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Public Regulation and Private Rights of Action[†]

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AS THE Christmas rush of 1960 approached, the employees of a Los Angeles toy wholesaler went on strike. The Teamsters Union promptly set up a picket line around the plant. Drivers employed by various trucking companies that ordinarily served the plant refused to cross the picket lines to pick up or deliver goods. Although the carriers directed their drivers to cross the lines, the drivers were adamant. After the strike the wholesaler filed suit in the federal district court against a number of the motor carriers, seeking recovery of damages caused by the loss of regular trucking services during the strike.

At the outset the wholesaler ostensibly had two strings to his bow. The Motor Carrier Act, by which the defendants were all governed, forbade any carrier to "subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage . . ." ¹ In addition, the act contained a "saving clause" that preserved all pre-existing rights and remedies not inconsistent with its terms; ² and the common law had long recognized a cause of action against a common carrier that unjustifiably refused to serve a shipper. ³ Yet, despite these impressive grounds for recovery, the district court dismissed the shipper's action and the court of appeals affirmed, ⁴ holding that the complaint stated neither a common law cause of action nor one based on the Motor Carrier Act.

[†] I am much indebted to my colleague, Professor Richard M. Buxbaum, for a very thorough reading of the manuscript for this article, and for the many helpful suggestions which preceded and followed that reading.

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¹ § 216(d), 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d) (1958).

² § 216(j), 49 Stat. 560 (1935), 49 U.S.C. § 316(j) (1958).

³ See, e.g., *Jackson v. Rogers*, 2 Show. K.B. 327, 89 Eng. Rep. 968 (1683); cf. *Missouri Pac. Ry. v. Larabee Flour Mills Co.*, 211 U.S. 612, 619-20 (1909). See generally 1 MICHIE, CARRIERS 221, 257 (1915); PATON, BAILMENT IN THE COMMON LAW 240 (1952); REDFIELD, RAILWAYS 261 (1858); RIDLEY, THE CARRIAGE OF GOODS BY LAND, SEA AND AIR 13 (1957).

⁴ *Pensick & Gordon, Inc. v. California Motor Express*, 302 F.2d 391 (9th Cir.), *vacated and remanded*, 371 U.S. 184 (1962). The original complaint, which sought an injunction as well as damages, was grounded on the provisions of the Motor Carrier Act. The district court

The explanation for this decision must be found in a signal omission from the Motor Carrier Act.⁵ Although Part I of the Interstate Commerce Act—from which large portions of the Motor Act (Part II) were taken—permits a rail shipper to seek either damages in court or reparation before the Commission,⁶ the shipper by truck or bus has been given neither remedy. Moreover, in light of this omission it has been held that no common law remedies were preserved to the motor shipper despite the general saving clause—that Congress, in other words, manifested by its silence a design to displace all private remedies.⁷

The problem which this case places in sharp relief recurs frequently, and affects many fields of federal regulation other than motor transportation. There are several other regulatory statutes, for example, that are similarly silent with respect to private remedies.⁸ There are other statutes that expressly create certain remedies but leave others to implication.⁹

dismissed the complaint, holding that the act itself created no cause of action and that no non-statutory basis of federal jurisdiction had been alleged. The plaintiff appealed, naming as appellees those carriers with respect to which there was no diversity of citizenship. The complaint was thereafter amended, as against those carriers with whom there was diversity, to allege a violation of the common carrier's common law duty to serve shippers without discrimination. The district court also dismissed that complaint, and a second appeal was taken. The two appeals were consolidated by the court of appeals and decided in a single opinion treating both the statutory and common law claims.

Had the suit been against rail carriers, there appears little question that the shipper could have recovered. See, e.g., *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126 (8th Cir. 1954); *Montgomery Ward & Co. v. Northern Pac. Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953). See generally Marshall, *Carrier Service and the Picket Line: A Dilemma*, 13 LAB. L.J. 301 (1962); Flood, *Common Carrier's Duty to Serve Strike-Bound Plants*, 24 ICC PRAC. J. 301 (1956); Note, *Duty of Common Carrier to Cross Picket Line of Shipper's Employees to Receive Goods for Carriage*, 67 HARV. L. REV. 317 (1953). As a matter of fact, other courts had been more generous than the instant court even to strike-bound motor shippers. E.g., *Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corp.*, 165 F. Supp. 67 (S.D. Ind. 1958); *Quaker City Motor Parts Co. v. Inter-State Motor Freight Sys.*, 148 F. Supp. 226 (E.D. Pa. 1957); *Beck & Gregg Hardware Co. v. Cook*, 210 Ga. 608, 82 S.E.2d 4 (1954). For the highly relevant views of the ICC on this difficult question, see *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719 (1942). Compare *Montgomery Ward & Co. v. Santa Fe Trail Transp. Co.*, 42 M.C.C. 212 (1943), with *Montgomery Ward & Co. v. Consolidated Freightways, Inc.*, 42 M.C.C. 225 (1943).

⁵ 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1958).

⁶ § 9, 24 Stat. 382 (1887), as amended, 49 U.S.C. § 9 (1958). This section also requires the aggrieved shipper to elect between the two remedies available to him.

⁷ *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959).

⁸ Federal Power Act, 41 Stat. 1063 (1920), as amended, 16 U.S.C. §§ 791a-825 (1958); Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w (1958); Federal Aviation Act, 72 Stat. 731 (1958), 49 U.S.C. §§ 1301-1542 (1958).

⁹ For a general discussion of implied remedies see, e.g., Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

Uncertainties may also arise where the legislature has failed to impose sanctions upon illegal activities that were also proscribed under the common law. Rarely do the terms of such statutes explain either the omission or the incomplete provision of private remedies. Thus the courts have had to infer legislative intent in fashioning new statutory remedies or preserving remedies from the prior law. It is hardly surprising that the results have been far from uniform.

The problem would be readily solved if the legislative history explained the failure of the statute to mention private remedies. In the absence of such explanation, however, recourse must be made to less certain interpretative guides. To begin, the possibility of mere inadvertence must be rejected; it is inconceivable that the legislature simply overlooked so important a matter as private remedies. It is quite possible, though, that the draftsmen considered the existing common law remedies so effective that new private sanctions simply were not needed. This theory would invite the continued recognition of prior remedies that do not impair the regulatory scheme, and would not clearly preclude the implication of new private claims against statutory violations. On the other hand, the legislature might well have intended to immunize a regulated industry from the heavy burdens of private damage suits, at least during the early years of regulation. Or the draftsmen might have designed so delicate or intricate a regulatory framework that no room remained for the courts to supplement the agency's superintendence of the regulated sector. It is clear that no private lawsuits would be permitted under either of the last two theories.

Such ambiguities and uncertainties may eventually evoke a response from the legislature in the form of clarifying amendments. In the motor carrier field, for example, countless private remedy proposals have been introduced,¹⁰ but to date none has succeeded. At the present time, however, there are strong indications that amendments now pending may pass the Congress,¹¹ but only after a quarter century of judicial and administrative guesswork.

If the legislature does not respond, the issue remains in the hands of

¹⁰ *E.g.*, S. 798, H.R. 4872, 79th Cong., 1st Sess. (1945); H.R. 2324, H.R. 2335, 80th Cong., 1st Sess. (1947); S. 3707, 83rd Cong., 2d Sess. (1954); S. 723, 84th Cong., 1st Sess. (1955); S. 378, 85th Cong., 1st Sess. (1957); H.R. 8031, 86th Cong., 1st Sess. (1959); H.R. 9903, 88th Cong., 2d Sess. (1964).

¹¹ See H.R. REP. NO. 1144, 88th Cong., 2d Sess. 16, 60-62 (1964). In his Transportation Message of April 5, 1962, President Kennedy urged "that all common carriers, including freight forwarders and motor carriers, be required to pay reparations to shippers charged unlawfully high rates." 108 CONG. REC. 5985, 5988 (1962). The failure of Congress to enact any of the proposed legislation for this object has been attributed by one commentator to a persistent disagreement whether the reparations power should be given to the ICC or vested exclusively in the courts. See FLOOD, *TRAFFIC MANAGEMENT* 459 (2d ed. 1963).

the courts. One solution, which has the virtue of simplicity if no other, is to turn the aggrieved party out of court on the theory that if the lawmakers had intended any private relief they would have given the agency the power to redress his grievances. Fortunately, the courts have usually been more generous and more imaginative. The experience under the Motor Carrier Act, for example, reveals a judicial attempt to employ pragmatic criteria to select among the prior remedies those which should survive according to their consistency with the statutory scheme. In other fields where the problem has arisen, there have been a number of cases and a good deal of scholarly comment about implied rights of action against conduct that violates a regulatory statute.¹² Much attention has also been lavished in deciding whether such implied remedies for violation of federal regulatory laws are within the nondiversity jurisdiction of the federal courts.¹³ All but neglected, however, has been the cognate problem of preserving prior common law and statutory remedies to fill the lacunae in the statutory scheme.

It is with the survival of prior remedies against federally regulated defendants that this article will be concerned.¹⁴ We begin with a survey of the experience under the Motor Carrier Act. Even if the legislation now pending resolves the motor carrier problem, that experience will continue to provide insights into similar problems elsewhere in the federal regulatory system. Also, the materials for the study of the motor carrier problem are richer than those in any other area.

The second part of the article will expand the inquiry from the particular case to the general problem, and will attempt to describe some criteria for the solution of the problem as it arises elsewhere. Such criteria are seldom to be found in cases which deal directly with the preservation of prior remedies, so that much reliance has to be placed on the analogous materials concerning the implication of new statutory remedies. A third and final section of the article will consider several procedural problems that must be faced in the interpretation and application of whatever prior remedies are held to survive.

¹² See note 9 *supra*.

¹³ See, e.g., Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1045-58 (1960); Note, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy*, 48 COLUM. L. REV. 1090 (1948); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

¹⁴ This article will deal only with the private remedy for money damages or reparations. The availability of injunctive relief against conduct which allegedly violates the common law or the regulatory statutes is a distinct and perhaps even more difficult matter. It is necessarily beyond the scope of this article. For a consideration of some of the special problems involved in the granting of injunctive relief under an administrative statute that makes incomplete provision for private remedies, see Loss, *supra* note 13, at 1068-83.

I

PRIVATE REMEDIES UNDER THE MOTOR CARRIER ACT

When Congress adopted the Motor Carrier Act in 1935, the Interstate Commerce Commission already had considerable experience with private suits against rail carriers. The aggrieved shipper either could sue for damages in the federal district court (in which case the reasonableness of any challenged carrier practices had to be referred to the Commission's expert judgment),¹⁵ or could file a complaint for reparation directly with the Commission.¹⁶ The courts and the Commission worked closely together regardless of how the case came up, for a reparation award could not be enforced against the carrier until the shipper brought an enforcement suit in the district court.¹⁷ Such a suit amounted virtually to trial de novo, since the Commission's award was to be treated only as "prima facie evidence."¹⁸ Thus, over the years a pathway had become well worn between the courts and the Commission by litigants travelling both ways.¹⁹

It was this background of experience that enabled the ICC to come quickly to the aid of the aggrieved motor shipper despite the silence of the statute. It was obvious from the outset that the Commission had no power to grant reparation.²⁰ But there seemed no reason why the shipper

¹⁵ Such referral of essentially "administrative" questions arising in the course of private litigation against regulated carriers has long been required by the decision of *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). For the origins, scope, and development of this doctrine, see 2 SHAREFMAN, *THE INTERSTATE COMMERCE COMMISSION* 393-406 (1931); 3 DAVIS, *ADMINISTRATIVE LAW* 1-14 (1958); Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 581-92 (1954).

¹⁶ § 9, 24 Stat. 382 (1887), as amended, 49 U.S.C. § 9 (1958).

¹⁷ § 16, 24 Stat. 384 (1887), as amended, 49 U.S.C. § 16(2) (1958). With respect to this provision, Professor Sharfman observes that the special treatment of reparation awards "arises from the fact that they are concerned exclusively with past transactions, and that they are designed to afford private redress to particular parties, rather than to further general public ends through the process of regulation." 2 SHAREFMAN, *op. cit. supra* note 15, at 387 n.64.

¹⁸ § 16, 24 Stat. 384 (1887), as amended, 49 U.S.C. § 16(2) (1958). The present section provides, more fully, that the enforcement proceeding "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated . . ." In the early decision of *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915), the Supreme Court explained that this section "only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence."

¹⁹ It should be noted here, and will be more fully explained later, that the Commission was not altogether happy with its responsibilities in the matter of rail reparations. See note 47 *infra*. On several occasions, the ICC had urged that exclusive power to grant reparations for allegedly unlawful past charges be vested in the courts. See generally 2 SHAREFMAN, *op. cit. supra* note 15, at 387.

²⁰ The Commission has quite consistently adhered to this restricted view of its own powers in motor-carrier private suits. See, e.g., *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43

might not file an ordinary lawsuit which would be held in abeyance pending referral to the Commission of the reasonableness of the carrier's rates or services.²¹ The doctrine of primary jurisdiction appeared to require such a referral, no less in motor than in rail cases.²² As long as the Commission's finding was given the status of "prima facie evidence" by the court, the requirements of primary jurisdiction would seem as fully complied with in the one case as the other.

Thus, a procedure improvised during the early years of motor regulation served to circumvent the impotency of the two tribunals involved—the court's lack of power to decide questions of reasonableness, and the agency's lack of statutory authority to award damages or reparation. In practical effect the procedure closely paralleled the procedure long employed in rail reparation cases.²³ Although the motor shipper lacked the inexpensive and convenient reparation remedy available to the rail shipper, an ingenious piece of interstitial lawmaking substantially minimized the competitive disadvantage at which Congress appeared to have placed him. In 1959, however, all this came to an end when the United States Supreme Court scrutinized this improvised procedure for the first time.

A. The Motor Shipper's Remedy in the Supreme Court

In *T.I.M.E. Inc. v. United States*,²⁴ the Supreme Court held, five-to-four, that after shipment a motor shipper could no longer litigate the

M.C.C. 337, 340 (1944); *W. A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co.*, 11 M.C.C. 365, 366 (1939). On the nature and development of the procedure which the Commission improvised in the early years of motor carrier regulation, see generally Monheim, *An Analysis of the Question of Reparation Involving Motor Carriers*, 27 ICC PRAC. J. 257 (1959).

²¹ This procedure seemed to have received the blessing of the Supreme Court in closely analogous contexts where the Commission was also without power to grant complete relief, and could only decide the question of reasonableness in aid of pending litigation. See, e.g., *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 432-33 (1940); *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 312 (1935).

²² See note 15 *supra*. The Commission quite naturally assumed from the outset that the requirements of the doctrine of primary jurisdiction applied equally to motor, rail, and water-carrier cases. Thus in *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337 (1944), the leading case in the development of the improvised procedure, the Commission concluded that "the rationale of the *Abilene* case has been translated into legislative grant under part II and that damages for the exaction of an unreasonable rate, specifically forbidden, are not recoverable without a determination by us of what was the reasonable rate whereby they may be measured." *Id.* at 342.

²³ For a thorough general survey of the interaction between the courts and the Commission in reparation cases before passage of the Motor Carrier Act, see 3-B SHARFMAN, *op. cit. supra* note 15, at 329-59 (1936); 2 *id.*, at 393-406 (1931).

²⁴ 359 U.S. 464 (1959). The single opinion of the Court decided two cases combined for argument because they shared the essential question of law though they arose upon quite

reasonableness of charges based on a carrier's filed and published tariffs. The majority concluded that Congress had meant to leave the shipper no recourse except to protest filed increases in advance of shipment; otherwise omission of the private remedy provisions would have been a meaningless and futile gesture. In thus holding, the Court also decided two subsidiary points: first, that the motor act's prohibitions against unjust and

different facts. The earlier of the two cases, *United States v. T.I.M.E., Inc.*, 252 F.2d 178 (5th Cir. 1958), involved charges for several shipments of scientific instruments for the United States. The carrier had charged on the basis of a through tariff covering the entire journey. There were also on file, in the schedules of other motor carrier conferences, separate rates for the two major segments of the through route, the aggregate of which was lower than the published through rate. The United States contended that the combination rather than the through rate should have applied to the shipments in question, or alternatively that if the through rate did apply, that rate was presumptively unlawful to the extent it exceeded the combination rate. When the United States refused to pay on the basis of the through rate, the carrier brought suit in the district court under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1958), for the disputed difference. The Government asked that the suit be stayed pending referral of the question of reasonableness to the ICC. The district court held the through rate applicable but entered summary judgment for the carrier on the ground that neither court nor Commission had the power to reopen the reasonableness of published rates applicable to past motor shipments. The court of appeals reversed, however, and ordered the referral. 252 F.2d 178 (5th Cir. 1958).

