deceptively simple act of filing a tariff with a regulatory body. These alternative doctrines provide federal courts the flexibility necessary to do this. Similarly, in states that recognize the doctrine, an analysis of primary jurisdiction would suffice to protect agency discretion.

There are, as proponents of the filed tariff doctrine would claim, potential costs to replacing the per se approach of the filed tariff shield with these alternative doctrines. Specifically, proponents might raise concerns with the impact of these alternative doctrines on regulatory commitments and uncertainty in regulated industries. Neither of these concerns has merit.

---

285. *See Rochester Gas*, 4 F. Supp. 2d at 175-76. The court found that, since a material issue of fact existed as to whether the wholesale customer was a bona fide competitor of the utility, it could not determine whether a violation of the antitrust laws existed. *Id.* at 176. Ultimately, the DOJ and the utility settled tbe case, agreeing that the contract language prohibiting the university from producing and selling power in competition with the utility would be dropped. *See* United States v. Rochester Gas & Elec. Co., 1998-1 Trade Cas. (CCH) ¶ 72,200, at 82,302 (W.D.N.Y. 1998). In a more recent case out of the Ninth Circuit, a defendant's refusal to wheel power to customers located in its old service area was held not to be immune under the state action doctrine, since state supervision of the conduct was lacking, although the Idaho statute clearly protects electric customer from pirating by other suppliers. *See* Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189, 1193-95 (9th Cir. 2001).

286. For instance, the Federal Power Act was not passed until 1935 and broad implied federal preemption decisions evolved many years later. Primary jurisdiction doctrine as a defense to antitrust cases did not fully evolve until the middle of the twentieth century, von Mehren, *supra* note 255, at 935-41, and state action immunity was not recognized until 1943. *See supra* note 262-263 and accompanying text.

The regulatory commitment argument for continued adherence to the filed tariff shield—i.e., valuing tariffs for promoting certainty and uniformity—proves too much. To be sure, regulatory commitments remain important to infrastructure-intensive industries, even in a deregulatory era. However, as has been argued in this Article, since it is increasingly rare for agencies to independently evaluate tariffs, the filed tariff shield allows firm-specific private behavior to play more of a direct role in creating regulatory commitments than is desirable from a social welfare perspective.[287] More importantly, absent the filed tariff doctrine, agencies possess adequate authority to make regulatory commitments. Without the doctrine, agency decisions would have the full force and effect of other government regulations, but no more. The filed tariff doctrine turns private behavior into a regulatory commitment, even where there is little or no regulatory action by an agency. This comes at the obvious cost of creating too strong of an incentive for one-sided private lobbying of an agency, even where the agency is unable to effectively regulate private behavior. In contrast, without a filed tariff doctrine, regulatory commitments would be more meaningful from a political accountability perspective, to the extent that an agency's regulatory decisions would more closely reflect its own choices or Congress' rather than the strategic choices of private firms.

Concerns with uncertainty also fail to justify continued adherence to the filed tariff doctrine. Allowing more adjudication in federal courts will inevitably increase uncertainty for firms in deregulated markets. Such uncertainty, however, is not inconsistent with that presented by other competitive firms facing antitrust claims, as well as tort and breach of contract claims, in federal courts.[288] Moreover, such uncertainty may have benefits for the lawmaking process: if private firms can no longer obtain certainty through tariffing, this will encourage private firms to focus their lobbying efforts on Congress, calling for expansion of agency jurisdiction and resources. Compared to private firms focusing their lobbying efforts on agencies, which assist firms in benefiting from the filed tariff shield but have little ability to police the type of conduct courts normally do, the net effect of such a change in lobbying behavior would be to enhance social welfare. In this sense, the proposal to replace the filed

287. *See supra* Part III.A.

288. While this Article speaks primarily to the current regulatory environment, its endorsement of an increased judicial role echoes proposals from a different regulatory era. *Cf.* Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 475 (1954) (arguing that courts should assume the general responsibility for defining the policies within which economic administration functions).

tariff shield with alternative doctrines better promotes responsible behavior by private firms in the lawmaking process in a deregulated environment, while simultaneously enhancing deterrence.

