

Interagency Transfers of Adjudication Authority

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Agencies sometimes give away their legislatively delegated decision-making power of their own accord. More specifically, agencies make agreements in order to transfer their entire jurisdiction to adjudicate administrative decisions to other agencies. This Article is the first to explore these mostly informal, endogenous interagency arrangements.

One example of this dynamic involves the authority to adjudicate the legality of pharmaceutical imports and exports, initially delegated by Congress to the Department of Treasury. Treasury has since transferred this authority to the U.S. Customs and Border Patrol via interagency agreement, which then retransferred this authority to the Food and Drug Administration (FDA) by means of another interagency agreement. The FDA does not have clear statutory authority to make these decisions. However, transferring this set of adjudications to the FDA allows it to bring its superior technocratic expertise to bear, which may lead to higher quality decision making.

On the one hand, these arrangements could be harbingers of a future in which agencies take advantage of opportunities to shirk, deteriorate rule of law values, and usurp the legislative branch's power to define agency jurisdiction and make the law. On the other hand, interagency transfers of adjudication authority represent agencies' potential to improve administrative decision making by sharing or even transferring power based on their on-the-ground knowledge of their own varying capacity to implement an efficient and effective regime of administrative adjudication.

This Article argues that that there is a way to ensure these interagency transfers of power and responsibilities are both beneficial to the quality of administrative decision making and also constitutional—in particular, by allowing those agreements that benefit the quality of administrative decision making to be deemed legitimate if grounded in statutory language authorizing interagency coordination. Finally, it proposes that courts play a primary role

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in shaping the development of high-quality interagency transfers of adjudication authority and ensuring that they remain within permissible constitutional bounds.

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Introduction

Agencies often engage in “joint rulemaking” with other agencies on the basis of shared statutory authority.¹ Agencies also participate in “coordinated interagency adjudication,” in which they subdelegate portions of their power to adjudicate administrative claims or share the responsibility of further administrative decision making on the basis of statutory authority that divides decision-making tasks among multiple agencies.² This Article is the first to bring to light instances in which agencies transfer wholesale their jurisdiction to adjudicate administrative decisions to other agencies—and in particular, to agencies that do not have the statutory authority to make these decisions. Indeed, neither scholars, Congress, courts (save the Tenth Circuit), nor the executive branch itself³ has acknowledged these endogenous efforts to reorganize administrative decision-making power, let alone considered the impact this activity may have on executive and interbranch lawmaking mechanisms.

For example, in 2009, the Department of Homeland Security (DHS) agreed to let the Department of Labor (DOL) adjudicate seasonal non-agricultural worker visas (known as “H-2B” non-immigrant visas) and to let the DOL’s denials of such visas stand as the final determination on these visa petitions.⁴ The two agencies based this transfer of decision-making power on a statute delegating to DHS the power to “consult with the appropriate agencies of the Government” in deciding whether to grant a foreign worker an H-2B

1. See generally, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. FORUM 78 (2012).

2. See generally Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 831-40 (2015). Even though coordinated interagency adjudication has only recently been acknowledged by scholars, it can be found in various substantive areas of administrative law across the executive branch. See generally *id.*; see also RICHARD POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 45 (2016) (“Shah shows convincingly that there are serious problems of coordination.”); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015) (citing Shah to acknowledge the “growth of administrative adjudication”).

3. The Administrative Conference of the United States currently notes: “Most studies of federal agency adjudication—by the Conference or others—took place years ago or assessed only limited aspects of the adjudication process. There is no single, up-to-date resource that paints a comprehensive picture of agency adjudications across the federal government.” Federal Administrative Adjudication, ADMIN. CONF. U.S., <http://www.acus.gov/research-projects/federal-administrative-adjudication> (last visited Feb. 23, 2016). While it is currently “undertaking a project to map the contours of the federal administrative adjudicatory process,” its database does not include information about interagency transfers of adjudication authority. Adjudication Research, Joint Project of ACUS and Stanford Law School database, <https://acus.law.stanford.edu> (last visited Feb. 23, 2016).