The companion case, *United States v. Davidson Transfer & Storage Co.*, 259 F.2d 802 (D.C. Cir. 1958), was also a suit by a motor carrier against the United States to recover a disputed amount—based upon a state ton-mile truck tax—which the carrier had included in its charges. At the time of the suit, the ICC had suspended the tariff in question but had not yet completed its investigation. Eventually the Commission found the surcharge unlawful and ordered it excised from the applicable rates. But the higher rate had gone temporarily into effect at the time of the disputed shipments because the period of suspension had expired. Upon the Government's protest the carrier had refunded the disputed amount previously collected, but thereafter sued for a refund in the district court under the Tucker Act. Here, as in *T.I.M.E.*, the district court refused to seek the advice of the Commission on the reasonableness of the disputed rate, even though here that would have required no more than awaiting the outcome of the ICC hearing already in progress. The court of appeals, relying heavily on the Fifth Circuit's *T.I.M.E.* decision, reversed. *Ibid.*

The procedure by which these cases arose differed somewhat from the procedure in the typical case involving a private shipper. The private shipper has no alternative but to pay the charges on the basis of published tariffs and then sue the carrier to recover any alleged overcharges. Section 217(b) of the act, 49 Stat. 561 (1935), as amended, 49 U.S.C. § 317(b) (1958), forbids carriers to "collect or receive a . . . less or different compensation for transportation . . . than the rates, fares, and charges specified in the tariffs in effect at the time . . ." However, a special statute permits the United States as shipper "to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." Transportation Act of 1940, § 322, 54 Stat. 955, as amended, 49 U.S.C. § 66 (1958). The practice appears to have developed prior to these two cases under which carriers acquiesced in demands by the General Accounting Office, based on post-shipment audit, for the refund of alleged overpayments. This practice was apparently followed because the future deductions that the statute contemplated would unduly complicate the carrier's accounting. The refund thus made under protest was generally treated by the Government, the carriers, and the courts as the legal equivalent of the statutory deduction. See Brief for Petitioner, p. 35 n.*, *Davidson Transfer & Storage Co. v. United States*, 359 U.S. 464 (1959).

unreasonable charges²⁵ furnished no basis for an implied private right of action; and second, that the act's saving clause²⁶ could not be read as preserving the common law remedy against excessive or discriminatory charges.²⁷ The Court was unimpressed that the Commission had consistently and for many years taken an opposite view, and that carriers and shippers had assumed the existence of a private remedy.²⁸ To the majority it simply seemed "anomalous" that Congress would have omitted any direct private remedies only to force the aggrieved shipper into a procedural labyrinth.²⁹

The decision threw shippers, courts, and the Commission into something of a quandary. The Commission began at once to dismantle the machinery for processing motor-shipper complaints, and dismissed several pending proceedings.³⁰ The lower federal courts quite generally assumed

²⁵ §§ 216(b), (d), 49 Stat. 558 (1935), as amended, 49 U.S.C. §§ 316(b), (d) (1958).

²⁶ § 216(j), 49 Stat. 560 (1935), 49 U.S.C. § 316(j) (1958).

²⁷ The courts and the Commission have regularly assumed the existence of such a common law right in the shipper. See *Arizona Grocery Co. v. Atchison, Topeka & S.F. Ry.*, 284 U.S. 370, 383 (1932); *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, 342 (1944). On the other hand, it has been forcefully argued that no such right was ever recognized in the absence of a regulatory statute prohibiting excessive charges. See *ATCHISON, FAIR REWARD & JUST COMPENSATION, COMMON CARRIER SERVICE* 10 (1954). There is some support for the latter view. An early treatise stated, for example: "If unreasonable or exorbitant charges be claimed or demanded by the [railroad] company, and are tacitly acquiesced in and paid without protest by the party seeking the service, and there is no rule of law but that of the common law, the party thus paying has no right of action for the excess so paid, although the amount paid be more than a reasonable compensation, if there be no mistake, deception or fraud. . . . On the other hand, he may pay the amount demanded, however exorbitant, protesting against the same at the time, clearly and distinctly, for excessiveness, and afterward, if the matter stands as at common law, may have his action against the carrier for the excess, and recover for the same." 2 *RORER, RAILWAYS* 1371-72 (1884). For an earlier and rather inconclusive view of the common law on this matter, see *REDFIELD, RAILWAYS* ch. XVIII (1858).

²⁸ In addition to the decisions of the two courts of appeals that *T.I.M.E.* reversed, see *Smith's Transfer Corp. v. Barksdale*, 259 F.2d 498 (4th Cir. 1958) (dictum); *United States v. Canfield Driveway Co.*, 159 F. Supp. 448 (E.D. Mich. 1958); *United States v. Garner*, 134 F. Supp. 16 (E.D.N.C. 1955); *New York & New Brunswick Auto Express Co. v. United States*, 126 F. Supp. 215 (Ct. Cl. 1954). In these cases the courts seem to have assumed that as long as the question of the reasonableness of the disputed charges was referred to the ICC, the shipper could either recover the amount by which he had been overcharged, or resist the carrier's suit for an outstanding but disputed balance.

²⁹ Mr. Justice Black dissented in an opinion in which the Chief Justice, Mr. Justice Douglas, and Mr. Justice Clark joined. The dissent relied more heavily upon the administrative practice and the statutory interpretation of the Commission itself. Mr. Justice Black chided the majority for its novel suggestion that "primary jurisdiction is inconsistent with court remedies of any kind." In summary, the dissenting Justices found the result particularly regrettable since it "leaves shippers with no remedy at all however unreasonable and unlawful a past rate may have been, and although there is not a word in the Act, and nothing to which we have been directed in its history, that shows any congressional purpose to take away the pre-existing remedy." 359 U.S. at 483 (dissenting opinion).

³⁰ The major dismissal proceeding was *Ford Motor Co. v. Standard Transp. Co.*, 308 I.C.C. 304 (1959), which was soon followed by, e.g., *Joslyn Mfg. & Supply Co. v. Trans-*

that the Supreme Court had decreed the death of all private remedies involving any question of carrier conduct referable to the ICC.³¹ It was thus increasingly apparent that the Court might soon be asked to reconsider the scope of its decision. Three years after *T.I.M.E.* the Court reviewed a case involving a cognate damage claim under the Motor Carrier Act. This time the Court reached a somewhat different conclusion.

In *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*,³² a shipper sought damages for the alleged misrouting of his goods over an interstate route when the carrier had available a cheaper certificated intrastate route between the same points. While his suit was pending in the district court the shipper went to the ICC and obtained a finding that the carrier's routing practice was unlawful.³³ The lower courts, convinced that *T.I.M.E.* had ousted all such claims, dismissed the suit.³⁴ The Supreme Court re-

american Freight Lines, 308 I.C.C. 799 (1959), and *Industrial Steel & Supply Co. v. Freight Ways, Inc.*, 308 I.C.C. 389 (1959). See also 11 SYRACUSE L. REV. 128 (1959). After the disposition of the *Ford Motor* case, a trade publication commented that there were "many such cases under consideration at the Commission, and it was said that reports and orders in line with the 'pilot' case were being drawn up." *Traffic World*, Aug. 15, 1959, p. 70.

³¹ Although there was some uncertainty about the scope and implications of *T.I.M.E.*, the lower courts tended to resolve doubts in favor of a broad reading of the Supreme Court's decision. *Pensick & Gordon, Inc. v. California Motor Express*, 302 F.2d 391 (9th Cir.), *vacated and remanded*, 371 U.S. 184 (1962); *Campbell "66" Express, Inc. v. United States*, 302 F.2d 270 (Ct. Cl. 1962); *West Tennessee Motor Express, Inc. v. Dyersburg Cotton Prods., Inc.*, 298 F.2d 710 (6th Cir. 1962); *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 293 F.2d 205 (2d Cir. 1961), *rev'd*, 371 U.S. 84 (1962); *Lynchburg Traffic Bureau v. Smith's Transfer Corp.*, 285 F.2d 743 (4th Cir. 1961), 309 F.2d 678 (4th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963). Various comments on the *T.I.M.E.* decision were critical, though more often of the breadth of the reasoning than of the result. See, e.g., 14 RUTGERS L. REV. 205 (1959); 33 SO. CAL. L. REV. 97 (1959); 12 STAN. L. REV. 467 (1960); 7 U.C.L.A.L. REV. 117 (1960). *But cf.* 13 VAND. L. REV. 412 (1959). For more thorough, and generally more sympathetic considerations of *T.I.M.E.*, see Comment, *The Doctrine of Primary Jurisdiction and the T.I.M.E. Case*, 27 U. CHI. L. REV. 536 (1960); *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 213-17 (1959).

³² 371 U.S. 84 (1962).

³³ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 302 I.C.C. 173 (1957). The Commission declared the routing practice to have been unreasonable and issued a cease-and-desist order. The carrier then brought an action against the Commission and the United States to set aside the report and the order. While that suit was pending, the ICC amended its decision by striking out the cease-and-desist order, leaving only the findings concerning the carrier's past practices. The three-judge district court thereupon held that it no longer had statutory jurisdiction to review the Commission's action. *Eastern Freight-Ways, Inc. v. United States*, 170 F. Supp. 848 (D.N.J. 1959). Decision of that case was then held in abeyance by a single judge of the District of New Jersey pending disposition of the shipper's main action, which was then on appeal, following *T.I.M.E.*, from the Southern District of New York. See Record, p. 15. Thus, as the Supreme Court noted with apparent disapproval, "the litigation has been bifurcated into two District Courts, whose further proceedings may yet be separately appealable." 371 U.S. at 85 n.*.

³⁴ The opinion of the District Court for the Southern District of New York is unreported. See Record, pp. 20-21. The opinion of the Court of Appeals for the Second Circuit, affirming the district court's dismissal, over the vigorous dissent of Judge Moore, is reported at 293 F.2d 205 (2d Cir. 1961).

versed, six-to-three,³⁵ noting that the issue here was "a far cry from that in *T.I.M.E. Inc. v. United States*"³⁶ The Court held it was irrelevant to the survival of common law remedies that the reasonableness of a carrier's routing practices had to be referred to the Commission.³⁷ The essential test for deciding whether a particular remedy was "inconsistent" and therefore did not survive was now a more flexible, more pragmatic one: "the effect of the exercise of the remedy upon the statutory scheme of regulation."³⁸ Applying that test the Court concluded that although the remedy against excessive rates had been inconsistent with the act, a remedy against alleged misrouting was altogether consistent.

In addition, the Court was concerned that without such a remedy the shipper would be virtually helpless against the unscrupulous and errant carrier—a result Congress could not have intended.³⁹ But to the dissenters,

³⁵ Mr. Justice Clark delivered the opinion of the Court, in which the Chief Justice and Justices Black, Douglas, Brennan, and Goldberg joined. Mr. Justice Harlan dissented in an opinion which Justices Stewart and White joined. Justices White and Goldberg had come onto the Court since the decision in *T.I.M.E.* Of the other seven Justices, only Mr. Justice Brennan was in the majority in both cases; the Chief Justice and Justices Black, Douglas, and Clark had been the four dissenters in *T.I.M.E.* Justices Frankfurter and Whittaker, who had retired in the interim, had joined the majority in the earlier case.

³⁶ 371 U.S. at 86.

³⁷ The court so assumed on the authority of *Northern Pac. R.R. v. Solum*, 247 U.S. 477 (1918), which had required a referral to the Commission of alleged misrouting practices by a rail carrier. It could be argued, however, that the instant case was not governed by that rule, since it required only a determination of which of two concededly lawful rates—one for interstate and the other for intrastate shipment—was applicable. The question of applicability is one which the courts may determine without prior resort to the Commission. Thus, the case was characterized by the Associate General Counsel of the ICC in a letter to the district judge of the District of New Jersey before whom the case came after the three-judge court dismissal: "Thus, the claim is not that the rate charged was intrinsically unreasonable, rather the controversy is over which of two rates, each embodied in published tariffs of the carrier, should have been charged. The *T.I.M.E.* and *Davidson* cases do not purport to deal with the present situation." Record, p. 18. See also *Wooleyhan Transp. Co. v. George Rutledge Co.*, 162 F.2d 1016 (3d Cir. 1947).

³⁸ 371 U.S. at 89.

³⁹ This concern was largely based upon the fact that the motor shipper does not have the rail shipper's right, § 15(8), added by 36 Stat. 553 (1910), as amended, 49 U.S.C. § 15(8) (1958), to designate or prescribe to the initial carrier a routing for his goods which the carriers are obligated to honor. The omission of any such provision in the later statute seems explainable in light of the absence of any extensive network of joint rates and through rates at the time of adoption of the motor act. There were various reasons why the statute did not oblige motor carriers to establish such joint rates and through routes. See TAFF, *COMMERCIAL MOTOR TRANSPORTATION* 430 (rev. ed. 1955). Judge Moore, dissenting in the court of appeals, anticipated the significance which this distinction might later assume in the case: "As to unreasonable routing practice no built-in protection for the shipper has been provided. Nor does a shipper have notice that it will be routed around Robin Hood's Barn until after this has actually occurred. In effect the shipper is in a position similar to that of a shipper who has been charged a rate in excess of the filed tariff." 293 F.2d at 209 (dissenting opinion). For a prescient comment on the Second Circuit's decision, see 62 COLUM. L. REV. 521 (1962).

T.I.M.E. "plainly controls"; the special considerations that required the dismissal of the overcharge claim applied alike to the misrouting claim.⁴⁰ The impact of *Hewitt-Robins* upon other litigation was immediate. Two weeks later the Court remanded to the court of appeals the case involving the struck toy wholesaler with which this article began.⁴¹ And that is roughly where matters now stand.⁴²

In order to understand the development of the motor carrier problem, several elements must now be examined more closely—elements which converged in the two Supreme Court decisions just considered. Of these the first to be consulted is understandably the legislative history, since the terms of the statute offer no clue why private remedies were not mentioned.

Any suggestion of inadvertence must be rejected at the start. The close correspondence between many sections of the rail and motor acts and the quite detailed private remedy provisions of the former make it inconceivable that Congress could simply have overlooked the matter.⁴³ Even conceding original inadvertence, there is the further fact that Congress has consistently declined since 1935 to make any provision for private remedies when amendments have come to the floor.⁴⁴

A more plausible explanation for the omission is that Congress may have wanted to protect small carriers from possibly ruinous lawsuits during the early years of federal regulation. There is, however, no contemporaneous evidence of such solicitude. Even the meager retrospective support

⁴⁰ 371 U.S. at 90-92 (dissenting opinion).

⁴¹ *Pensick & Gordon, Inc. v. California Motor Express*, 302 F.2d 391 (9th Cir.), *vacated and remanded*, 371 U.S. 184 (1962). The Ninth Circuit thereafter held that a common law cause of action did survive, and sent the case back to the district court for a full hearing. 323 F.2d 769 (9th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

⁴² There is one other development worth noting. In the summer of 1963 the ICC issued a somewhat unusual *ex parte* statement designed to "clarify any misunderstanding resulting from the decision of the Supreme Court in *T.I.M.E., Inc. v. United States* . . . and to direct the attention of carriers and the shipping public to the decision of the same Court in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.* . . ." Ex Parte No. 235, Adjustment of Claims for Damages Resulting from Misrouting, 319 I.C.C. 462 (1963). The statement then set forth various criteria to guide the settlement of misrouting claims. Two Commissioners dissented, however, on the ground that such an interpretative order was unnecessary, if not unseemly. "Whatever doubt," they concluded, "may have existed as to the effect of the *T.I.M.E.* decision on misrouting practices of motor carriers *Hewitt-Robins* put to rest. The latter decision furnishes ample guide . . . as to the handling of misrouting matters." *Id.* at 463. See also *Traffic World*, Oct. 19, 1963, p. 24.

⁴³ See, e.g., *Consolidated Freightways, Inc. v. United Truck Lines*, 216 Ore. 515, 521-23, 330 P.2d 522, 525 (1958), *cert. denied*, 359 U.S. 1001 (1959). While the Supreme Court did not even consider the possibility in *T.I.M.E.*, the Court has declined to attribute less obvious omissions in other contexts to mere inadvertence. See, e.g., *Miner v. Atlass*, 363 U.S. 641, 645-46 (1960); *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 113 (1960).

⁴⁴ See House and Senate bills cited note 10 *supra*.

for this theory is far from conclusive.⁴⁵ Moreover, this explanation appears incompatible with the paramount concern of Congress to protect truckers against ruinous price-cutting competition—*i.e.*, a concern that carriers caught in a struggle for survival would be underpaid rather than that shippers would be overcharged. Given the highly competitive state of the industry, the pervasive assumption seems to have been that shippers needed no explicit protections against excessive rates.⁴⁶

There is also an hypothesis that the framers feared creation of private remedies would saddle the ICC with an onerous administrative burden. It is true the Commission had long been unhappy about its duties in granting reparation to rail shippers, and had more than once asked Congress for relief.⁴⁷ This theory would be tenable, however, only if the draftsmen had anticipated a flood of private litigation against truckers, which, as we have already seen, they apparently did not. Moreover this theory explains too little. Whatever it proves about the absence of any administrative repara-

⁴⁵ Apparently the only corroboration for this hypothesis is found in the testimony of Commissioner Joseph B. Eastman, one of the architects of the Motor Carrier Act, during hearings on the Transportation Act of 1940: "So far as reparation is concerned, there is no reason why these provisions should not be applied to motor carriers as well as to railroads. They were omitted from the Motor Carrier Act only because of the desire to lighten the burdens of motor carriers in the early stages of regulation, in the absence of any strong indication of public need." *Hearings on S. 1310, S. 2016, S. 1869, and S. 2009, Before the Senate Committee on Interstate Commerce*, 76th Cong., 1st Sess. 791-92 (1939).

⁴⁶ See HUDSON & CONSTANTIN, *MOTOR TRANSPORTATION: PRINCIPLES AND PRACTICES* 462-64, 475-76 (1958). In the Hearings cited at note 45, *supra*, Commissioner Eastman assured the Senate Committee that motor carriers "have practically no traffic which is noncompetitive, and there is little danger that they will exact exorbitant charges." He continued: "It follows that there is nothing to indicate that shippers need provisions to enable the Commission to award reparation for damages suffered because of unreasonable charges." *Hearings on S. 1310, S. 2016, S. 1869, and S. 2009, supra* note 45, at 792.

On the present state of competition in the motor transport industry, which may cast some doubt on the optimistic assumptions of the framers of the act, see generally FULDA, *COMPETITION IN THE REGULATED INDUSTRIES—TRANSPORTATION* ch. 5 (1961); Hale & Hale, *Competition or Control III: Motor Carriers*, 108 U. PA. L. REV. 775 (1960).