Because battle lines are shifting, and the role of tariffs is changing, application of the filed tariff shield is particularly adverse to consumers and competitive markets in circumstances where a more complete analysis of the regulatory issues would reveal limited agency regulatory oversight in the context of tariff approval and monitoring. The common law is hardly perfect—its remedies will be slower in their realization and less predictable than regulation—but absent express efforts to preempt and supersede it, it is necessary to deter wrongdoing in competitive markets.

VI. SURRENDER

The thin-lipped armorer,
Hephaestos, hobbled away;
Thetis of the shining breasts
Cried out in dismay
At what the god had wrought
To please her son, the strong
Iron-hearted-man slaying Achilles
Who would not live long.[289]

The filed tariff doctrine has had a questionable and curious history. Even under traditional natural monopoly regulation, it is not clear that the filed tariff doctrine was necessary to protect consumers from rate discrimination, to promote federalism, or to respect agency deference. Although the doctrine began with consumer protection aspirations, by the end of the twentieth century it evolved into a shield for utilities against consumer protection litigation. It was eventually co-opted by courts in ways that seriously constrain agency discretion. Indeed the exact purposes of the doctrine were never made clear and on inspection, many of the rationales proffered in support of the doctrine fail to justify it as an independent basis for a court to refuse to consider a case.

Invoked today as a shield, providing ultra-immunity for firms against antitrust and common law claims, the filed tariff doctrine is not only unnecessary; it has seriously harmful effects. Courts routinely overreach, applying the doctrine in ways that preclude the

289. W.H. AUDEN, *The Shield of Achilles*, *in* SELECTED POEMS 198, 199-200 (Edward Mendelson ed., 1979).

enforcement of federal and state laws designed to enhance competition and consumer protection. Further, the doctrine creates private incentives for manipulation of the regulatory process in ways that escape monitoring by courts and regulators. Limited jurisdiction and resources of regulatory agencies allow the filed tariff doctrine to expand the gap in the dual jurisdiction system for enforcing market norms. The result is more radical deregulation—markets absent even antitrust or common law enforcement—than either Congress or agencies intend. A decision to forgo judicial remedies should depend on an assessment of the scope of public enforcement, not on private tariffing conduct. Today, doctrines such as federal preemption and federal antitrust defenses and immunities promote clarity and accountability in regulatory law, and courts have at their disposal ways of respecting agency discretion without invoking a filed tariff shield. These alternative doctrines envision a way for courts to protect the public interest by safeguarding against strategic uses of the regulatory tariffing process in a dual enforcement system.

In an environment that affirmatively promotes competition and the development of markets, courts would best protect the goals of regulatory law by refusing to give filed tariffs any independent, legally significant role. The filed tariff doctrine's shield should be lowered, subjecting traditionally regulated industries to the same potential legal liabilities, along with access to the same defenses and immunities, as other firms in competitive markets.

***

Chicago Man, K-T Man, and the Future of Behavioral Law and Economics

Robert A. Prentice 56 Vand. L. Rev. 1663 (2003)

Legal scholars have increasingly begun to use principles of behavioral psychology, cognitive science, and related disciplines to inform legal analysis. Much of this analysis has been motivated by perceived limitations of economic analysis of law, particularly its foundational assumption that man is a rational maximizer of his expected utilities ("Chicago Man"). Drawing in substantial part from the work of Nobel Prize winning psychologist Daniel Kahneman and his late colleague Amos Tversky, behavioral decision theorists have argued that legal analysis should be based upon more realistic models of human activity (hence, "K-T Man"). As behavioral analysis of law has grown in popularity, inevitably it has come under attack on several dimensions. This article (a) defends both the scientific integrity and legitimacy of this new mode of analysis, and (b) defends its particular applications by legal decision theorists. The author argues that attempts to paint the heuristics and biases literature founded by Kahneman and Tversky as the mere product of parlor tricks used in laboratory experiments involving college sophomores will ring increasingly hollow as new techniques of neuroimaging continue to produce evidence of brain activity substantiating these limitations on human reasoning.

***