4. 73 Fed. Reg. 78,020 (Dec. 19, 2008) (DOL); 73 Fed. Reg. 78,104 (Dec. 19, 2008) (DHS).

visa.⁵ In late 2015, in response to litigation brought by employers claiming that their workers' petitions were unfairly denied by the DOL without review by DHS, the Tenth Circuit decided that the transfer of this decision-making authority from DHS to the DOL was an "impermissible subdelegation" of authority, because it was not a permissible construction of DHS's authority to "consult."⁶

In a substantively different area of administrative law, the Equal Employment Opportunity Commission (EEOC) long ago delegated the responsibility to accept Title VII claims on behalf of the EEOC to a subcomponent of the DOL that deals with federal contractors, perhaps in order to support the two entities' shared interests.⁷ There is controversy regarding whether this delegation is a valid interpretation of statute and whether it impermissibly deteriorates administrative due process.⁸ Despite these concerns, however, the EEOC subsequently arranged to transfer to this DOL subcomponent the power to adjudicate Title VII claims in their entirety, without any involvement by the EEOC, on the basis of interagency agreement alone.⁹

While the examples above focus on areas impacting the rights and claims of individuals, such agreements may also concern the claims of and penalties faced by institutional and business stakeholders as well. And yet, these arrangements are often created by agency-driven agreements (like Memoranda of Understanding ("MOUs")). In this way, these arrangements are substantive, but also profoundly informal and unanchored. They also exceed traditionally accepted bounds of both intra- and interagency delegation by allowing for complete transfers of adjudicatory authority that essentially permit agencies to redefine their own jurisdiction. For these reasons, they force us to grapple with the question of whether these agencies are acting on the basis of legitimate statutory authority.¹⁰ These arrangements also, in turn, push us to consider

5. 8 U.S.C. § 1184(c)(1) (2012).

6. See *infra* note 45 and accompanying text; G.H. Daniels III & Assoc., Inc. v. Perez, 626 Fed. Appx. 205, 207 (10th Cir. 2015). The court declined to defer to the agency's interpretation, saying that "[t]he issue we confront is whether an agency may delegate its decision-making responsibility to an entirely different agency. Courts are quite tolerant of the administrative practices of agencies, but *passing the buck* on a non-delegable duty exceeds elastic limits." *Id.* at 207 (emphasis added). Referring to interagency transfers of adjudication authority in general as "passing the buck" has some resonance because of the potential mix of both positive and negative normative impact of these arrangements.

7. Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 903 (8th Cir. 1979) ("The common goal of the EEOC and the OFCCP is to eradicate employment discrimination.").

8. See *infra* notes 79-82 and accompanying text.

9. Memorandum of Understanding Between the Equal Emp't Opportunity Comm'n and the U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs § 7(d) (Nov. 9, 2011).

10. Per the government's own expression of constitutional norms: "The [constitutional] theory . . . is that there is inherent in a grant of authority to a department or agency to perform a certain function, and to expend public funds in connection therewith, a responsibility which, having been reposed specifically in such department or agency by the Congress, may not be transferred

when agency interactions may be appropriations of legislative power and to examine the pervasive assumption that interagency coordination is, for the most part, constitutional.

Despite their potential lack of statutory basis, these curious agency-led changes to administrative structure, and the potential for more of them, are not necessarily bad. Rather, they represent complexities in agency interactions that require further examination and, as this Article suggests, may even benefit the administrative state. In addition, agencies' growing reliance on power- and burden-shifting agreements such as these also serve as an impetus for the reexamination of core, traditionally rigid structural constitutional principles such as the nondelegation and separation of powers doctrines. Put another way, these agreements offer a novel and useful lens through which to view various governmental dynamics, including those within the executive branch, as well as between the executive branch and the other two branches of government.