⁴⁷ This hypothesis has been suggested in 12 STAN. L. REV. 467, 468 (1960). The Commission's dissatisfaction expressed in its annual report for 1916 is representative: "If we had no power to award reparation, a mass of cases which now require consideration and decision, with all their attendant detail work and expense, would be kept off the Commission's dockets." 30 ICC ANN. REP. 76 (1916). See also 33 ICC ANN. REP. 18 (1919), in which the Commission reiterated its earlier suggestion that the act be amended "so as to place the power to award reparation exclusively with the courts." For a later summary of some of the Commission's problems under the reparations procedure before 1935, and the reasons for its dissatisfaction, see Miller, *The Necessity for Preliminary Resort to the Interstate Commerce Commission*, 1 GEO. WASH. L. REV. 49, 78-79 (1932). Recently it has been urged that any legislation to confer private remedies upon motor shippers should also limit such actions to the courts. See FLOOD, *op. cit. supra* note 11, at 459. But the proposed amendments now pending before Congress provide the shipper with the same election between a judicial and administrative remedy that the rail shipper has long enjoyed. See H.R. REP. NO. 1144, 88th Cong., 2d Sess. 16, 60 (1964).

tion provisions, it fails to explain the omission of any provision for damage suits in the federal district courts, since the latter had long been available as an alternative remedy to the rail shipper.⁴⁸

Since neither of these theories deserves much credence, the safest position is to conclude that Congress in 1935 had only slight interest in the matter of private remedies. As Mr. Justice Black pointed out in his *T.I.M.E.* dissent, later statements by members of the Commission and others familiar with the origins of the statute suggest a vague understanding that the courts would continue as at common law to redress any grievances the motor shipper might suffer.⁴⁹ Private remedies were therefore most likely not mentioned because their inclusion was considered unnecessary.

This hypothesis leaves open, however, the further question why Congress has taken no action on private remedies since 1935. As to this, Mr. Justice Black has suggested that congressional silence must have implied approval of the improvised two-stage procedure.⁵⁰ That inference is, however, a treacherous one for several reasons. First, the question was never presented to Congress in connection with proposals to abolish whatever shippers' remedies had evolved, but only in the context of proposed expansions or extensions of such remedies.⁵¹ Second, it is always hazardous to infer legislative approval from nothing more decisive than silence or inaction.⁵² Finally, if the failure of Congress to take any action before *T.I.M.E.* implied approval of the improvised procedure, then the subsequent failure to overrule that decision would logically have to mean that Congress changed its mind on the issue almost overnight.⁵³

⁴⁸ § 9, 24 Stat. 382 (1887), as amended, 49 U.S.C. § 9 (1958).

⁴⁹ See *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 485-87 (1959) (dissenting opinion).

⁵⁰ *Id.* at 487-90.

⁵¹ See *id.* at 477.

⁵² See, e.g., *Girouard v. United States*, 328 U.S. 61, 69 (1946). For a thorough consideration of the problem of inferring legislative intent or approval from silence or reenactment without change, see HART & SACKS, *THE LEGAL PROCESS* 1393-1406 (tent. ed. 1958). The authors cite myriad plausible reasons for the failure of a legislature to act affirmatively on proposed statutes—many of which may have little to do with legislative judgment on the merits. *Id.* at 1395-96.

⁵³ Legislation was soon proposed to restore the private remedy procedure that *T.I.M.E.* had extinguished, but no favorable action was taken. See H.R. 8031, 86th Cong., 1st Sess. (1959).

There is another possible explanation that cannot quite be rejected out of hand. The dissenters in *T.I.M.E.* suggested that Congress must have meant to approve the improvised procedure when the statute was amended in 1949, § 204a, added by 63 Stat. 280 (1949), as amended, 49 U.S.C. § 304a (1958), to provide a uniform statute of limitations for actions at law "for recovery of overcharges." However, the crucial term "overcharges" was defined elsewhere in the amendment as charges "in excess of those applicable thereto under the tariffs lawfully on file with the Commission." § 204a(5), added by 63 Stat. 281 (1949), 49 U.S.C. § 304a(5) (1958). Thus the tenor of this amendment might well cut the other way, suggesting

Although the saving clause preserves to the motor shipper all remedies that are "not inconsistent," neither the text of the act nor its legislative history supplies any reliable canon of consistency. On the one hand, Congress could not have meant to foreclose all private remedies unless the saving clause was considered a meaningless appendage to an otherwise meaningful statute. Yet the draftsmen could not, on the other hand, have meant all private remedies to survive, since they could so easily have made such a design explicit in terms identical to those used in the original Interstate Commerce Act. A formula must therefore be fashioned or discovered somewhere between these two extremes in order to give some vitality to the saving clause. This is what the *Hewitt-Robins* opinion initiated by directing attention to the "effect of the exercise of the remedy upon the statutory scheme of regulation." That test cannot be meaningfully applied, however, without a fuller understanding of the two-stage improvised procedure by which the motor shipper's surviving remedies must be processed.

The improvised procedure closely resembled, as we have noted already, the procedure that the Interstate Commerce Act had expressly provided for rail shippers. Since the substantive provisions of the motor act drew heavily upon those of the rail statute, and were administered by the same agency, it seems unlikely that a procedure which was the creature of one statute could be deemed "inconsistent" with the operation of the other. If there is "inconsistency" to be found, therefore, the concern ought to be with particular applications of the procedure in aid of particular private remedies, rather than with the adjective framework. Yet in *T.I.M.E.* the Supreme Court cast considerable doubt upon the very nature of the procedure as well as upon its use in connection with the shipper's overcharge claim. That is where the present inquiry must begin.

The Court's initial concern was that the ICC could not arrogate the authority "to accomplish indirectly what Congress has not chosen to give it authority to accomplish directly."⁵⁴ Here the Court relied heavily on a case decided eight years earlier under the Federal Power Act,⁵⁵ a statute which, like the Motor Carrier Act, neither creates private remedies nor gives the Power Commission any reparation jurisdiction. In *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*⁵⁶ one electric public utility company sued another, seeking damages for overcharges that were

that Congress intended thereby to foreclose private suits for overcharges of any other sort. The Commission, incidentally, has held that because of the precise and narrow definition of the term "overcharges" the uniform limitations period does not apply to shippers' suits for recovery of allegedly unreasonable but published tariff charges. *Toledo Steel Tube Co. v. George F. Alger Co.*, 67 M.C.C. 101 (1956). For a discussion of the various kinds of "overcharges" to which § 204a clearly does apply, see FLOOD, *op. cit. supra* note 11, at 450.

⁵⁴ *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 474-76 (1959).

⁵⁵ 41 Stat. 1063 (1920), as amended, 16 U.S.C. §§ 791a-825 (1958).

⁵⁶ 341 U.S. 246 (1951).

alleged to violate the mandate of the power act.⁵⁷ The Supreme Court held that the complaint stated no federally cognizable cause of action because the power act gave neither the courts nor the FPC the authority to grant relief against past charges.⁵⁸ Although the statute declared unreasonable rates unlawful, that declaration supplied no basis by itself for the implication of private remedies. Not only could the courts not determine what would have been a reasonable rate for past transactions, they could not even refer that question to a Commission which lacked power to grant any but prospective relief regarding rates and charges. Although the general practice had been to hold a suit in abeyance pending the referral of questions within an administrative agency's primary jurisdiction, the Court acknowledged "no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose."⁵⁹ Here, then, were "only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide"⁶⁰

Such broad grounds of decision might at first appear to foreclose absolutely the central question of *T.I.M.E.* Since the Motor Carrier Act says no more about private remedies than the power act, the *T.I.M.E.* Court apparently considered that *Montana-Dakota* compelled dismissal of the motor shipper's suit.⁶¹ A closer comparison of the two cases will indicate,

⁵⁷ The charges were alleged particularly to have violated § 205(a), added by 49 Stat. 851 (1935), 16 U.S.C. § 824d(a) (1958), which declares unjust and unreasonable rates to be unlawful.

⁵⁸ It has sometimes been supposed that the Court held the complaint dismissable for want of federal jurisdiction. On the contrary, Mr. Justice Jackson took pains to explain that "there was power in the District Court to decide whether the claims . . . constitute a cause of action maintainable in federal court and, if so, whether it is sustained on the facts." 341 U.S. at 249. Dismissal was eventually required on the quite distinct ground that "the petitioner has not established a cause of action." *Id.* at 255.

⁵⁹ *Id.* at 254. The suggestion that the issue of reasonableness might be referable to the FPC came, curiously, not from the petitioner but from the dissent. Indeed, the petitioner insisted that there "was and is in the act nothing vesting in the Commission power to make findings as to past charges in aid of any court, either in anticipation of court action, or after an action is commenced." Brief for Petitioner, p. 22. Mr. Justice Frankfurter, joined by Justices Black, Reed, and Douglas, dissented on the ground that the peculiar facts of the case showed that the petitioner had very likely been prevented by the respondent's dominant influence from availing itself of the statutory protections against unreasonable or excessive charges. See 341 U.S. at 258-59. In the ordinary case in which the plaintiff showed no more than that past charges might have been unreasonable, though based on properly filed and published tariffs, the dissent agreed with the majority that "recovery of damages in a civil action would not be an appropriate remedy" *Id.* at 258.

⁶⁰ *Id.* at 255.

⁶¹ See *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 475 (1959): "To permit a utilization of the procedure here sought by the Government would be to engage in the very 'improvisation' against which this Court cautioned in *Montana-Dakota*, . . . in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly."

however, that the earlier decision was in many respects distinguishable. Most important, *Montana-Dakota* was concerned only with the creation or implication of a new federal cause of action from the statute and not with the survival of common law remedies.⁶² There was no occasion even to consider a common law right of action, not only because the electric power purchaser apparently had none,⁶³ but more significantly because the plaintiff had in fact pleaded only a statutory claim.⁶⁴ Thus, in the absence of diversity of citizenship (which was not alleged and apparently did not exist) any consideration of a common law remedy would have been altogether gratuitous.

In the history and text of the two statutes, moreover, important distinctions could be found. The legislative history of the power act supplied an answer to the question on which the motor act's history is silent: The draftsmen had withheld private remedies for reasons of policy inconsistent with the continued recognition of any private claims.⁶⁵ In addition there really was no great need for private remedies in view of the power purchaser's effective statutory protections. He could, for example, perceive at once the effect upon him of a rate filed in a contract to which he was directly a party and could make effective protest before the increase took effect.⁶⁶

⁶² On this ground *Montana-Dakota* was distinguished by the two courts of appeals in the *T.I.M.E.* cases, *United States v. Davidson Transfer & Storage Co.*, 259 F.2d 802, 807 (D.C. Cir. 1958), *rev'd sub nom. T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959); *United States v. T.I.M.E., Inc.*, 252 F.2d 173, 181 (5th Cir. 1958), *rev'd*, 359 U.S. 464 (1959). See also 33 So. CAL. L. REV. 97, 104 (1959); 28 U. CHIC. L. REV. 512, 513-14 (1959).

⁶³ See 14 RUTGERS L. REV. 205, 210 (1959).

⁶⁴ The Power Commission had, in fact, not passed upon the question whether it might consider the reasonableness of past charges in the course of this particular litigation. A complaint filed with the Commission before the commencement of the lawsuit had been dismissed as moot because the defendant-respondent had filed a new schedule of rates satisfactory to the plaintiff-petitioner. See *Petition for Certiorari*, pp. 5-6. Earlier, however, the Commission had taken the view that, like the ICC under the Motor Carrier Act, it did have such power to determine reasonableness of past practices. See *City of Cleveland v. Hope Natural Gas Co.*, 3 F.P.C. 150, 187-88 (1942), *rev'd sub nom. Hope Natural Gas Co. v. FPC*, 134 F.2d 287, 310-11 (4th Cir. 1943), *rev'd*, 320 U.S. 591 (1944). For a fuller development of the Commission's views on this question, see *Brief for Petitioners*, pp. 115-21, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). In this litigation, the court of appeals had been generally unimpressed with the Commission's position, but the Supreme Court, in reversing the court of appeals on other grounds, had no occasion to consider the issue.

⁶⁵ A Senate Committee Report, for example, explained that while private remedies might be appropriate for a state public utility law, "the committee does not consider them applicable to one governing merely wholesale transactions." S. REP. NO. 621, 74th Cong., 1st Sess. 20 (1936). Other legislative materials which corroborate this view of the omission are found in *Brief for the FPC as Amicus Curiae*, pp. 9-13, *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

⁶⁶ This appears, at least, to be the case with respect to increases in natural gas rates. See *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 211 (1959). Presumably the effect of changes in electric power rates would be equally apparent to those immediately concerned.

The *Montana-Dakota* Court found no inequity in denying recovery, because the alleged overcharge had presumably long since been passed on to retail consumers. The Court observed, paraphrasing a concession the plaintiff itself had offered, that "if it recoups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover."⁶⁷ Thus, in the Court's judgment recovery of the claimed overcharges would apparently have produced a windfall. By contrast, it seems less clear that a motor shipper's recovery would constitute such a windfall,⁶⁸ although it may be virtually impossible to determine precisely who bears what share of the ultimate burden of excessive trucking costs.⁶⁹

Although *Montana-Dakota* is distinguishable on various grounds, it is not for that reason wholly irrelevant to the problem of *T.I.M.E.* For example, *Montana-Dakota* is still authority for the proposition affirmed in *T.I.M.E.* and not questioned in *Hewitt-Robins* that a statute making "unreasonable" rates unlawful creates by that fact alone no new federal cause of action in favor of one who has been overcharged.⁷⁰ Had the Court said only that in *Montana-Dakota*, there would have been no need to deal with the case when the Court reached the common law claim under the

The statute requires the giving of notice and the opportunity for a hearing if the increase is challenged, § 205(d), added by 49 Stat. 851 (1935), 16 U.S.C. § 824d(d) (1958). The Commission may suspend and investigate filed rates either upon complaint or on its own motion. § 205(e), added by 49 Stat. 852 (1935), 16 U.S.C. § 824d(e) (1958).

⁶⁷ 341 U.S. at 254.

⁶⁸ There is not, however, unanimity on this point. For example, the carrier in the *Hewitt-Robins* case argued that a shipper's recovery would likely produce the sort of windfall which had troubled the Court in *Montana-Dakota*. See Brief for Respondent, pp. 15-16, *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962). Also, Professor Jaffe has suggested that in the motor carrier context as well as that of electric power, "the overcharge has usually been passed along by the one who paid it to some undiscoverable and unreimbursable consumer." Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 589 (1954). Compare Brief for Petitioner, p. 21, *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), with 28 U. CINC. L. REV. 512, 514-15 (1959).

⁶⁹ Any really reliable answer to the windfall question would require a careful and detailed economic analysis of the distribution of the burdens of increased transportation costs—such as has been made with respect to the real incidence of state taxation of interstate sales. See, e.g., Warren & Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 COLUM. L. REV. 49, 71-74 (1938).

⁷⁰ Mr. Justice Harlan, dissenting in *Hewitt-Robins*, suggested that *T.I.M.E.* clearly controlled the subsequent case "to the extent that the complaint purports to allege a statutory cause of action, that is, one based on the terms of the Motor Carrier Act itself." 371 U.S. at 89. Although the complaint in *Hewitt-Robins* recited only a cause of action grounded on the statute (the complaint was filed well before the *T.I.M.E.* decision) diversity of citizenship afforded an independent basis of federal jurisdiction, and the Supreme Court simply assumed that the shipper sought to invoke a common law right. See 371 U.S. at 86. There was thus no occasion to question *T.I.M.E.*'s holding that the statute gave rise to no new cause of action for its alleged violation.

saving clause in *T.I.M.E.* The trouble was that *Montana-Dakota* went much further, albeit in dictum addressed to issues not contested by the parties. It was this dictum upon which the *T.I.M.E.* majority seized for the novel suggestion that even a general saving clause preserves no common law remedies against a carrier's unlawful practices when the reasonableness of those practices must be decided by an agency powerless to award damages as an original matter.⁷¹ So broad a reading of *T.I.M.E.* permits, of course, no distinction between the claim for overcharges and the misrouting claim presented in *Hewitt-Robins*. Indeed, no claims would have survived under the Motor Carrier Act except those, perhaps, for recovery of payments based upon an inapplicable rate or otherwise tainted by some purely technical error.⁷²

The first task in *Hewitt-Robins* was therefore to divorce *T.I.M.E.* from the sweeping implications of *Montana-Dakota* and place it on narrower ground. While *Montana-Dakota* was not cited, this was surely the purpose and result of the new emphasis upon the practical test of "effect of the exercise of the remedy upon the statutory scheme of regulation," for this test necessarily assumes the survival of some pre-existing remedies despite the Commission's inability to award reparation. The focus has now shifted to examining what particular remedies survive because, on a practical appraisal, they are consistent with the statutory scheme.

B. The Improvised Procedure in Perspective

It is now clear, therefore, that the motor act did not displace all pre-existing remedies. There is still the question, however, whether the procedure evolved for the vindication of surviving claims is in any way inconsistent with the statute. The Court suggested in *T.I.M.E.* some doubts on this issue by intimating that the procedure had been rarely used by shippers and seldom sustained by the courts even when it had been invoked. A review of the history of the procedure tends, however, to undermine both these suggestions. During the two decades prior to *T.I.M.E.*, the ICC had on dozens, perhaps hundreds, of occasions considered the reasonableness of motor carrier rates and practices that had been chal-

⁷¹ *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 474-76 (1959).

⁷² For example, those claims that were clearly within the statutory category of "overcharges"—"charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission"—would presumably have survived in any event. § 204a(5), added by 63 Stat. 281 (1949), 49 U.S.C. § 304a(5) (1958). Such claims might arise from various technical errors, such as: assessment of the wrong or an inapplicable rate; errors in description on the bill of lading; errors in weighing; mistakes in interpretation of the filed tariffs; and clerical errors of various kinds. See FLOOD, *TRAFFIC MANAGEMENT* 450 (2d ed. 1963).

lenged in the course of post-shipment litigation.⁷³ Several times the Commission explored fully the theory and rationale of the extra-statutory procedure.⁷⁴ Dissenting views were occasionally recorded,⁷⁵ so that most of the issues mooted in *T.I.M.E.* had already been fully canvassed within the Commission.