At the very least, the existence of these types of interagency arrangements destabilizes fundamental assumptions in administrative law scholarship. One such assumption is grounded in the foundational theory that agencies are constantly attempting to maintain, grow, and compete for power, or "empire build."¹¹ Another expectation, which has its roots in the empire-building narrative, is that when agencies interact, they do so in order to augment their joint capacity,¹² or even compete for power.¹³ One more core assumption held by both scholars and legislators is that agency coordination is squarely based in the direct legislative delegation of authority to multiple agencies.¹⁴ Arguably,

except by specific action of the Congress." U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF GEN. COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-71 (3d. ed. 2004).

11. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 916 (2005) ("[An] enduring and pervasive assumption in constitutional law and theory is that much government behavior is driven by empire-building, the self-aggrandizing pursuit of power . . .").

12. See Freeman & Rossi, *supra* note 1; Biber, *supra* note 1; Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2006). Similar to the focus on agency overlap in the law literature is the interest in bureaucratic "redundancy" in a related school of political science theory; instead of championing agency overlap, this work views overlap as providing limited benefits that are dependent on circumstance. See, e.g., Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 287 (2003) (suggesting the benefits of redundancy depend on the alignment between Congress's and agencies' preferences); Raaj Kumar Sah & Joseph E. Stiglitz, *The Architecture of Economic Systems: Hierarchies and Polyarchies*, 76 AM. ECON. REV. 716, 716-17 (1986) (arguing that the institutional architecture of complex institutions, and in particular their use of functional redundancies, influences outcomes); see also Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1657 (2006) (drawing on Ting's work to "question the siren call of [agency] unification").

13. See Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries* (unpublished manuscript) (on file with author); Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL FORUM 329 (2013).

14. See Jody Freeman & Jim Rossi, *Improving Interagency Coordination in Shared Regulatory Space*, ADMIN. & REG. L. NEWS, Summer 2013, at 11 ("Congress bears primary responsibility for creating . . . overlapping functions [across agencies]."); see generally Freeman &

these assumptions have been formed and reinforced by the literature's and Congress's focus on joint rulemaking and other types of activity within "shared regulatory space,"¹⁵ which often reflects these characteristics.

Interagency transfers of adjudication authority do not conform to this set of paradigms. For one, they do not help agencies to build their jurisdiction unequivocally or work together to jointly augment capacity (or even encourage competition among agencies). Rather, each such arrangement represents an agency's desire to reduce its delegated power and attendant responsibility by shifting them to another agency. At base, agencies may give away their decision-making power for self-interested reasons, such as the desire to relieve their own bureaucratic burden, and in ways that reduce administrative transparency. In this way, transferring decision-making power may inoculate agencies against attempts by the non-executive branches to constrain consequentialist bureaucratic activity, and may serve to obscure administrative decision making from the public. For these reasons, these agreements have the potential to deteriorate ideals of good administrative decision making and negatively impact the executive branch's accountability to Congress and the public.

Further, by transferring adjudication authority, an agency may also frustrate the legislative intent underlying the initial delegation of authority. Congress may have issued a law with assumptions about how that law is best enforced that go to the heart of the law itself—including, for instance, an expectation that a certain agency, with its specific political orientation and functionalities, is best suited to enforce the law in a manner that honors its true meaning and intent. Even a high-quality agreement transferring power away from the agency that was originally delegated the power to adjudicate may not capture these congressional assumptions. In addition, it may be naïve to expect that the executive branch will effectively and trustworthily develop and adhere to reasonable structures of law enforcement and aim to be accountable to the law, unless agencies are required to play at least some role in the responsibilities that Congress initially delegated to them, or at least held to specific and formalized legislative standards.

And yet, interagency transfers of adjudication authority offer significant potential benefits to administrative decision making. For instance, an agency that receives a wholesale transfer of adjudication authority based on the terms

Rossi, *supra* note 1; Biber, *supra* note 1; Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 240 (2011); Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2234–35 (2012); Marisam, *supra* note 12. As will be discussed *infra* Section III.B.1, courts assume this paradigm as well, although thus far they have not deferred to agencies' interpretation of shared legislative authority.

15. See Freeman & Rossi, *supra* note 13 (introducing the term); see generally Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000); Cameron Holley, *Removing the Thorn from New Governance's Side: Examining the Emergence of Collaboration in Practice and the Roles for Law, Nested Institutions, and Trust*, 40 ENVTL. L. REP. 10,656 (2010).

of an explicit agreement has the autonomy to maintain responsibility for the adjudication process more so than an agency that has been delegated only part of an administrative process, which may allow the recipient agency to maintain better the quality and consistency of decision making. These transfers may also guard against ad hoc bureaucratic shirking by allowing for predictable burden shifting, including in instances when it would benefit the adjudication process. Thus, concrete and explicit agreements to burden-shift in adjudication may allow agencies to act in ways that acknowledge the realities of their self-interest, and exploit this impulse to maximize administrative effectiveness. In addition, these transfers could increase the availability of agency expertise in administrative adjudication, or otherwise allow agencies to act quickly on knowledge or intensify competencies that benefit the adjudication process.

Furthermore, these transfers may allow agencies to push back against coalitional drift caused by arbitrary, political, or punitive new legislative constraints—particularly those limiting agencies’ resources or funding—in order to better preserve their core functional mandates. Thus, they may not only improve the general quality of administrative decision making, but also allow agencies to reshape their own decision making in ways that reenergize the values underlying the initial transfer of certain adjudicatory responsibilities from the courts to administrative agencies in the first place.¹⁶

Overall, this Article suggests that a proactive evaluation of the benefits and constitutionality of these and other agency-led shifts in administrative structure could encourage interagency burden shifting that both improves the quality of agency decision making and operates safely within the bounds of permissible executive power. More specifically, this Article champions the development of these unusual interagency agreements on the basis of statutory language empowering agencies to coordinate, consult, or otherwise interact with one another, in particular, within a robust system of interbranch oversight.¹⁷

This project also encourages lawmakers and scholars to take a more functionalist approach to both the separation of powers and nondelegation doctrine.¹⁸ As to the former, this Article argues for privileging the quality of

16. In general, there are benefits to administrative adjudication, including a reduction in Article III caseloads, increased procedural efficiency, and the potential for agency expertise to improve the quality of the outcome. These are fundamental qualities motivating the transfer of certain judicial responsibilities from the courts to administrative agencies. Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 476 (2003).

17. See Jennifer Nou, *Agency Coordinators Outside the Executive Branch*, 128 HARV. L. REV. FORUM 64, 74 (2014-2015) (responding to Shah by suggesting that identifying “institutions outside of the executive branch that could provide a bird’s-eye view” of coordinated interagency adjudication is a valuable endeavor).

18. Legal scholars have divided the Supreme Court’s separation of powers doctrine into two approaches. These categories are loosely understood as requiring a separation of tasks and balance of power between and among the three branches of government, respectively. See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155-59 (2000); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 689 (1996-1997) (“The

policymaking over formalist determinations of which entities are responsible for making it, thus reinforcing administrative unilateralism and challenging conventional checks and balances formulations that caution against allowing the executive branch to determine its own shape. Regarding the latter, this Article encourages consideration of the ways in which legislative intent underlying the delegation of authority to agencies to coordinate may—and perhaps should—grow over time to encompass burden-shifting dynamics as well as more traditionally delegated collaborative activity.

This Article proceeds in four parts. Part I considers the dynamics of interagency transfers of adjudication authority, including underlying bureaucratic motivations, and explores examples of these arrangements. Through comparisons to the public/private delegation context, Part II considers the functional drawbacks of these interagency arrangements, such as reduced administrative transparency and due process concerns, and suggests that these problems are not endemic to these transfers and could be cured by better written agreements. This Part also identifies the potential benefits of these interagency transfers, including that they may increase the positive influence of agency expertise and lead to greater agency responsibility for process quality, as well as allow agencies to better protect their core functions.