It is more difficult to determine the attitude of the courts toward the procedure. Prior to 1959 there were only a handful of reported decisions involving the procedure, and most of these were not illuminating.⁷⁶ But these cases do not reflect the full measure of the judicial reception of the procedure. Apparently a great many more courts had either decided or

⁷³ A quick search of the reported Motor Carrier Cases, noting only those decisions in which the Commission expressly cited either *W. A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co.*, 11 M.C.C. 365 (1939), or *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337 (1944), reveals at least several dozen such cases. Even these probably represent only a fraction of the total because of the Commission's practice of disposing of the great majority of motor carrier cases "without printed report," noted briefly at the back of each volume of reports. Sample cases include the following: *Dixie Mercerizing Co. v. ET & WNC Motor Transp. Co.*, 21 M.C.C. 491 (1940), *on further hearing*, 41 M.C.C. 355 (1942); *Patten Blinn Lumber Co. v. Southern Ariz. Freight Lines, Ltd.*, 31 M.C.C. 716 (1942); *Kingan & Co. v. Olson Transp. Co.*, 32 M.C.C. 10 (1942); *Hausman Steel Co. v. Seaboard Freight Lines, Inc.*, 32 M.C.C. 31 (1942); *Armour & Co. v. Bell*, 44 M.C.C. 34 (1944); *Wolfe Wear-U-Well Corp. v. Columbus & Chicago Motor Freight, Inc.*, 44 M.C.C. 257 (1944); *Victory Granite Co. v. Central Truck Lines*, 44 M.C.C. 320 (1945); *Glenn L. Martin Co. v. W. T. Cowan, Inc.*, 44 M.C.C. 726 (1945), *modified on further hearing*, 47 M.C.C. 303 (1947); *Southeastern Metals Co. v. Roadway Express, Inc.*, 47 M.C.C. 395 (1947); *United States Rubber Co. v. Associated Transp., Inc.*, 48 M.C.C. 6 (1948); *D. E. Bolman Mercantile Co. v. Santa Fe Trail Transp. Co.*, 48 M.C.C. 561 (1948); *Renwal Mfg. Co. v. A. Towle Co.*, 53 M.C.C. 59 (1951); *American Greeting Publishers, Inc. v. A. C. E. Transp. Co.*, 53 M.C.C. 174 (1951); *Pacific Airmotive Corp. v. Los Angeles-Seattle Motor Express, Inc.*, 54 M.C.C. 120 (1952); *Peck's Prods. Co. v. Burlington Truck Lines*, 54 M.C.C. 134 (1952); *E. I. DuPont de Nemours & Co. v. Super Service Motor Freight Co.*, 54 M.C.C. 481 (1952); *Eljer Co. v. Bowman Motor Freight*, 54 M.C.C. 486 (1952); *Manhattan Soap Co. v. Supreme Motor Freight Lines*, 61 M.C.C. 430 (1952); *Kalte v. Central Motor Lines, Inc.*, 61 M.C.C. 529 (1953); *Arma Corp. v. M & M Transp. Co.*, 61 M.C.C. 723 (1953); *Ewald Sales & Supply Co. v. Truck Transp. Co.*, 62 M.C.C. 59 (1953); *United States Gypsum Co. v. Bos Freight Lines*, 63 M.C.C. 212 (1955); *Fedders-Quigan Corp. v. Long Transp. Co.*, 64 M.C.C. 581 (1955); *United States v. Davidson Transfer & Storage Co.*, 302 I.C.C. 87 (1957); *Advance Paint Co. v. Ellis Trucking Co.*, 302 I.C.C. 701 (1958); *Ditto, Inc. v. Pacific Intermountain Express Co.*, 303 I.C.C. 739 (1958); *Hewitt-Robins, Inc. v. Red Star Express Lines of Auburn, Inc.*, 303 I.C.C. 758 (1958); *Wisconsin Axle Div. v. Olson Transp. Co.*, 303 I.C.C. 761 (1958).

⁷⁴ For the most thorough consideration of the foundation of the procedure, and the rules by which it was to be invoked, see *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, 340-44 (1944). See generally Monheim, *An Analysis of the Question of Reparation Involving Motor Carriers*, 27 ICC PRAC. J. 257 (1959).

⁷⁵ See, e.g., *Patten Blinn Lumber Co. v. Southern Ariz. Freight Lines, Ltd.*, 31 M.C.C. 716, 718 (1942) (Commissioner Splawn, dissenting); *United States v. Davidson Transfer & Storage Co.*, 302 I.C.C. 87, 96 (1957); (Commissioner McPherson, dissenting, joined by Commissioners Hutchinson & Minor); *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 302 I.C.C. 173, 178 (1957) (Commissioner Minor, dissenting).

⁷⁶ See cases cited note 28 *supra*.

simply assumed they had power to grant damages to a motor shipper after referring the administrative question to the ICC. From the outset the Commission had viewed with disfavor a shipper's request for a purely advisory determination,⁷⁷ and some proceedings had been dismissed because no lawsuit was pending.⁷⁸ A favorable finding by the Commission was, moreover, of slight value to the shipper without a court proceeding, since the carrier could disregard it with impunity.⁷⁹ Thus it may be inferred that most of the substantial number of ICC proceedings accompanied pending lawsuits, and that a great many courts presumably stood ready to grant damages to shippers depending upon the Commission's findings.

Not everyone was satisfied with the procedure, to be sure. Shippers, for example, had complained that the road to relief was tortuous, time-consuming, and uncertain.⁸⁰ For a group to whom the statute gave nothing except by implication, even such a journey was better than none at all. More important, the carriers apparently never protested the procedure with any vigor. While truckers may well have preferred the complete immunity that *T.I.M.E.* conferred briefly, they were still better off than the railroads. Thus, their complaints were directed only at the recurrent amendments that would have subjected them to ICC reparation. Such amendments, they feared, would permit the awarding of liberal counsel fees, thus inviting claim-chasing by avaricious attorneys.⁸¹ Whatever their reasons, the motor carriers apparently acquiesced for twenty years in the improvised remedial procedure.

⁷⁷ In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, 343 (1944), the Commission cautioned that "generally speaking, adversary proceedings involving past unreasonableness, unjust discrimination, or undue prejudice under part II should not be brought before us prior to the institution of a suit in court in which damages are sought predicated upon the unlawfulness alleged in the complaint." The following year, however, in *Victory Granite Co. v. Central Truck Lines*, 44 M.C.C. 320, 321 (1945), the Commission announced that the prerequisite might be relaxed in exigent circumstances.

⁷⁸ *E.g.*, *Advance Paint Co. v. Ellis Trucking Co.*, 302 I.C.C. 701 (1958); *C. G. Hussey & Co. v. Roadway Express, Inc.*, 303 I.C.C. 789, 790 (1958).

⁷⁹ In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, 343 (1944), for example, the Commission recognized that unless the carrier was "willing to be governed by our conclusions, our action becomes merely a step preliminary to a suit in court." In this respect, of course, the Commission's authority was not significantly less than its authority to make binding reparation awards against rail carriers, since the latter were unenforceable without recourse to the courts by the shipper. See, *e.g.*, 30 ICC ANN. REP. 75-76 (1916). Moreover, even in motor carrier cases the Commission occasionally admonished the carrier voluntarily to refund any amounts collected in excess of what the Commission had found to be the applicable and lawful rate. *E.g.*, *Pacific Airmotive Corp. v. Los Angeles-Seattle Motor Express, Inc.*, 54 M.C.C. 120, 124 (1952).

⁸⁰ See 13 VAND. L. REV. 412, 415 (1959); see also Brief for the United States, p. 33, n.11, *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959). These criticisms appear to have been confined to congressional hearings on the various proposals to extend to motor carriers the private remedy provisions of Part I, rather than to take away the improvised remedies which the motor shippers had theretofore enjoyed.

⁸¹ See *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 485 (1959) (dissenting opinion).

It has also been suggested that, because of the time and expense involved, the procedure favors large shippers and discriminates against their smaller competitors. Indeed there has been some feeling that only the Federal Government as the nation's largest motor shipper has really been able to take advantage of the remedy.⁸² Again, however, the history of the procedure suggests the contrary. The vast majority of the reported ICC proceedings involving referred motor carrier practices have been brought by non-governmental shippers. While the dollar amounts are seldom reported, many of the proceedings appear to have involved small claims of small or medium-sized shippers. So neither the expense nor the delay of the improvised procedure appears to have made it exclusively a rich-man's remedy.

C. The "Practical Effect" Test in Operation

If the courts and the Commission may redress certain grievances of the motor shipper, and if the procedure itself is not inconsistent with the act, the last important question is to what extent its use in aid of particular remedies may thus be inconsistent. This question compels a fairly close parsing and application of the canon of consistency announced by *Hewitt-Robins*—"the effect of the exercise of the remedy upon the statutory scheme of regulation."⁸³ An important qualification to the apparently absolute principle of *T.I.M.E.*, this test raises two further questions: (1) whether the result in *T.I.M.E.* is itself consistent with the new test; and (2) whether that test serves to distinguish the overcharge and misrouting claims.

As one works backward with the more discriminating tools supplied by *Hewitt-Robins*, the central question presented in *T.I.M.E.* becomes considerably more complex. Persuasive arguments appear to cut both ways. It can be contended, for example, that post-shipment suits afford the only effective protection against unreasonable charges. The mere filing of a rate increase or a new schedule, and the tacit approval of the ICC, mean very little because of the enormous number of filings each year and the inability of the Commission to suspend them all *sua sponte*. It is true, of course, that increases may not take effect without thirty days' notice, during which time shippers may protest and call for an investigation.⁸⁴ But the vast number of rates and schedules that may affect a particular shipper at some time in the future makes it almost impossible for him to attack more than a fraction of the new filings. The small shipper, in fact, may not even have a realistic opportunity to study the proposed rates carefully, much less to protest them, until he actually makes a shipment to which they

⁸² See 28 *FORDHAM L. REV.* 544, 548 (1959); 11 *SYRACUSE L. REV.* 128, 129-30 (1959).

⁸³ *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 89 (1962).

⁸⁴ §§ 217(c), 218(c), 49 Stat. 561-62 (1935), 49 U.S.C. §§ 317(c), 318(c) (1958).

apply. Even if he has both the opportunity and the incentive to scrutinize the tariffs carefully, the complexity of the typical schedule and the overlapping of rates in the schedules of several conferences may obscure inequities until it is too late to protest.⁸⁵

There is a special situation in which the equities of the motor shipper are unusually compelling.⁸⁶ Generally when filed rates or charges are suspended pending investigation by an administrative agency they will nevertheless go into effect if the hearing outlasts the statutory suspension period.⁸⁷ Except under Parts II and IV of the Interstate Commerce Act—the Motor Carrier and Freight Forwarder Acts—the agency may require a party that charges the increased rate to keep accurate accounts of his collections and to refund the interim overcharges if the rate is eventually held to be unreasonable.⁸⁸ The motor shipper is, however, without such protection: If the suspended rate goes into effect because the hearing is still in progress, the shipper must pay the charges without prospect of refund whatever the Commission's ultimate decision. The statute thereby leaves the shipper remediless while the Commission deliberates. The only remaining question is whether such situations arise frequently enough to constitute a serious inequity.⁸⁹

On the other hand, there is considerable doubt whether the typical motor shipper needs the added protection of a post-shipment damage remedy. Conceding that small shippers cannot protest all filed rate increases that may affect them, the competitive conditions of the industry

⁸⁵ These arguments are outlined, albeit later refuted, in Comment, *The Doctrine of Primary Jurisdiction and the T.I.M.E. Case*, 27 U. CHI. L. REV. 536, 542-44 (1960).

⁸⁶ This is illustrated by the companion case to *T.I.M.E.*, *Davidson Transfer & Storage Co. v. United States*, 359 U.S. 464 (1959).

⁸⁷ The Supreme Court recently considered the suspension provisions of Part I of the Interstate Commerce Act, § 15(7), added by 36 Stat. 552 (1910), as amended, 49 U.S.C. § 15(7) (1958), and held that courts are without power to prolong the period of suspension beyond the statutory term for which the Commission may suspend a rate under investigation. *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963). Other representative suspension provisions are: *Water Carrier Act* § 307(g), (i), 54 Stat. 938-39 (1940), 49 U.S.C. §§ 907(g), (i) (1958); *Freight Forwarder Act* § 406(e), 56 Stat. 288 (1942), 49 U.S.C. § 1006(e) (1958).

⁸⁸ Perhaps the most important and frequently invoked of such provisions is Section 4(e) of the *Natural Gas Act*, 52 Stat. 823 (1938), 15 U.S.C. § 717c(e) (1958).

⁸⁹ The majority in *T.I.M.E.*, although conceding that some inequity could result to shippers when the investigation outlasted the suspension period, suggested that "it is ordinarily the carrier, rather than the shipper, which is made to suffer by any period of administrative 'lag,'" and concluded that the problem infrequently arises "since the suspension period is ordinarily ample to permit such adjudication." *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 480 & n.22 (1959). On the other hand, the Court has more recently noted in *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 665-66 n.11 (1963), that only about three-fifths of the rail-rate investigations can be completed within the seven months' suspension period—although a mere 4% of the cases require longer than a year. There appear to be no comparable figures to indicate the average time required to complete motor-carrier rate investigations.

afford a measure of protection against excessive charges, which the rail shipper generally lacks.⁹⁰ Motor rates, like rail rates, are usually filed and published by groups of collaborating carriers through rate bureaus or conferences⁹¹ that enjoy a statutory immunity from the antitrust laws.⁹² The statute requires the conference, however, to recognize the individual member's right of independent action with respect to tariffs.⁹³ Because of the competitive conditions of motor transportation, independent action seems to have supplied a more effective check upon the conferences than it has in the rail industry.⁹⁴ The mere possibility of an independent filing of a lower schedule by a single carrier, which might flag general inequities in the conference schedule, tends to keep conference rates in check. Finally, although a particular excessive or discriminatory rate will surely not catch the eye of every shipper, the large number of shippers covered by any schedule makes it unlikely that outrageous increases will be completely undetected.

There are negative considerations as well. Allowing a private post-shipment damage suit might dampen the present incentive to protest rates in advance of shipment—particularly for the largest shippers who can protest most effectively.⁹⁵ Preshipment challenge is vital to the whole statutory scheme, for even if by a single shipper, it serves to protect all shippers large and small alike. Post-shipment litigation, however, recoups past overcharges only for the shippers who have actually joined in the suit, even though it may succeed in setting the challenged rate aside.

Moreover, the inequity of post-shipment litigation of rates may be a two-edged sword, striking at carriers as well as shippers. Since the aggrieved shipper usually calls upon a single carrier or small group of carriers to defend the reasonableness of rates filed by the entire conference, it might be possible to upset the whole schedule simply by picking off a few of the weaker carriers in a proceeding they cannot adequately

⁹⁰ See, e.g., Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 589 (1954); *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 216-17 (1959).

⁹¹ See HUDSON & CONSTANTIN, *MOTOR TRANSPORTATION: PRINCIPLES AND PRACTICES* 413-14 (1958); TAFF, *COMMERCIAL MOTOR TRANSPORTATION* 433-43 (rev. ed. 1955). The overlapping and apparent inconsistency between the through and combination rates involved in *T.I.M.E.* may, for example, be explained by the fact that the several rates were contained in the schedules of different carrier conferences or bureaus. See *Stipulation of Facts, Record*, pp. 10-11, *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959).

⁹² See the Reed-Bulwinkle Act, § 5a of the Interstate Commerce Act, added by 62 Stat. 472 (1948), 49 U.S.C. § 5b (1958), which applies to conferences and agreements among all carriers subject to the Commission's jurisdiction.

⁹³ § 5a(6), added by 62 Stat. 472 (1948), 49 U.S.C. § 5b(6) (1958).

⁹⁴ See NORTON, *MODERN TRANSPORTATION ECONOMICS* 265 (1963); Marx, *Group or Conference Rate-Making and National Transportation Policy in the United States*, 24 LAW & CONTEMP. PROB. 586, 593 (1959).

⁹⁵ See *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 169-70 (1963).

defend. It is uncertain to what extent the conference would or could come to the aid of the beleaguered carrier in such a case.⁹⁸ This whole objection seems to have been the source of the Court's rather cryptic observation in *Hewitt-Robins* that "the allowance of a judicial remedy [for unreasonable charges] would result in undercutting the stability of the rate structure which the statutory procedures sought to insure."⁹⁷

Arguments of this nature might appear to prove too much, since essentially the same objections could also be applied to private damage remedies that are clearly available to the rail shipper. The ready answer is that the issue arises in a quite different context. The remedies in Parts I and III of the Interstate Commerce Act are contained in the express terms of the statute and thus are not "inconsistent" with the statutory scheme of which they form an integral part. There Congress has already made the very judgment that the motor act's saving clause requires the courts to make.

If for these reasons the shipper's overcharge claim is inconsistent and does not survive, can the claim for misrouting be distinguished? The Court in *Hewitt-Robins* gave several grounds for distinction. First, the motor shipper is virtually helpless against misrouting because he lacks the statutory and competitive protections that make the overcharge claim generally unnecessary.⁹⁸ Second, he lacks even the rail shipper's right to designate the routing of his goods at the time of shipment.⁹⁹ Third, since the "selection of the route is usually made on an *ad hoc* basis,"¹⁰⁰ the shipper can anticipate no misrouting even if he has a preshipment remedy. Finally, unlike the overcharge suit, "a misrouting claim does not jeopardize the stability of tariffs or of certificated routes"¹⁰¹

While the Court's conclusion appears sound, the reasoning raises several difficult questions. It is true enough that inquiry into a particular carrier's past routing practices in no way disrupts the stability of the certificated route structure; indeed, if anything it tends to reinforce that structure by affording additional sanctions against deviations. It is also

⁹⁸ Cf. two recent decisions bearing on this question, *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246 (1963) (conference held to have standing to seek district court review of ICC order affecting conference members); *Arbet Trucklines, Inc. v. Central States Motor Freight Bureau, Inc.*, 32 U.S.L. WEEK 2372 (I.C.C. 1963) (Bureau's practice of protesting rate schedule of nonmember carrier held not to violate Interstate Commerce Act even if sole purpose of such practice was harassment of nonmember carrier).

⁹⁷ *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962).

⁹⁸ *Id.* at 88.

⁹⁹ The right of the rail shipper to designate a route which the carrier is obligated to honor is preserved by § 15(8), added by 36 Stat. 553 (1910), as amended, 49 U.S.C. § 15(8) (1958).

¹⁰⁰ *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962).