Part III extrapolates lessons from the intra-agency and other interagency delegation frameworks to contextualize the potential danger to norms of structural constitutionalism that interagency transfers of adjudication authority pose. First, this Part examines the shaky legislative bases for existing interagency transfers of adjudication authority, and concludes that without statutory authority, these arrangements are *ultra vires*. This Part then suggests

separation of powers puzzle appears to have stumped the Supreme Court. In a series of decisions over the last half-century, and particularly in the last twenty-five years, the Court has veered between two separation of powers doctrines that cannot easily be reconciled. Commentators usually label these two opposed doctrines ‘formalism’ and ‘functionalism.’’); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1946 (2011) (“As Professor Thomas Merrill has put it, the Court’s separation of powers doctrine assumes that ‘the Constitution contains an organizing principle that is more than the sum of the specific clauses that govern relations among the branches.’ Within that framework, what counts for functionalists is the apparent background purpose of balance among the branches. What counts for formalists is the apparent background purpose of strict separation.”); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 226-35 (explaining the Supreme Court’s two conceptions of separation of powers, the “formal” and “functional” approaches); *see also* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1605 (2014) (“In the first line of analysis, legal scholars and jurists have suggested that the choice between formalist and functionalist approaches . . . provides a central organizing principle for thinking about structural constitutionalism.”). “The formalist approach emphasizes the need to maintain three distinct branches of government based on function. The functionalist approach emphasizes the need to maintain pragmatic flexibility to respond to modern government.” Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 854-55, (2009); *see also* Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434-37 (1987) (characterizing the former as the “pure” view); *see generally* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 229-35 (exploring this distinction); Peter R. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

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that, if these transfers in fact foster the benefits discussed in Part II, they may be legitimately based in statutory language authorizing interagency coordination. This proposal draws from the premise that legislative language empowering agencies to interact of their own accord encapsulates a congressional intent to encourage interagency activity that improves the quality of administrative processes.

Finally, Part IV considers the ability of each branch of government to determine whether interagency transfers of adjudication authority are legitimate on this basis, and settles on the judiciary as the most practicable option. This Article concludes by offering preliminary suggestions for how courts should determine whether agencies that give away their decision-making power have remained sufficiently accountable to the ideals of good administrative process, and how courts might even establish a blueprint for the proliferation of successful and legitimate interagency burden-shifting in administrative decision making.

I. Varieties of Transfers

Drawing from agreements that are both new and decades old, agencies have begun to rely more frequently on arrangements that allow the wholesale interagency transfer of their authority to adjudicate both administrative petitions for public benefits and claims to private rights. This Part explores a number of examples of these interagency transfers of adjudication authority. The included list of examples expands on my previous work¹⁹ to broach exploration of “tricky and new terrain.”²⁰

At base, interagency transfers of adjudication authority epitomize those qualities of coordinated interagency adjudication that distinguish it from rulemaking, and are thus perhaps naturally relatively rare. For instance, while shirking and burden shifting may be pervasive on an ad hoc basis in other forms of coordinated interagency adjudication,²¹ agreements in which agencies give away their adjudication authority are more radical, in that agencies agree to burden shift the entirety of their adjudicatory jurisdiction. Further, unlike joint rulemaking, interagency transfers of adjudication authority are often based in informal agreement,²² which renders them more difficult to identify. Indeed,

19. See Shah, *supra* note 2, at 840–46 (introducing interagency transfers of adjudication authority as the “substitutable model” of coordinated interagency adjudication).

20. I would like to thank Anne Joseph O’Connell for this insight.

21. In separate work, I have assembled data to establish the prevalence of shirking in coordinated interagency adjudication. Bijal Shah, *Dodging Power* (unpublished manuscript) (on file with author). Others have noted the potential for shirking in joint rulemaking. See Todd S. Aagaard, *supra* note 14, at 288 (2011); Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 727 (2013); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 864 (2006); O’Connell, *supra* note 12, at 1680; Ting, *supra* note 12, at 275.

22. See generally *supra* note 2; Nou, *supra* note 17; Chris Walker, *Shah on Interagency Adjudication Coordination*, YALE J. ON REG. NOTICE & COMMENT (Feb. 7, 2015) (“I agree with Professor Nou that one of the more interesting findings from Professor Shah’s examination is the

locating and gaining access to interagency agreements is challenging because of both the inconsistency in and lack of availability of these government records, and the common requirement that information about them is often obtainable only by finding amenable agency officials. This having been said, there are enough examples to indicate that these transfers happen and to serve as fodder for discussion of the under-examined agency dynamics brought to light by these agreements.