¹⁰¹ *Id.* at 88.

true that the motor shipper cannot designate the route in advance by statutory prerogative, as can the rail shipper. The shipper is still not, however, "entirely at the mercy of the carrier," as the Court suggested. There are, for example, various statutory proscriptions of unreasonable or unlawful carrier practices¹⁰² which must, in light of the Commission's consistent policies, be presumed to comprehend misrouting.¹⁰³

It is also questionable whether truck shipments are routed on "an *ad hoc* basis." If that were literally the case, then of course there would be no occasion for the Court's concern about the "stability of . . . certificated routes" ¹⁰⁴ Nor would there really be any need to refer the reasonableness of a carrier's routing practices to the ICC. The fact is that motor common carrier routes, though not of course limited by the physical factors that restrict rail routes, are nonetheless strictly regulated by the Commission. A certificate of convenience and necessity prescribes in some detail the highways that a regular-route carrier may travel;¹⁰⁵ even the irregular-route carrier is not left wholly free by the terms of his certificate.¹⁰⁶ Although deviations and the use of alternative routes are permitted in emergencies and under special highway conditions,¹⁰⁷ they are always subject to detailed Commission rules and regulations.¹⁰⁸

On the other hand, these administrative sanctions afford the injured shipper slight comfort. Lacking the power to prescribe the route of shipment, he may be unaware of an errant carrier's deviations until he gets the final bill. In the absence of a private damage claim, post-shipment com-

¹⁰² *E.g.*, §§ 212(a), 216(e), 222(a), (b), 49 Stat. 555, 558, 564 (1935), as amended, 49 U.S.C. §§ 312(a), 316(e), 322(a), (b) (1958).

¹⁰³ The Commission's view as to the unlawfulness of routing shipments by a more expensive interstate route when a cheaper intrastate route was available had been perfectly clear. See, *e.g.*, *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 302 I.C.C. 173 (1957); *Great Atl. & Pac. Tea Co. v. Ontario Freight Lines Corp.*, 46 M.C.C. 237, 239 (1946); *cf. United States Gypsum Co. v. Bos Freight Lines*, 63 M.C.C. 212 (1955). For a recent application of the Commission's sanctions to somewhat analogous misrouting practices, see *Hudson Transp. Co. v. United States*, 219 F. Supp. 43 (D.N.J. 1963).

¹⁰⁴ 371 U.S. at 88.

¹⁰⁵ See § 208(a), 49 Stat. 552 (1935), 49 U.S.C. § 308(a) (1958); *TAFF, COMMERCIAL MOTOR TRANSPORTATION* 506-07 (rev. ed. 1955). Under certain circumstances, moreover, the Commission may authorize a certificated carrier to use an alternate route; but that, like the original route, will be prescribed in detail. See *id.* at 510-11.

¹⁰⁶ The Commission may, but need not, grant a regular-route certificate to a qualified carrier. In any event, even as to irregular-route certificates, the statute requires a prescription of "the territory within which, the motor carrier is authorized to operate" § 208(a), 49 Stat. 552 (1935), 49 U.S.C. § 308(a) (1958). For a discussion of the distinctions between the restrictions upon these two types of certificates, see *Railway Express Agency, Inc. v. United States*, 205 F. Supp. 831 (S.D.N.Y. 1962); *FULDA, COMPETITION IN THE REGULATED INDUSTRIES—TRANSPORTATION* 95-96 (1961).

¹⁰⁷ § 208(b), 49 Stat. 552 (1935), 49 U.S.C. § 308(b) (1958).

¹⁰⁸ See, *e.g.*, 49 C.F.R. § 211 (1961).

plaint to the Commission will bring the shipper little satisfaction or redress even if the carrier is sternly censured. Moreover, the post-shipment litigation of routing practices does not threaten to interfere with the Commission's jurisdiction or its regulatory functions, as long as certificated routes are not themselves drawn in question without seeking the Commission's expert advice. Indeed, as the *Hewitt-Robins* Court suggested, the private damage remedy might exercise a "healthy deterrent effect upon the utilization of misrouting practices" ¹⁰⁹ Thus, although the claim against excessive charges encounters many serious practical and administrative objections, the misrouting claim appears altogether compatible with the statutory scheme. ¹¹⁰

While the two Supreme Court decisions may thus be reconciled according to the "practical effect" test, the distinction is far from obvious and the grounds of distinction remain uncertain and necessarily *ad hoc*. The test supplies no clear bright line, nor does it even suggest the criteria by which that test is to be applied or the scope of the inquiry to be made in future cases. Every time the question of survival of a pre-existing remedy arises under a federal regulatory statute containing a general saving clause, a broad-scale appraisal of the "effect" of the remedy must seemingly be made de novo. Although it is best illustrated in that context, the problem is by no means confined to the motor carrier field. Thus a tentative approach must now be made to the general problem by gathering principles and criteria from the broad fabric of administrative law with which to formulate a framework for principled solution of private-remedy problems throughout the regulated sector of the economy.

¹⁰⁹ 371 U.S. at 88.

¹¹⁰ There is one other curious feature of the *Hewitt-Robins* opinion that is worthy of at least marginal mention. The suggestion that private remedies might minimize the need for cease-and-desist proceedings implies that injunctive remedies should be invoked by the Commission only as a last resort. Yet, only three weeks after *Hewitt-Robins*, the Court chastised the Commission for having certificated a new carrier, in order to enable a group of existing carriers to interline through freight despite a labor dispute, rather than first exhausting the ordinary range of administrative sanctions. *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). With particular reference to the cease-and-desist order, the Court concluded, "there was no reason [for the Commission and the district court which affirmed the Commission] to have assumed that the ordinary processes of the law were incapable of remedying the situation." *Id.* at 170. It seems difficult to square this view with the Court's apparent hierarchy of sanctions in *Hewitt-Robins*.

There may well be other instances in which a carrier's misrouting affects only a few shippers and can be adequately deterred by a single damages suit with no need to invoke the administrative machinery (except, of course, to determine the reasonableness of the challenged practice). On the other hand, where the deviations are flagrant or persistent, there appears no reason why both damages and cease-and-desist proceedings should not be available against the same practices.

II

THE PRIVATE REMEDY AND THE REGULATORY SCHEME

The motor carrier experience points the way to a solution of the general problem of survival of prior private remedies under regulatory statutes. Presumably the criterion announced in *Hewitt-Robins*—the practical effect of the particular remedy upon the whole regulatory scheme—is the one that will be used in other regulatory contexts as well. The principles that should guide the application of that general standard have already been suggested in part by the distinctions drawn between *T.I.M.E.* and *Hewitt-Robins*. The task that now remains is to generalize and rationalize those principles and search for others in the wealth of case law and scholarly comment in the various sectors of administrative law that may prove relevant.

Problems of accommodation may arise whenever a plaintiff seeks damages from a defendant subject to federal regulation, at least where the conduct complained of lies within the sphere of such regulation. The shipper's action for overcharges acutely poses the problem, as we have already observed. On the other hand, such conflict or interference is most unlikely where, for example, an injured motorist brings a common law negligence action against the owner or operator of an interstate truck or bus that has run him off the road. In such a case the impact of federal regulation of motor carriers is unlikely to be felt, and there will ordinarily be no need whatever to consult the ICC. Indeed, even the shipper may sue the carrier on certain claims without prior resort to the ICC or reference to the extensive federal supervision of other aspects of the shipper-carrier relationship.¹¹¹ These basic illustrations suggest that the problems of accommodation are most serious when the gist of the private lawsuit is conduct which is extensively regulated and which is close to the heart of the agency's concern. When, as in the common law negligence action, the gist of the suit is peripheral to the agency's concern (or even more clearly when it is beyond the agency's jurisdiction) the threat of conflict is slight and accommodation generally unnecessary.

Private remedies may derive from three distinct sources: the statute

¹¹¹ For example, the shipper has various common-law remedies against loss or damage of his property by a motor carrier, which have apparently not been impaired by the advent of federal regulation and may be pursued without recourse to the ICC. See *Hudson & Constantin, op. cit. supra* note 91, at 368-89. *Cf. Whiteside v. Southern Bus Lines*, 177 F.2d 949 (6th Cir. 1949), a damage suit by a Negro passenger against a motor carrier based upon the carrier's racially discriminatory practices, but without reference to the statutory prohibitions against discrimination or prior resort to the ICC. Compare *Lyons v. Illinois Greyhound Lines*, 192 F.2d 533 (7th Cir. 1951), in which a similar suit was entertained without resort to the Commission, though based principally upon the carrier's alleged violation of the statute.

that creates the administrative jurisdiction, the common law, or some other statute.¹¹² In those instances in which the statute makes certain conduct unlawful, but designates no remedies for persons injured thereby, the problem is one of the implication of new remedies—essentially the problem posed but not resolved by *Montana-Dakota*. That problem has been fully canvassed elsewhere¹¹³ and will not be explored here. Many of the cases that deal with the implication of new statutory remedies are, however, highly relevant to the problem of the survival of prior remedies against federally regulated defendants.

A. General Statutory Considerations

There are a few situations in which the terms of a statute unmistakably extinguish private remedies. Strong federal interests, or even constitutional uncertainties, have occasioned the closing of the doors of the federal courts to certain private actions,¹¹⁴ as in the case of the Norris-LaGuardia Act.¹¹⁵ Other statutes, while not completely displacing private remedies, have required that they be asserted only at prescribed stages of administrative or judicial proceedings, or only through particular channels.¹¹⁶ Even in these cases, however, the courts have been reluctant to turn an aggrieved party away empty-handed unless the statute left absolutely no alternative. When mitigating exceptions were available, they have been liberally con-

¹¹² Jaffe, *supra* note 90, at 579. A particular suit may, of course, present claims based on more than one of these sources, as was the case in *T.I.M.E.*, where the shipper asserted rights under both the common law and the Motor Carrier Act.

¹¹³ See, e.g., Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1045-58 (1960); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456 (1948); Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). There is an increasing wealth of material on this question, of which the above citations afford only a bare sample. Many of the decisions which deal primarily or even exclusively with the implication of private remedies for violations of regulatory statute will have great relevance to the question of survival of pre-existing rights and remedies. Thus, the discussion which follows will draw heavily from this analogous field in which the materials are more bountiful.

¹¹⁴ See, e.g., INT. REV. CODE OF 1954, § 7421(a), which bars (subject to certain very narrow exceptions) suits to enjoin the assessment or collection of any tax.

¹¹⁵ Norris-LaGuardia Act §§ 1, 4, 47 Stat. 70 (1932), 29 U.S.C. §§ 101, 104 (1958).

¹¹⁶ The most apposite problem here is that of the timing—either by acceleration or deferral—of judicial review of administrative actions and decisions. Some of the difficulties are suggested by cases like, e.g., *Estep v. United States*, 327 U.S. 114 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *Falbo v. United States*, 320 U.S. 549 (1944). On the limitation or abrogation of the avenues of judicial review of administrative agency action, see generally 4 DAVIS, ADMINISTRATIVE LAW ch. 28 (1958); on the subject of congressional limitation of the jurisdiction of the federal district courts, see HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312-40 (1953).

strued and generously invoked.¹¹⁷ Thus, the problem is rarely one of complete or explicit statutory extinguishment of private rights and remedies.

In the more typical case where Congress either says nothing about private remedies or creates some remedies but fails to deal with others, the general canons of statutory construction seem to be in conflict. On the one hand, there is the maxim *expressio unius exclusio alterius*—suggesting that when the legislature has conferred any private rights the courts have no business fashioning others. A sounder argument against the implication or preservation of unmentioned remedies is that of preemption or supersession: Where Congress has established a comprehensive scheme of regulation it means to leave no lacunae for the continued operation of prior remedial law. This argument rests in part upon the obvious need for uniform standards of federal law within the regulated sector, a uniformity which might be jeopardized by myriad private lawsuits in many different courts.

Whatever force these arguments have on paper, they have found little favor with the courts. Particularly when regulated conduct has been expressly proscribed by Congress, the courts have been quick to infer or recognize private remedies to aid those whom the statute was designed to protect.¹¹⁸ Moreover, repeal of a prior law by the mere implication of a later enactment has long been disfavored unless there is "a positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy."¹¹⁹ Likewise the courts have usually sought to avoid the "administrative no-man's land" that might result from the withdrawal of private remedies.¹²⁰ Thus, in contrast to the assumptions of *Montana-Dakota* and *T.I.M.E.*, the failure of Congress to create or preserve private remedies has more often inclined the courts to create or preserve remedies of their own than to turn away the aggrieved party.¹²¹

¹¹⁷ For recent examples of the Supreme Court's willingness to infer a congressional intent to permit judicial review, despite the silence or even contrary implications of the statute, through an original suit in the district courts, see *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963); *Leedom v. Kyne*, 358 U.S. 184 (1958). *But cf.* *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943).

¹¹⁸ See, e.g., *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916).

¹¹⁹ *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842); see also *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939).

¹²⁰ See, e.g., *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944); *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499, 502 (2d Cir. 1956); *Crosby v. Weil*, 382 Ill. 538, 547, 48 N.E.2d 386, 391 (1943); *cf.* *Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

¹²¹ See, e.g., *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-65 (1954); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944); *Fitzgerald v. Pan Am.*

Finally, the argument of *exclusio alterius*, if it adds anything more than a Latin phrase to those already considered, can be readily disposed of. For apart from the low repute in which American courts generally regard it,¹²² the maxim sheds no light on the hardest problem of all, that of the statute which contains no private remedies of any sort.¹²³

Since the general canons of construction are of little assistance, it may be well to consider the saving clause of the particular statute. If the statute contains no such clause, the omission may well suggest that Congress intended the statutory remedies to be exclusive.¹²⁴ Where saving clauses do appear, their terms are by no means uniform. Some are quite explicit with respect to remedies that are preserved—designating, for example, certain antitrust provisions that the statute does not displace.¹²⁵ Under a clause of this kind there may be a serious question about the status of remedies not expressly designated.

The typical saving clause is, however, both general in terms and neutral in import.¹²⁶ It neither preserves nor extinguishes any rights or

World Airways, 229 F.2d 499 (2d Cir. 1956); *Aerovías Interamericanas de Panama, S.A. v. Board of County Comm'rs*, 197 F. Supp. 230, 250 (S.D. Fla. 1961), *rev'd on other grounds sub nom.* Board of County Comm'rs v. Aerolineas Peruanas, S.A., 307 F.2d 802 (5th Cir.), *cert. denied*, 371 U.S. 961 (1962); *Wills v. TWA*, 200 F. Supp. 360, 363-65 (S.D. Cal. 1961); *Cogan v. Johnston*, 162 F. Supp. 907, 909 (S.D.N.Y. 1958); *cf. Wheeldin v. Wheeler*, 373 U.S. 647, 664-65 (1963) (Brennan, J., dissenting); *Northeast Airlines v. Weiss*, 113 So.2d 884 (Fla. Dist. Ct. App.), *cert. denied*, 116 So.2d 772 (Fla. 1959); *Northridge Coop. Section No. 1, Inc. v. 32d Ave. Constr. Corp.*, 2 N.Y.2d 514, 530, 533-34, 141 N.E.2d 802, 810, 812 (1957).

¹²² See, e.g., *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943); *Baird v. Franklin*, 141 F.2d 238, 245 (2d Cir.) (Opinion of Clark, J.), *cert. denied*, 323 U.S. 737 (1944). See also Loss, *supra* note 113, at 1049-50.

¹²³ There is the problem, for example, of the inference to be drawn from the enactment of a statute without certain private remedy provisions contained in an earlier draft. Even if there is no explanation in the legislative materials for the deletion, that fact alone might warrant an inference that the legislature at least made a more conscious choice to withhold private remedies than in the case in which none were ever proposed. See, e.g., as to the conflicting inferences that may be drawn in this situation, Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 654-55 (1961); *Developments in the Law—The Federal Food, Drug and Cosmetic Act*, 67 HARV. L. REV. 632, 722 & n.757 (1954).

¹²⁴ See 2 SUTHERLAND, STATUTORY CONSTRUCTION 475 (3d ed. 1943).

¹²⁵ See, e.g., *McCleneghan v. Union Stock Yards Co.*, 298 F.2d 659, 669 (8th Cir. 1962); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708, 709 (3d Cir. 1958); *First Nat'l Sav. Foundation, Inc. v. Samp.*, 274 Wis. 118, 138-39, 80 N.W.2d 249, 261 (1956). *Cf. Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 217 F. Supp. 210, 217 (S.D.N.Y. 1963), for a suggestion that a saving clause, exemption or proviso which expressly preserves certain designated remedies reveals a legislative design not to preserve other remedies which have not been so designated.

¹²⁶ Courts seldom use the saving clause as anything more than a make-weight to justify or reinforce a result reached on other grounds. For various expressions of the view that the saving clause should be liberally construed, to preserve prior rights and remedies wherever possible, see, e.g., *Head v. New Mex. Bd. of Examiners*, 374 U.S. 424, 444 (1963) (Brennan, J., concurring); *Independence Shares Corp. v. Deckert*, 108 F.2d 51, 54 (3d Cir. 1939), *rev'd on other grounds*, 311 U.S. 282 (1940); *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47, 56-57

remedies by name. Thus only two conclusions may safely be drawn: First, it is axiomatic that only pre-existing remedies can survive.¹²⁷ Whether subsequent statutory remedies apply in the regulated sector must be ascertained from other sources. Second, it is equally clear that whatever the terms of the particular clause, only those remedies which are (in the terms of the Motor Carrier Act saving clause¹²⁸) "not inconsistent" with the statutory scheme will survive at all.¹²⁹ A saving clause cannot, as the Supreme Court declared long ago, operate to destroy the statute.¹³⁰

B. Effect of the Exercise of the Private Remedy

It may be appropriate to examine with some care the origins and development of the particular private remedy in question. For example, the issue of survival might depend in part on how fully developed and widely recognized the remedy was at the time the regulatory statute was enacted.¹³¹ This would bear at least upon the likelihood that Congress understood that the remedy fell within the terms of a general saving clause. For example, if the remedy were generally recognized at the time, Congress would presumably have dealt specifically with that remedy had it been meant not to survive.

The extent to which the regulatory statute departs from the prior law may also be relevant. Particularly when the statute creates a new cat-

(D. Idaho 1962); *Porter v. Southeastern Aviation, Inc.*, 191 F. Supp. 42, 43 (M.D. Tenn. 1961); *Curran v. Mackay Radio & Tel. Co.*, 123 F. Supp. 83, 92 (S.D.N.Y. 1954); *Southeastern Aviation, Inc. v. Hurd*, 209 Tenn. 639, 646-48, 355 S.W.2d 436, 440, *appeal dismissed*, 371 U.S. 21 (1962); *Continental Charters, Inc.*, 16 C.A.B. 772, 775 (1953).

¹²⁷ *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *Mack v. Eastern Air Lines*, 87 F. Supp. 113, 115 (D. Mass. 1949).

¹²⁸ § 216(j), 49 Stat. 560 (1935), 49 U.S.C. § 316(j) (1958).

¹²⁹ See, e.g., *Hull, Jurisdiction of Causes of Action Arising Under the Act to Regulate Commerce*, 17 COLUM. L. REV. 309, 315 (1917).

¹³⁰ *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

¹³¹ There may also be some preliminary question whether the surviving remedy draws upon state or federal common law. Generally the courts have spoken in such cases only of "the common law," without recognizing such a distinction. It could be argued that since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the common law applicable to a diversity action would be necessarily that of the forum state. Yet it has been argued in at least one case that the application of state common law to suits arising from purely interstate transportation would contravene the commerce clause of the Federal Constitution. "A state," the argument runs, "no more has constitutional power to regulate rates retrospectively through its judiciary than it has to regulate them prospectively through its legislature." Brief for Petitioner, p. 22, *Davidson Transfer & Storage Co. v. United States*, 359 U.S. 464 (1959). There was no occasion to reach the question in *T.I.M.E.*, since the United States was the shipper and its claims were thus apparently governed by federal law in any event, cf. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). The issue was not raised in *Hewitt-Robins*. Perhaps it is a sufficient answer for the present to note that there is unlikely to be very much difference between the federal and state common law. Thus the question seldom has more than theoretical significance.

egory of offenses or transgressions unknown to the common law, or establishes a very different level of proof in dealing with conduct which was historically unlawful, the gap between the old law and the new may suggest a congressional design to leave the prior remedies undisturbed.¹³² In general, it would appear that the greater this gap, the further the prior remedy is from the heart of the regulatory scheme—although there may well be exceptions in which such a departure is evidence of displacement rather than of preservation.

More illuminating than the nature of the prior law is the relationship between the private remedy and the statutory purpose or objective. To the extent that congressional aims can be discerned at all, it will be obvious that some remedies are more consonant with those aims than others, and their survival may to that degree be preferred. Certain remedies may, for example, serve important public interests to which the statute is addressed.¹³³ A damage suite might beneficially reinforce a congressional proscription of certain regulated conduct.¹³⁴ A private action may especially be favored where, as the Supreme Court suggested in *Hewitt-Robins*, it may have a "healthy deterrent effect" upon practices outlawed by the statute.¹³⁵

The deterrent argument seems most persuasive when the agency is unwilling or unable in a particular instance to police adequately the conduct challenged by the private complaint.¹³⁶ On the other hand, there is

¹³² There seems to be no statement which directly supports this hypothesis, but there are suggestions of it lurking in several opinions. See, e.g., *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951); *Schleiff v. Baltimore & O.R.R.*, 36 Del. Ch. 342, 350-51, 130 A.2d 321, 327 (1955); *Southeastern Aviation, Inc. v. Hurd*, 209 Tenn. 639, 648-49, 355 S.W.2d 436, 440, *appeal dismissed*, 371 U.S. 21 (1962).

¹³³ See, e.g., *Wills v. TWA*, 200 F. Supp. 360, 364-65 (S.D. Cal. 1961); cf. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946); *Dixon, Civil Rights in Transportation and the ICC*, 31 GEO. WASH. L. REV. 198, 226 (1962).

¹³⁴ This principle has been recognized chiefly as a factor favoring the implication or creation of new statutory causes of action. See, e.g., *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Goldstein v. Groesbeck*, 142 F.2d 422 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947); *Brown v. Bullock*, 194 F. Supp. 207, 223-25 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961); *Roosevelt Field, Inc. v. Town of North Hempstead*, 84 F. Supp. 456 (E.D.N.Y. 1949). These cases, although dealing with a somewhat different question than the survival of prior remedies, do serve to illustrate a principle which would seem equally applicable in both contexts—that the recognition of private remedies against regulated defendants may serve important public enforcement objectives as well as vindicate private rights.

¹³⁵ *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88 (1962).

¹³⁶ This appears to have been the situation in *Wills v. TWA*, 200 F. Supp. 360, 364-65, 367-68 (S.D. Cal. 1961), where the district court was seemingly influenced, in awarding not only compensatory but punitive damages as well for the defendant's conduct in violation of statute, by the inability or unwillingness of the CAB to take action against the carrier practices of which the plaintiff had complained. See 60 MICH. L. REV. 798, 800 & n.15 (1962). Another recent case in which such considerations may have played some part in the recognition

a very serious question how far the courts ought to go in doing the agency's work for it. The courts may sometimes fail to appreciate the agency's reasons for refusing to take action that the private plaintiff seeks. Only the agency, for example, may be aware of the need to complete a thorough study of the industry or to adopt new rules and regulations before taking any action affecting the regulated sector.¹³⁷

Even in the absence of these considerations, cumulation of civil and administrative sanctions may excessively burden the regulated sector, or upset a delicate balance maintained by the agency.¹³⁸ The problem is much more subtle than the obvious disruption which would result if the court told the regulated defendant to act directly contrary to the agency's orders. Indeed, the indiscriminate awarding of private damages might seriously disturb a particular level of regulation or cause the regulated defendant to fear the dull blow of the private lawsuit more than the sting of the agency's lash. In short, the problem may not be that the private remedy conflicts or interferes with the agency's objectives, but rather that it serves them too well, with an eventual result—hardly consistent with the statutory scheme—that the agency can no longer speak with authority in its own house.¹³⁹

The essence of the *Hewitt-Robins* test is that survival of the private remedy must be judged by its practical effect upon the regulatory machin-

of a private remedy is *Aerovias Interamericanas de Panama, S.A. v. Board of County Comm'rs*, 197 F. Supp. 230, 250 (S.D. Fla. 1961), *rev'd on other grounds sub nom.* *Board of County Comm'rs v. Aerolineas Peruanas, S.A.*, 307 F.2d 802 (5th Cir.), *cert. denied*, 371 U.S. 961 (1962).

¹³⁷ For recent suggestions that the courts should stand back and await the finished results while an administrative agency is designing or preparing to undertake a new program of regulation, see *Wisconsin v. FPC*, 373 U.S. 294, 307-14 (1963) (concerning the Power Commission's area-rate pricing program); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963) (concerning the FCC's "freeze" on the acceptance of applications for most classes of standard radio broadcast stations pending the adoption of a set of new rules governing the matter). See also Note, *FPC Regulation of Independent Producers of Natural Gas*, 75 HARV. L. REV. 549, 568 (1962); 60 MICH. L. REV. 798, 800-01 (1962).

¹³⁸ See, e.g., Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 655 (1961); cf. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378-79 (1958). The issue has recently arisen through comment upon the decision of *Wills v. TWA*, 200 F. Supp. 360 (S.D. Cal. 1961), which granted punitive as well as compensatory damages against a regulated air carrier's unlawful practices. The dangers of cumulating non-administrative sanctions in this fashion have been pointed out in Note, 77 HARV. L. REV. 285, 297-98 (1963); 60 MICH. L. REV. 798, 800-01 (1962).

¹³⁹ Distinct from the important public interests which may be served, courts sometimes look to the equities of the particular plaintiff's claim, or that of the class of which the plaintiff is a member, in deciding whether to recognize a pre-existing remedy. In the implication of new statutory causes of action, the courts have been persuaded that it would be inequitable and unsound as a matter of public policy to leave without a remedy a member of the very class for whose benefit the statute was designed, even though its terms may afford him no relief. See, e.g., *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39-40 (1916); *Couch v. Steel*, 3 E. & B. 402, 411, 118 Eng. Rep. 1193, 1196 (Q.B. 1854); RESTATEMENT, TORTS § 286 (1934).

ery and the functions of the agency. Generally speaking, the broader and more detailed the agency's powers and responsibilities, the more reluctant the courts are to take interstitial action in the regulated sector.¹⁴⁰ It is rare that the terms of the statute give the agency an exclusive enforcement power.¹⁴¹ More often, the regulatory scheme is so pervasive, or the balance struck between the regulated sector and the rest of the economy so delicate, that the agency must by implication be given certain exclusive powers.¹⁴² In these instances private grievances must be redressed through the agency or not at all, even though the agency may be powerless to award damages or reparation.

There are several practical ways in which the survival of a private remedy might impair or disrupt the agency's superintendence. First, there is the threat to uniformity of interpretation and application of statutory standards that some private remedies might present.¹⁴³ That danger could

¹⁴⁰ This "pervasive scheme" principle seems to be one distinguishing factor among recent decisions involving the accommodation of the antitrust laws and the federal regulatory statutes. Compare *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-54 (1963), and *California v. FPC*, 369 U.S. 482 (1962), with *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963). See *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 161 (1963); cf. *Standard Radio & Television Co. v. Chronicle Publishing Co.*, 182 Cal. App. 2d 293, 6 Cal. Rptr. 246 (1960).

¹⁴¹ Cf. Clayton Act § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958) ("nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the [Interstate Commerce] Act . . . in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.")

¹⁴² An apparent congressional design to entrust exclusive enforcement powers to the agency may be based on various grounds within and without the statutory scheme. Where such a design is found, it has often been cited as a factor militating against the recognition of private remedies in the regulated sector. See, e.g., *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378-79 (1958); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-28 (1940); *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927); *Spirit v. Bechtel*, 232 F.2d 241, 251 (2d Cir. 1956) (Lumbard, J., concurring); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *Daly v. West Central Broadcasting Co.*, 201 F. Supp. 238, 240-41 (S.D. Ill.), *aff'd on other grounds sub nom. Daly v. Columbia Broadcasting Sys., Inc.*, 309 F.2d 83 (7th Cir. 1962); *Acorn Iron & Supply Co. v. Bethlehem Steel Co.*, 96 F. Supp. 481, 482 (E.D. Pa. 1951); cf. *General Comm. v. M-K-T R.R.*, 320 U.S. 323, 336-37 (1943).

Such exclusive enforcement powers are especially likely to be found where the statutory purpose appears to be a "public" rather than a "private" one, to which private damage remedies seem inappropriate. For a suggestion of such a distinction as a ground for denying private recovery, see, e.g., *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, *supra*; *Farmer v. Philadelphia Elec. Co.*, 215 F. Supp. 729, 732-34 (E.D. Pa. 1963), *aff'd*, 32 U.S.L. WEEK 2464 (3d Cir. 1964); *City and County of San Francisco v. Western Air Lines*, 204 Cal. App. 2d 105, 119-20, 22 Cal. Rptr. 216, 224-25 (1962), *cert. denied*, 371 U.S. 953 (1963). *But cf.*, for a critical view of such a distinction as a basis for the grant or denial of substantive rights, Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946); Note, *Implied Liability Under the Securities Exchange Act*, 61 HARV. L. REV. 858, 861-62 (1948).

¹⁴³ Such a possibly disruptive effect of private remedies on the regulatory structure is occasionally suggested as a factor militating against the creation or implication of statutory

be avoided in most cases, however, by referring the essential question to the agency for a uniform interpretation. Second, the private remedy might operate to produce results that are notably at variance with the aims and objectives of the agency. There was, for example, the objection in *Montana-Dakota* that private recovery by the wholesale power purchaser would produce a windfall since the unreasonable charges had already (or so the Court assumed) been passed along to unreimbursable retail consumers.¹⁴⁴ Because the congressional design and the agency's task were to protect the retail rather than the wholesale purchaser, the windfall was not only inequitable as between the parties but inimical to the operation of the statutory scheme as well. In the transportation field there is another and similar difficulty. Recovery by a shipper who has already paid charges based on filed and published, but allegedly unreasonable, rates or tariffs, amounts to a legally sanctioned rebate, since it affords a single shipper a lower rate than the filed rate which his competitors have paid.¹⁴⁵ These objections are not insuperable, as we have seen, but they

remedies. See, e.g., *Briggs Transfer Co. v. National Butter Co.*, 199 F.2d 847, 849 (8th Cir. 1952); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500-01 (1st Cir. 1950); *Riss & Co. v. Association of Am. Railroads*, 178 F. Supp. 438, 445-46 (D.D.C. 1959); *Akers Motor Lines v. Malone Freight Lines*, 88 F. Supp. 654, 656-57 (N.D. Ala. 1950); *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, 216 Ore. 515, 528-31, 330 P.2d 522, 528-29 (1958), *cert. denied*, 359 U.S. 1001 (1959). Significantly, the two cases last cited were both suits by certificated motor carriers against competitors seeking relief (one by way of damages, the other through an injunction) against the defendant's competitive practices alleged to violate the Motor Carrier Act. Both courts refused to entertain the suits and remitted the complaining carriers to the ICC, noting *inter alia* the disruptive effect which such judicial proceedings would likely have upon the Commission's regulation of the field. See also an excellent case note on an earlier phase of the *Consolidated Freightways* litigation, 68 HARV. L. REV. 1272, 1274 (1955).

¹⁴⁴ See text accompanying notes 67 & 68 *supra*.

¹⁴⁵ See, e.g., *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907). It is for this reason that the motor shipper has generally been required to pay the disputed amounts before filing suit for refund, rather than withholding these amounts and requiring the carrier to sue to collect. See *C. G. Hussey & Co. v. Roadway Express, Inc.*, 303 I.C.C. 789, 790 (1958). On the other hand, the Commission has gone so far as to authorize a willing carrier to waive its outstanding claims to the extent they are held to be based on unlawful rates, rather than requiring the shipper to bring a formal suit. *United States Rubber Co. v. Associated Transp., Inc.*, 48 M.C.C. 6, 9-10 (1948). This exception is analogous to the Commission's well developed "special docket" procedure for rail cases, which permits the carrier to refund disputed charges which he concedes to be unlawful, after the Commission has so determined in a quick and informal proceeding. See 3-B SHEARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 335-36 & n.27 (1936). The Commission has warned, however, that even the special docket procedure should permit no refund "which would not be awarded under the same set of facts in a contested case and in face of the defendant's opposition instead of its admission." *Swift & Co. v. Chicago & A.R.R.*, 16 I.C.C. 426, 428 (1909). The other exception to the general requirement of prepayment of disputed charges is the provision of § 322 of the Transportation Act of 1940, 54 Stat. 955, as amended, 49 U.S.C. § 66 (1958), that the United States as a shipper may "deduct the amount of any overpayment" which the General Accounting Office audit shows to have been made to any carrier.

deserve at least passing consideration in determining the effect of the private remedy upon the regulatory scheme.

Another practical danger is suggested by the tendency that the availability of private remedies may have to dull the incentive to exhaust administrative remedies which serve important public interests. If in the motor carrier field, for example, the large shippers know they will find redress against flagrant overcharges in post-shipment suits, then the procedure for preshipment protest of rate increases may well languish. The small shippers, to whom the post-shipment suit obviously affords less meaningful protection, are also less effectively able to challenge the reasonableness of filed rates. And while the Commission has the statutory power to suspend filed rates on its own initiative,¹⁴⁶ it lacks the personnel and time to scrutinize every schedule submitted. Thus the abrogation of the private remedy might be the only way to force shippers to examine rates carefully when increases are announced. On the other hand, this argument may prove too much; the investigation and suspension procedure has surely not become a dead letter under Part I of the Interstate Commerce Act even though both preshipment and post-shipment remedies are available to the rail shipper.

Finally, a court may have to consider the long-range economic effect of certain private remedies on competitive conditions within a particular industry, or even between industries that may be regulated by more than one agency. This consideration is particularly germane to the transportation field, of course, for a drastic change in the private remedy picture might upset the competitive balance between railroads and trucks, buses, or airlines.¹⁴⁷ Indeed, it can be argued that the National Transportation Policy¹⁴⁸ requires the Commission and the courts to take account of the probable economic effects of particular private remedies upon the competitive relations among the three modes of surface transportation.¹⁴⁹ The policy is designed to assure "fair and impartial regulation of . . . [rail, motor and water transportation] so administered as to recognize

¹⁴⁶ § 216(g), 49 Stat. 554, as amended, 49 U.S.C. § 316(g) (1958).

¹⁴⁷ On the economic factors which affect intermodal competition in the federally regulated transportation sector, see generally DEARING & OWEN, NATIONAL TRANSPORTATION POLICY (1949); U.S. DEP'T OF COMMERCE, FEDERAL TRANSPORTATION POLICY AND PROGRAM (1960). Some theoretical economic considerations are outlined in Roberts, *The Regulation of Transport Price Competition*, 24 LAW & CONTEMP. PROB. 557 (1959).

¹⁴⁸ 54 Stat. 899 (1940), note preceding 49 U.S.C. §§ 1, 301, 901, 1001 (1958).

¹⁴⁹ For discussion of the role of the National Transportation Policy in decisions of the Commission which may affect intermodal competition, see *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957). For a more recent and possibly restrictive view of the policy, stating that the policy speaks only to the Commission and not the courts, see *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 672-73 (1963).

and preserve the inherent advantages of each." Since an indiscriminate system of private judicial remedies might disrupt the balance, an inquiry into the inter-industry effects of particular remedies cannot lightly be avoided.