Also unlike rulemaking²³ and coordinated interagency adjudication as a whole,²⁴ none of the interagency agreements introduced in this Part are based in specific authority authorizing the interagency transfer of adjudicative authority. This may be because there is little motivation for Congress to assign an agency the power to transfer its authority, instead of simply allotting the power to a second agency.²⁵ At best, agencies may be taking an aggressive approach to the application of a statute,²⁶ one that allows them to operate with relatively loose interagency guidelines.²⁷ In general, an agency's opportunity to transfer an entire decision-making regime to another agency appears to be greater if

very informal nature of the coordination agreement between agencies—which is often in the form of an interagency memorandum if even that formalized.”).

23. In rulemaking, Congress creates “overlapping functions” across agencies fairly often. Freeman & Rossi, *supra* note 14, at 11; *see generally* Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815 (2011); Gersen & Vermeule, *supra* note 14; Freeman & Rossi, *supra* note 12; Gersen, *supra* note 12; Marisam, *supra* note 12. “Such delegations may reflect congressional dysfunction, or may be a byproduct of the legislative committee process. Or they may result from purposeful design choices or from compromises necessary to pass legislation.” Freeman & Rossi, *supra* note 12.

24. In coordinated interagency adjudication, the strength of the purported legislative basis for coordination varies. For instance, agencies may delegate a task in order to make use of another agency's resources, in service of its own decision-making process. For instance, in a process based in regulation, HHS often fulfills an investigatory function for DOL, in service of the latter's final adjudication of claims under the Energy Employees Occupational Illness Compensation Program Act. *See* 20 C.F.R. § 30.2(b); 31 U.S.C. § 3801(a)(1) (2012) (defining authorities eligible to initiate investigations under the Act). Or, an agency may delegate the responsibility to conduct an analysis that improves the quality of its own empirical conclusions. One example with a complicated, multi-tiered basis for authority involves the shared adjudication of cases under federal anti-terrorism and anti-tampering acts. *See* 18 U.S.C. § 1365(g) (2012); FBI ET AL., CRIMINAL INVESTIGATION HANDBOOK FOR AGROTERROISM (2008), http://www.fsis.usda.gov/PDF/Investigation_Handbook_Agroterrorism.pdf; 6 U.S.C. § 111(b) (2012); DEP'T OF HOMELAND SECURITY, HSPD-5, MANAGEMENT OF DOMESTIC INCIDENTS, 229 (2003). In collaborative interagency arrangements created especially to manage crises, the DHS, FBI, FDA, and United States Department of Agriculture (USDA) work together under both statutory authority and MOU to decide cases under federal anti-tampering and agro-terrorism acts. *See id.* Each of these agencies provides expertise on tampering and terrorism concerns, especially during times of crisis when these matters are particularly prevalent. *See id.* Overall, only about twenty percent of those coordinated interagency processes that are documented as such are authorized by interagency agreement clearly based in statutory authority. *See* Shah, *supra* note 2, at 894-95 app. B.

25. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (discussing how Congress intentionally assigns administrative jurisdiction to make certain decisions).

26. *Cf. Richard A. Epstein, The Role of Guidances in Modern Administrative Procedures: The Case for De Novo Review*, 8 J. LEGAL ANALYSIS 47, 50 & 90-91 (2016) (discussing agency expansion of its own jurisdiction through aggressive use of internal guidance).

27. Indeed, it is worth noting that the ways in which agencies transfer their power sometimes remain unconstrained even by the informal authority of the underlying interagency agreement. *See, e.g., supra* notes 73 & 90 and accompanying text.

Congress has not issued in-depth legislation detailing the adjudication process and if the regime is not consistently monitored by Congress or the public (as in the immigration context²⁸).