C. Available Administrative Remedies

The court can hardly determine the survival of a prior judicial remedy without at least considering the remedies the agency is authorized to grant. If, on the one hand, the agency may grant complete relief and an essential issue in the case would in any event have to be referred to that agency, the conclusion is difficult to avoid that the court should dismiss and leave the aggrieved party to his administrative remedies. On the other hand, it would appear futile for the court to send the plaintiff to an agency that has no jurisdiction over the central issues or lacks power to grant any form of relief whatever.¹⁵⁰ The difficult questions arise between these two extremes—when, for example, the agency does have jurisdiction but only for some limited or tangential purpose, or when administrative remedies are available but their sufficiency or consistency is in doubt.¹⁵¹ In such cases as these the problem might be approached by analogy to the doctrine of exhaustion of administrative remedies, although the nature of this problem is concededly somewhat different from that of exhaustion.

When the agency does have jurisdiction to judge the conduct of which the plaintiff complains, a basic question would seem to be whether the agency's remedies are adequate. For example, by analogy to the exhaustion doctrine, there is some doubt whether a plaintiff who seeks money damages should be relegated to an administrative remedy that promises no

¹⁵⁰ In accommodating the antitrust laws and the regulated industries, the courts have been reluctant to require referral or resort to an agency which lacks the power to decide antitrust questions as such. See, e.g., *United States v. RCA*, 358 U.S. 334, 339-46 (1959). Similar problems have recently arisen because of the FCC's evident lack of statutory authority over community antenna facilities, see *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47, 55-58 (D. Idaho 1962); *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315, 323-25 (D. Idaho 1961); Note, *Community Antenna Television: Survey of a Regulatory Problem*, 52 GEO. L.J. 136, 167-68 (1963).

It is also persuasive to the granting of a private remedy that the agency lacks power to grant the particular relief the plaintiff seeks, even though it may have jurisdiction of the challenged conduct for other purposes. See, e.g., *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499, 502 (2d Cir. 1956); *Wills v. TWA*, 200 F. Supp. 360, 364-66 (S.D. Cal. 1961). Compare *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963), with *TWA v. Hughes*, 214 F. Supp. 106, 111-12 (S.D.N.Y. 1963) (private damage action survives despite Supreme Court holding in *Pan Am.* that the CAB has exclusive jurisdiction over similar challenged practices in Government's antitrust suit).

¹⁵¹ Cf. *Head v. New Mex. Bd. of Examiners*, 374 U.S. 424, 441-42 n.20 (1963) (Brennan, J., concurring).

monetary return.¹⁵² In the present context, however, a non-monetary remedy might be held "adequate" even though the plaintiff complains only of economic injury. For instance, vigorous prospective sanctions from the agency might be deemed a fair exchange for the common law damage action since they would fully protect the plaintiff against a recurrence of similar injury. Moreover, it may be appropriate to gauge the adequacy of the administrative remedy by the broader public interests underlying the whole regulatory scheme. Such interests might be vindicated most effectively by sending the plaintiff to the agency. On the other hand, where such overriding policy considerations are absent, the adequacy of the administrative remedy should probably be judged by its appropriateness to the particular private claim involved.

Several other factors may bear on the adequacy of relief available through administrative channels. If substantial delay or a tortured procedural course awaits the party remitted to the agency, then even the monetary value of the administrative remedy may not render it adequate.¹⁵³ If the statute requires a significantly higher standard of proof than the common law, or raises other substantive hurdles, the agency remedy may not be a reasonable substitute for the damage action.¹⁵⁴ Any test of adequacy might also take account of the thoroughness of the agency's procedures and the availability, if any, of judicial review.¹⁵⁵ For if the agency's procedures are summary and judicial review either unavailable or uncertain, it seems doubtful that Congress intended to make the administrative remedies exclusive.

Even if an adequate administrative remedy exists, the agency's failure to dispense it in a particular class of cases might incline the courts to fill the vacuum. There are, however, various reasons already discussed why the courts should tend to move cautiously into areas where the agency has purposefully declined to act. Indeed, if the matter has been brought to the agency's attention but no action has been forthcoming, it can be

¹⁵² Professor Jaffe states generally that one "requirement of adequacy is that the remedy be a remedy calculated to give relief more or less commensurate with the claim." Jaffe, *The Exhaustion of Administrative Remedies*, 12 *BUFFALO L. REV.* 327, 329 (1963). See also 3 DAVIS, *ADMINISTRATIVE LAW* § 20.07 (1958).

¹⁵³ Cf. Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 *GEO. L.J.* 495, 508-09 (1953).

¹⁵⁴ Cf. *Colonial Airlines v. Janas*, 202 F.2d 914, 919-20 (2d Cir. 1953); *Schleiff v. Baltimore & O.R.R.*, 36 Del. Ch. 342, 350-51, 130 A.2d 321, 327 (1955).

¹⁵⁵ Cf. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351, 354 (1963), in which the Court suggested that the absence of any explicit provisions for judicial review of an administrative decision militated against application of the doctrine of primary jurisdiction; *Leedom v. Kyne*, 358 U.S. 184, 188-91 (1958), where the Court's willingness to imply an extraordinary private remedy to review agency action may have been influenced partly by the uncertainty of judicial review through the formal channels.

argued that the courts should treat such conscious administrative inaction as tantamount to approval of the conduct in issue.¹⁵⁶ On the other hand, there are various forms of administrative silence which clearly import no judgment on the merits and should not therefore deter judicial proceedings.¹⁵⁷ The failure of an agency, for example, to suspend filed rates or tariffs *sua sponte* may mean nothing more than that the agency is overworked and understaffed and tends to rely on private parties to police the rate structure. A very different question is presented, of course, where an agency has held a full hearing and immunized or approved the precise conduct at which the lawsuit is directed.¹⁵⁸ If it is within the agency's power to confer such immunity and the proper procedures have been invoked, judicial review would appear to be properly confined to the channels set up by statute, and collateral attack in a subsequent damage action thus foreclosed.¹⁵⁹

These, then, are the kinds of questions that might be raised, and some of the criteria that might be applied, in deciding whether a particular private remedy has survived the enactment of a regulatory statute. What emerges from this survey is the importance of flexibility and a willingness to consider a number of factors before reaching a decision. While there is a certain clarity and neatness in the broad strokes with which the Court painted in *Montana-Dakota* and *T.I.M.E.*, those strokes have only temporarily hidden some rough spots in the administrative process that must eventually be exposed and studied. Doctrinaire solutions appear, moreover, to be incompatible with the general background of administrative law from which these problems emerge.

The decision in *Hewitt-Robins*, and the test which that case announces, supply the much needed and long overdue authority for a flexible approach to the whole question. While this test removes the certainty that once

¹⁵⁶ *Cf. Vogelsang v. Delta Air Lines*, 302 F.2d 709, 713 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962); *United States v. Railway Express Agency, Inc.*, 101 F. Supp. 1008 (D. Del. 1951); *Manacher v. Reynolds*, 165 A.2d 741, 746-47 (Del. Ch. 1960). *But cf.*, as to certain types of agency determinations that are not accorded such deference, *United States v. RCA*, 358 U.S. 334, 352 (1959); *Standard Fruit & S.S. Co. v. Midwest Stock Exchange*, 178 F. Supp. 669 (N.D. Ill. 1959).

¹⁵⁷ See Loss, *supra* note 113, at 1065-66. *But see* cases cited in *id.* at 1066 n.96.

¹⁵⁸ See, e.g., *United States v. Railway Express Agency, Inc.*, 101 F. Supp. 1008 (D. Del. 1951); *cf. McManus v. Lake Central Airlines*, 327 F.2d 212 (2d Cir. 1964). There may well be exceptions to this general rule. Where agency action constituting tacit approval of conduct later challenged in court is perfunctory, or is given no weight by the agency itself in later proceedings, such action would be no bar to private lawsuits. See Loss, *supra* note 113, at 1065-66 & n.96; Note, 77 HARV. L. REV. 285, 294 n.63 (1963).

¹⁵⁹ See Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673, 698-99 (1958). Concerning the problem of forfeiture of the prescribed statutory avenues and opportunities for judicial review, see Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327, 350-54 (1963).

governed this field, the courts and the agencies have not been left completely at large. As the foregoing discussion indicates, there are many principles and criteria that may aid in the solution of other problems coming in the wake of *Hewitt-Robins*. Not all of these criteria will apply, of course, in any given case. Even of those criteria that clearly do apply, not all will point in the same direction. For example, there will almost surely be some tension between the equity of an injured party's claim for redress and the value to the industry and the general public of the greater use of administrative machinery that might be encouraged by judicial abstinence. It is for the court to balance such opposing considerations as new remedial issues appear, and to judge the question of survival accordingly. Just this kind of balancing serves to explain and reconcile the paradoxical results of *T.I.M.E.* and *Hewitt-Robins*; and, indeed, the paradox cannot be resolved without such an inquiry. Given the criteria that make up the balance, the solution of similar problems in the future should be equally feasible.

III

PURSUIT OF THE PRIVATE REMEDY: PROCEDURAL LIMITATIONS

Against the background developed in the preceding section, it is now appropriate to consider some remaining procedural problems. This inquiry is not, of course, completely separate, for the procedural implications may bear directly on the question of survival as such, though usually they are matters which arise only after the survival issue has been decided. Nevertheless, any discussion of the subject would be manifestly incomplete without some attention to these difficult and complex questions.

A. The Private Remedy and Primary Jurisdiction

It is obvious why the doctrine of primary jurisdiction is relevant in defining the process by which a private remedy is to be pursued, but it must first be determined whether primary jurisdiction has any bearing on the question of survival as such. Until the *Montana-Dakota* decision, it does not appear that private remedies were ever considered less available merely because they depended upon questions that had incidentally to be referred to administrative agencies.¹⁶⁰ Confusion engendered by *Montana-Dakota* persisted because of *T.I.M.E.*'s suggestion that the landmark primary jurisdiction case of *Texas & Pac. Ry v. Abilene Cotton Oil Co.*¹⁶¹ had held that a shipper's common law rights were "necessarily extin-

¹⁶⁰ See *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 168 (1963); cf. *General Am. Tank Car. Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247 (1913).

¹⁶¹ 204 U.S. 426 (1907).

guished" simply because the central issue of reasonableness had to be decided by the ICC.¹⁶² The matter appears now, however, to have been clarified by *Hewitt-Robins*. The Court in that case, recognizing that a carrier's routing practices no less than his rates had to be passed upon by the Commission and not by the courts, cautioned that "the survival of a judicial remedy under the saving clause of § 216(j) cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends."¹⁶³

The *Hewitt-Robins* Court made no attempt, however, to deal head-on with *Abilene*, nor is that case as easily disposed of as the brief and confident discussion in *Hewitt-Robins* might suggest. *Abilene* did indicate that the Interstate Commerce Act had superseded the shipper's common law damage remedy. Such a remedy was apparently deemed "inconsistent" with the statute despite its clear historical antecedents¹⁶⁴ and notwithstanding the act's saving clause. That decision might therefore appear to support the broad rationale of *T.I.M.E.*, but on closer scrutiny the very context in which *Abilene* was decided supplies the ground for distinction. What the Court feared was not the survival of a common law remedy as such, but rather the disruptive consequences of leaving every lower federal and state court free to determine questions of reasonableness in the course of common law suits. *Abilene* did not hold, as Mr. Justice Black has explained, "that the existence of primary jurisdiction alone destroyed all court remedies."¹⁶⁵ And after *Abilene*, "when the question of unreasonableness has arisen in court proceedings courts have often refused to dismiss the cause but have stayed the action pending I.C.C. determination of that issue."¹⁶⁶ Thus, history confirms the view of the *Hewitt-Robins* Court that

¹⁶² *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 474 (1959): "[T]he holding of the *Abilene* case that a common-law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue"

¹⁶³ *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 89 (1962).

¹⁶⁴ In *Abilene* the Court declared: "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier . . . made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge." 204 U.S. at 436. See also Brief for the United States, pp. 16-17, *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959). *But cf.* materials cited note 27 *supra*.

¹⁶⁵ *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 482 (1959) (dissenting opinion).

¹⁶⁶ *Ibid.* See also *Southern Ry. v. Tift*, 206 U.S. 428 (1907), suggesting such a reading within a few months after the *Abilene* decision. In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, 341-42 (1944), *Abilene's* requirement of primary jurisdiction and referral of questions of reasonableness to the Commission presented no obstacle. On the other hand, one commentator has urged that "*T.I.M.E.* represents a defensible, if technical, reading of *Abilene*." Comment, *The Doctrine of Primary Jurisdiction and the T.I.M.E. Case*, 27 U. CHI. L. REV. 536, 542 (1960).

primary jurisdiction and the survival of the private remedy are quite independent questions.

Although the two issues can thus be divorced, several difficult questions remain concerning the coordination of court and agency. The most basic issue involves the very power of an administrative agency that cannot grant damages or reparation to inquire into the reasonableness of past rates or practices for any purpose. For, if no such power can be implied, then (as *Montana-Dakota* suggested) referral would be an idle gesture. It seems obvious at the outset that not every case in which the agency is impotent to award money damages raises such a problem. Consider, for example, the case of *United States v. Western Pac. R.R.*,¹⁶⁷ in which the carrier filed a timely district court suit against the shipper for the recovery of unpaid charges, and the shipper (the United States) sought a referral to the ICC of the question of reasonableness. Although it was uncertain whether the shipper could still have filed a timely reparation claim with the Commission,¹⁶⁸ the Supreme Court found no obstacle to referral of the reasonableness issue since the lawsuit itself had been timely commenced. Moreover, as the Court later explained in *T.I.M.E.*, "the authority of the ICC to determine the reasonableness of past filed rates in aid of litigation was undoubted."¹⁶⁹

The question is more difficult, however, under the Motor Carrier Act and the few other statutes that create no reparation power. In these acts the barrier to a plenary proceeding before the agency is not simply procedural, as it was in *Western Pacific*. Nor can the necessary authority always be derived from the agency's undoubted authority to investigate past practices as a basis for prospective orders: There are cases in which the plaintiff either seeks no future relief, or in which there would be no basis for any—because, for example, the carrier no longer serves the territory or the shipper no longer uses the carrier's services.¹⁷⁰ In such cases the agency's authority to look into the reasonableness of past practices must stand on its own foundation.

Particular provisions of the regulatory statutes in question have guided each of the affected agencies to a respectable basis for its own

¹⁶⁷ 352 U.S. 59 (1956).

¹⁶⁸ The carrier's suit against the Government was timely under the Tucker Act, 28 U.S.C. § 2501 (1958), since it was commenced within six years of the disputed shipments. At that time, however, a private shipper would have been barred by § 16(3) (c), added by 43 Stat. 633 (1924), as amended, 49 U.S.C. § 16(3) (c) (1952), which provided a two-year limitation (now three years) on shippers' reparation claims before the Commission. The Court assumed without deciding that after two years a reparation claim by the Government as shipper would likewise be time-barred. 352 U.S. at 71.

¹⁶⁹ *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 475 (1959).

¹⁷⁰ See, e.g., *Manhattan Soap Co. v. Supreme Motor Freight Lines*, 61 M.C.C. 430, 433-34 (1952); *Kingan & Co. v. Olson Transp. Co.*, 32 M.C.C. 10, 11 (1942).

authority over past practices.¹⁷¹ Then, too, there are decisions from analogous areas which reinforce that authority at a more general level.¹⁷² As Mr. Justice Frankfurter noted in his *Montana-Dakota* dissent, citing solid Supreme Court precedent: "The fact that the Federal Power Commission is not itself authorized to award damages does not disable it from advising a court on questions on which its judgment is needed. . . . We see no reason why the Commission's findings should not be sought here."¹⁷³

Among the cases cited in support of this conclusion was *United States v. Morgan*,¹⁷⁴ which serves to illustrate the analogy. In that case the Secretary of Agriculture had prescribed certain stockyard rates, but his order had been set aside by a court because of procedural defects. In the interim the court had impounded funds representing the difference between prior rates and the lower rates invalidly set by the Secretary. The Supreme Court held first that the district court, acting as an equity court, had both the power and the responsibility to dispose of the impounded funds in accordance with a "reasonable" schedule of rates. The question remained whether the Secretary might reopen his proceedings and determine a lawful rate not only for the future but also—in view of the Secretary's lack of any statutory power to grant reparation—for the past as well. The Court held not only that he might, under the circumstances, make such a determination, but that the district court should be guided by it in disposing of the impounded fund.¹⁷⁵

¹⁷¹ For the views of the three agencies, which have no statutory power to award damages or reparation, see *Continental Charters, Inc.*, 16 C.A.B. 772, 774-77 (1953); *City of Cleveland v. Hope Natural Gas Co.*, 3 F.P.C. 150, 187-88 (1942), *rev'd sub nom.* *Hope Natural Gas Co. v. FPC*, 134 F.2d 287 (4th Cir. 1943), *rev'd on other grounds*, 320 U.S. 591 (1944); *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, 340-44 (1944). See also *Brief for Petitioners*, pp. 115-21, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

¹⁷² See, e.g., *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 432-33 (1940); Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 579-80 (1954). Ironically, in fact, the courts in antitrust suits seem to have deferred on occasion to the agency even where there has been considerable doubt whether the agency could grant any meaningful form of relief, or measurably affect the issues before the court. See, e.g., *Seatrains Lines v. Pennsylvania R.R.*, 207 F.2d 255, 261 (3d Cir. 1953); *United States v. Alaska S.S. Co.*, 110 F. Supp. 104 (W.D. Wash. 1952). This tendency has evoked a substantial amount of criticism, e.g., L. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 464-70 (1954); B. Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495 (1953). But see von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954).

¹⁷³ *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 264 (1951) (dissenting opinion).

¹⁷⁴ 307 U.S. 183 (1939).

¹⁷⁵ The Court, noting the Secretary's lack of reparations power, conceded that ordinarily "there would be no occasion for such an investigation if, as a result of it, the Secretary could make no reparation order." *Id.* at 193. But the Court continued: "[W]hen the alleged excessive rates are *in custodia legis*, the court has authority and is under an equitable duty to dispose

There is a final aspect of the court-agency relationship that bears upon the survival of prior remedies: the relative ease or difficulty of securing the agency's views on any referable question which may arise in the course of the suit. Sometimes the channels of referral will be clearly marked and no problem will be encountered in obtaining the agency's expert judgment. There are other cases, however, in which referral may be difficult, because the agency lacks jurisdiction over some aspect of the referable question, or of an essential party, or because the agency is too busy to decide and return the case promptly.¹⁷⁶ Where formal referral is unavailable, though, there may be other ways of securing the agency's views, perhaps outside the formal channels of interaction,¹⁷⁷ or through such expedients as inviting the agency to intervene in the lawsuit.¹⁷⁸ In any event the attitude of the court should remain flexible toward the question of referral, and the requirements of primary jurisdiction, however onerous, should rarely justify turning away the aggrieved party without a remedy that would otherwise be available.¹⁷⁹

B. The Procedural Mechanics of Referral

A threshold question that confronts the plaintiff seeking to press a surviving cause of action is where in the procedural labyrinth he should begin. Suppose, for example, that a shipper has already secured from the ICC a determination that the carrier practice of which he complains is unreasonable and unlawful. Surely he will be in a stronger position than the plaintiff challenging conduct which the agency has already approved.¹⁸⁰ The

of them according to law and justice. Thus the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his determination can afford a proper basis for the action of the district court in making disposition of the fund." *Ibid.* The Court thus concluded that the district court should stay its hand pending the outcome of the rate proceeding before the Secretary, after which "the court will have the appropriate basis for its action and will be able to make its order of distribution accordingly." *Id.* at 198. See also *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 432-33 (1939); *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 312-13 (1935).

¹⁷⁶ *Cf. Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 327-29 (1963) (Brennan, J., dissenting).

¹⁷⁷ See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 484 n.5 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); Letter from B. Franklin Taylor, Jr., Associate General Counsel, ICC, to Hon. Richard Hartshorne, United States District Court for the District of New Jersey, July 31, 1959, in *Record*, pp. 16-19, *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

¹⁷⁸ See Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 *YALE L.J.* 65 (1940).

¹⁷⁹ Thus a threshold refusal to refer the case to the agency need not preclude referral should the case develop in such a way that the agency's advice eventually becomes relevant. See, e.g., *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708, 710 (3d Cir. 1958); *Schwartzman v. United Air Lines Transp. Corp.*, 6 F.R.D. 517, 525 (D. Neb. 1947).

¹⁸⁰ See cases cited note 156 *supra*.

question remains, however, whether the private plaintiff is typically in a better position by having gone first to the agency rather than having filed his complaint and waited for the court to refer the matter to the agency. In some cases, of course, the plaintiff will have no choice, either because the agency will not entertain a complaint that does not accompany a pending lawsuit, or because there is insufficient time to go to the agency and back to court before the statute of limitations has run. If there is a choice, however, several factors appear to favor preliminary resort to the agency.¹⁸¹ First, the agency's action may obviate the need for a lawsuit if the defendant should decide to acquiesce voluntarily rather than risk the expense and uncertainty of further litigation.¹⁸² Second, there is always the possibility that the plaintiff who starts out in court may be remitted to the agency for exhaustion of administrative remedies before pressing his damage claim. Unless the court agrees to stay the suit pending such exhaustion, the underlying claim might be barred by the statute of limitations before the plaintiff could get back to court. Third, there may well be cases in which the plaintiff has reason to prefer an agency decision on some central question in the case. The court might decline to refer that question if it is not clearly within the agency's primary jurisdiction, even though the agency would willingly have decided it had the opportunity been presented. Once the agency has spoken, however, its findings would undoubtedly carry considerable weight with the court, even though the court might neither have referred the question nor have decided it as the agency did.¹⁸³

¹⁸¹ There seems little doubt that the plaintiff's position will be enhanced by an administrative decision in his favor. *E.g.*, *McCleneghan v. Union Stock Yards Co.*, 298 F.2d 659, 668 (8th Cir. 1962). Where it is the defendant rather than the plaintiff who seeks the agency's advice, one commentator has suggested that the defendant's position before the court will be strengthened by early action on his own to invoke the agency's jurisdiction. See von Mehren, *supra* note 172, at 948.

¹⁸² These considerations apparently underlie the ICC's "special docket" procedure by which rail reparation cases can be quickly processed and refunds informally authorized where the carrier admits the unreasonableness of the assailed charges. See note 145 *supra*.

¹⁸³ There appears to have been some dispute in *T.I.M.E.* concerning how much deference ought to be accorded the ICC's long-standing interpretation of the Motor Carrier Act and its saving clause. While the Court has often inclined to attribute considerable weight to administrative interpretations of statutes, particularly where private parties may have relied extensively on those interpretations, it has also made clear that the agencies cannot be final arbiters of the law. *Compare* *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944), and *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931), *with* *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 n.5 (1954). If, after full hearing, the agency has dismissed the particular complaint for want of jurisdiction, further referral would be unwarranted. *Seatrains Lines v. Pennsylvania R.R.*, 207 F.2d 255, 259-60 (3d Cir. 1953). On the other hand, the courts are understandably reluctant to permit agencies to avoid responsibility for the decision of questions which properly belong to them, simply by appearing in court to disclaim interest in the case. *Trans-Pac. Airlines, Ltd. v. Hawaiian Airlines, Ltd.*, 174 F.2d 63, 65 (9th Cir. 1949).

Assuming that the plaintiff does begin in court rather than before the agency, several questions remain concerning the disposition the court should make.¹⁸⁴ Outright dismissal would seem appropriate only if the plaintiff has clearly failed to exhaust available and adequate administrative remedies, or the court is powerless to grant relief. Otherwise, as the courts have suggested with increasing frequency, the lawsuit should be held in abeyance pending a referral of the issue by the court or an opportunity for the parties to invoke the agency's machinery.¹⁸⁵ Moreover, if the court could grant the plaintiff complete relief without reaching issues that are reserved for the agency, it should consider such judicially cognizable claims first and then consult the agency only if those claims fail to dispose of the case.¹⁸⁶ If the court determines these claims in the plaintiff's favor, or in such a way as to make the agency's views immaterial, considerable time and expense may be saved to the parties, and the agency may be spared a needless imposition.

Where the matter of referral is left to the parties, there is a further danger of what happened in *Hewitt-Robins*—that the original lawsuit will be bifurcated into two separate court proceedings, one to review the agency and the other to review the district court in which the suit was commenced.¹⁸⁷ A statute that is now pending before Congress would obviate this possibility in all cases referred to the ICC,¹⁸⁸ although the problem

¹⁸⁴ There is, of course, a threshold question of district court jurisdiction if the suit is brought in a federal court. Although that question is beyond the scope of this article, a brief note on the matter may be appropriate. Where there is no diversity of citizenship (as in *Montana-Dakota*), some alternative basis of federal jurisdiction must be found. If the surviving remedy is based upon some federal statute, such as the Sherman or Clayton Act, then the suit presumably "arises under" that statute and federal jurisdiction exists without regard to diversity. 28 U.S.C. § 1331 (1958). Or if the complaint asserts a colorable violation of a federal statute "regulating commerce," federal jurisdiction may be claimed not only without diversity but without regard to amount in controversy. 28 U.S.C. § 1337 (1958). And if the surviving common law claim can be made pendent to a federal statutory count—one based either on the regulatory statute itself or on some other act of Congress—there will be federal jurisdiction over the common law count as well. But if that claim cannot be made pendent, or if the statutory claim is dismissed as frivolous, then there would appear to be no non-diversity basis of federal court jurisdiction. Thus many cases of this kind will necessarily be relegated to the state courts.

¹⁸⁵ Where a central question in the case requires the agency's judgment, a stay of the suit is generally preferable to outright dismissal, *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940). If the agency can grant complete relief, however, so that no issues remain for the court after referral, then dismissal may still be appropriate. Where the question of stay or dismissal is a close one, the ultimate decision may be left to the trial court. See *McCleneghan v. Union Stock Yards Co.*, 298 F.2d 659, 670 (8th Cir. 1962).

¹⁸⁶ *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

¹⁸⁷ *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 85 n.* (1962).

¹⁸⁸ H.R. 7508, 88th Cong., 1st Sess. (1963),¹ which has been passed by the House, would amend 28 U.S.C. § 1336 (1958), to provide that review of ICC orders in referred cases shall be confined to the district court which made the referral. On the problems which called forth

might still arise in other areas. In order to avoid bifurcation of this sort, it may be possible (as a footnote in *Hewitt-Robins* has suggested) for the court to make the referral on its own authority rather than leaving it up to the parties.¹⁸⁹

Finally, there may be special problems of referral and coordination in the case where the views of two or more administrative agencies may be relevant if not essential. The problem is acutely posed by the recent case of the struck toy wholesaler, *Pensick & Gordon, Inc. v. California Motor Express*,¹⁹⁰ with which this article began. There, it will be recalled, the Supreme Court vacated a judgment of the court of appeals that disallowed the shipper's claim to damages for the loss of trucking services during the strike, and remanded the case for further consideration in light of *Hewitt-Robins*.¹⁹¹ On remand, the Ninth Circuit held only that the shipper's common law damage remedy survived as against those carriers with respect to which there was diversity of citizenship.¹⁹² The court acknowledged that issues arising in the case might have to be referred not only to the ICC but also to the NLRB, but then left it to the district court to decide what referrals should be made and in what order.¹⁹³

this legislation, and the Court's footnote in *Hewitt-Robins*, see Ginnane & Murray, *Judicial Review of Orders of the Interstate Commerce Commission Relating to Motor Carriers*, 11 VAND. L. REV. 1143, 1144 & nn.7, 8 (1958). There is a closely related question whether orders in such cases are reviewable by a district court of one or three judges, see *Eastern Freight-Ways, Inc. v. United States*, 170 F. Supp. 848 (D.N.J. 1959), and whether the affected carrier may seek judicial review of an adverse finding as to past rates or of a reparation award before the shipper seeks judicial enforcement. For the recent views of the ICC on this question, see Memorandum in Support of Motion to Dismiss, *Atlantic Coast Line R.R. v. United States*, Civil No. 4771-Civ-J, S.D. Fla. (1962).

¹⁸⁹ See generally *FMB v. Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958). For examples of referral orders which retained substantial control in the referring court, see *Natco Corp. v. Great Lakes Indus., Inc.*, 214 F. Supp. 185, 192 (W.D. Pa. 1962); *Feinstein v. New York Cent. R.R.*, 159 F. Supp. 460, 467 (S.D.N.Y. 1958) (L. Hand, J.).

¹⁹⁰ 302 F.2d 391 (9th Cir. 1962).

¹⁹¹ 371 U.S. 184 (1962).

¹⁹² The court did not consider whether the applicable common law would be federal law or that of the forum state (California). The opinion cited both state and federal decisions, the tenor of which appears virtually identical with respect to the shipper's common law remedy against unjustified refusals of service by a common carrier. Thus, while there is a theoretical question whether the substantive law is federal or state, the issue is unlikely to be of practical importance. It has occasionally been suggested, however, that the question has some relevance. See, e.g., Brief for Petitioner, p. 22, *Davidson Transfer & Storage Co. v. United States*, 359 U.S. 464 (1959).

¹⁹³ In fact, the court of appeals left it to the district court to determine the nature and scope of the surviving remedy itself. Several sentences are worth quoting to give the flavor of the court of appeals' mandate: "The evidence adduced before the District Court may well disclose a situation where the common law rights of the parties must be balanced in the light of pertinent federal statutes. Indeed, a balance may have to be stricken in measuring the conflicting impacts of apparently conflicting federal statutes upon those common law rights. Resolution may not be easy, but it can best be accomplished after a full airing and consid-

Thus as the case goes back to the district court many difficult questions that are likely to arise in the multiple-agency case remain. The court must first determine the nature and source of the surviving common law remedy. The trial judge must then consider whether there are aspects of the case that could be decided completely by the court so as to avoid resort to either agency. It appears, however, that the central issue of this case—whether the defendant carriers breached a common law duty owed the shipper by refusing to cross the picket lines—is one that calls primarily for the expert judgment of the ICC, an agency long familiar with such questions.¹⁹⁴

Since there are two agencies potentially involved, it is up to the district court—in its discretion—to decide the priorities of referral. As a general rule it would appear sounder to seek initially the advice of that agency whose decision might remove any need for resort to the other agency.¹⁹⁵ Surely in the present case that would be the Commerce Commission. A decision, for example, that no provisions of the carriers' collective bargaining agreements justified the refusal to serve the struck shipper would make the opinion of the Labor Board superfluous.¹⁹⁶ Even if the ICC held that the carriers did have a colorable defense, it is doubtful that the case would ever go to the NLRB, because the events in suit occurred after the effective date of the new Section 8(e) of the Labor Act, which may invalidate the contract provisions presumably relied on.¹⁹⁷ Although the views of the Labor Board on this question might conceivably be relevant if the ICC allowed the defense, everything favors sending the case at least initially to the Commission.

The court must also be careful to manage the suit so as to minimize possible abrasion between the two agencies and the bodies of regulatory law they administer. When the question goes to the ICC, for example, that agency cannot adjudicate without regard to the labor questions that lurk

eration of all the facts." *Pensick & Gordon, Inc. v. California Motor Express*, 323 F.2d 769, 772 (9th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

¹⁹⁴ For the Commission's previous consideration of this and very similar issues, see, e.g., *Planters Nut & Chocolate Co. v. American Transfer Co.*, 31 M.C.C. 719 (1942); *Montgomery Ward & Co. v. Santa Fe Trail Transp. Co.*, 42 M.C.C. 212 (1943); *Montgomery Ward & Co. v. Consolidated Freightways, Inc.*, 42 M.C.C. 225 (1943). See generally Katcher, *The Duty of a Common Carrier to Handle Strike-Bound Goods*, 24 ICC PRAC. J. 22 (1956); Marshall, *Carrier Service and the Picket Line: A Dilemma*, 13 LAB. L.J. 301 (1962); Note, 67 HARV. L. REV. 317 (1953).

¹⁹⁵ *Cf. Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

¹⁹⁶ Compare *Montgomery Ward & Co. v. Consolidated Freightways, Inc.*, 42 M.C.C. 225 (1943), with *Montgomery Ward & Co. v. Northern Pac. Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953).

¹⁹⁷ § 8(e), added by 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1963). See *Burlington Truck Lines v. United States*, 371 U.S. 156, 171-72 (1962).

in the case. Here, as the Supreme Court has recently warned in a closely analogous situation, the Commission "acts in a most delicate area" whatever relief it may grant, since the policies of the two interacting statutes "necessarily must be accommodated, one to the other."¹⁹⁸ And, as the Court concluded, "if either agency is not careful it may trench upon the other's jurisdiction, and, because of lack of expert competence, contravene the national policy as to transportation or labor relations."¹⁹⁹ Yet there is impressive evidence of the skill and efficiency with which these two agencies, at least, have handled such problems of accommodation and interaction in the past,²⁰⁰ and it appears reasonable to assume that this problem, too, could be adroitly managed.

Where the priorities of referral in a multiple-agency case are less obvious than they appear in *Pensick & Gordon*, the district court might consider which of the agencies involved has had the greatest experience with the central question of the case; which agency possesses the personnel and facilities for deciding referred questions most efficiently; to which regulatory statute the private remedy is most relevant, and on the work of which agency it would have the greatest impact; and, which agency's remedies are most appropriate to the conduct of which the plaintiff complains.²⁰¹

CONCLUSION

Recent developments concerning private remedies under federal regulatory statutes have displayed several salutary features. Largely because of these developments there appears a greater likelihood than ever before of a healthy congressional solution of many of the thorny problems discussed in this article. As the currently pending motor carrier legislation²⁰² indicates, the adoption of a comprehensive and explicit scheme of statu-

¹⁹⁸ *Id.* at 172.

¹⁹⁹ *Id.* at 173. *Cf.* Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958).

²⁰⁰ For examples of the care and sensitivity with which the Board and the Commission have in the past shared responsibility for problems of common interest and concern to the two agencies, see *Galveston Truck Line Corp. v. Ada Motor Lines*, 73 M.C.C. 617, 625 (1957); *Local 728, Int'l Bhd. of Teamsters (Genuine Parts Co.)*, 119 N.L.R.B. 399, 411-12 (1957). Such illustrations as these suggest that there is little likelihood either agency would encroach upon the domain of the other while deciding such common questions.

²⁰¹ For examples of how other courts have handled similar suits by strikebound shippers against common carriers, both by motor and by rail, see *Meier & Pohlmann Furniture Co. v. Gibbons*, 233 F.2d 296 (8th Cir.), *cert. denied*, 352 U.S. 879 (1956); *Minneapolis & St. Louis Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126 (8th Cir. 1954); *Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corp.*, 165 F. Supp. 67 (S.D. Ind. 1958); *Quaker City Motor Parts Co. v. Inter-State Freight Sys.*, 148 F. Supp. 226 (E.D. Pa. 1957); *Montgomery Ward & Co. v. Northern Pac. Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953); *Beck & Gregg Hardware Co. v. Cook*, 210 Ga. 608, 82 S.E. 2d 4 (1954).

²⁰² H.R. 9903, 88th Cong., 2d Sess. See H.R. REP. No. 1144, 88th Cong., 2d Sess. 16, 60-62 (1964).

tory remedies would greatly alleviate the present need for speculation, implication, and inference in judging private claims against regulated defendants. Second, the Supreme Court has finally and properly divorced the question of whether and to what extent private remedies survive at all, from the logically quite distinct question of primary jurisdiction, which concerns the functions of the administrative agency in processing private claims from whatever source. Finally, there is some hope for the assimilation of two questions which—although they have been separated for purposes of analysis in this article—are obviously close kin: the preservation or survival of pre-existing remedies under the saving clause, and the implication of new remedies to redress statutory violations for which the terms of the statute afford no civil sanction. Significantly, the United States Supreme Court is about to consider a case that raises many facets of the latter issue of implied statutory rights of action.²⁰³ Perhaps a thorough consideration of that case and of others likely to follow it will underscore the very close analogy between the implication and the preservation of private remedies, and may evolve certain common principles which will aid the solution of problems in both areas.

²⁰³ *Borak v. J. I. Case Co.*, 317 F.2d 838 (7th Cir.), *cert. granted*, 375 U.S. 901 (1963) (No. 402, 1963 Term).