Before looking more closely at these agreements transferring decision-making authority, it is worth considering what might motivate agencies to enter into them and how these motivations destabilize current assumptions about how agencies interact that come from the focus on joint rulemaking in the literature. Fundamentally, agencies may choose to give away their power to adjudicate—instead of clamoring for more of it or seeking to share it in lieu of giving it away, as they do in the regulatory context—because there is relatively little benefit to and greater bureaucratic burden for an agency tasked with adjudicating administrative cases.

Unlike rulemaking authority, the jurisdiction to adjudicate is not considered as meaningful an opportunity to wield influence, and agencies do not perceive adjudicatory power to be clear evidence of the agency's executive authority and application of the agency's interests. Rather, an agency's responsibility to further an adjudication regime is more likely conceived of as a longer-term drain on resources. Certainly, this overarching theory has some potential exceptions. For instance, agencies may find adjudicatory authority attractive if they make policy primarily through adjudication, and not rulemaking, follow a more "civil law" tradition in which precedent flowing from administrative courts codifies a strong and salient set of policies over time, or utilize adjudication in order to reaffirm rulemaking. Further, agencies may seek out adjudicatory authority in order to issue policy that remains politically "below the radar" more so than rulemaking, or in response to hostile courts.²⁹ While identifying and categorizing these agencies is outside the scope of this project, we may expect to see fewer wholesale transfers of adjudication authority from an agency whose adjudication regime has a strong policy-making or politically salient function.

In general, in joint rulemaking, agencies working as partners in a relatively nonhierarchical arrangement benefit from "the power that comes from influencing other agencies' actions, the reputational benefits derived from exhibiting one's skills in a variety of settings throughout the executive branch, and future contributions to one's own efforts from agencies reciprocating the interagency contribution."³⁰ However, agencies are less likely to angle for

28. See 8 C.F.R. §§ 208.2(a), 208.14(c)(1) (detailing the relationship between DOJ and DHS in the adjudication of asylum claims); see also Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2548 (2014) (noting incomplete and duplicative instances of immigration regulation); Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655 (2006) (reviewing the evolution of the immigration court system). There are myriad sources showing the great interest that Congress and the public have in immigration reform. See, e.g., Rachel L. Swarns, *Dwindling Hopes for Immigration Reform*, N.Y. TIMES, Oct. 15, 2015, at A22.

29. I would like to thank Gillian Metzger for this insight.

30. Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 191 (2013).

responsibility over tasks in furtherance of administrative adjudication, given that in coordinated interagency adjudication, agencies are often responsible for single, discrete parts of the adjudication process and do not “jointly” own any same task,³¹ which limits their opportunity to influence other agencies contributing to the process.

In addition, joint rulemaking with ambiguously overlapping jurisdictions may facilitate beneficial competition.³² On the other hand, agencies involved in coordinated interagency adjudication are unlikely to benefit from future opportunities to show off, compete over the same project for praise from higher-ups or do favors for one another, again because of the way in which authority is parsed in this context.³³ Thus, the likely benefits to agencies of upholding or even sharing their responsibilities, instead of shifting them fully to another agency, are fewer in the coordinated interagency adjudication context than in shared regulatory space.³⁴

Further, the “threat of jurisdictional loss” serves as an adequate sanction against transfers of responsibility in joint rulemaking and may even incite a grab for more power by agencies in that context.³⁵ However, because agencies in coordinated interagency adjudication do not necessarily fear the loss of adjudicative power, agencies may be likely to welcome the opportunity to “free ride,” because this allows them to expend fewer resources with minimal potential cost. In essence, because coordinated interagency adjudication is a non-cooperative system, there is no cooperative exchange from which it may later be excluded.³⁶

Overall, this set of dynamics both stands in contrast to and augments the story of agencies as empire-builders. It pushes back against the traditional narrative, which holds that agencies prefer to build jurisdiction at all costs, by showing that agencies sometimes give it away. And yet, by giving away jurisdiction to adjudicate, an agency with the power to leverage a transfer, an agency with pinched resources that has been charged with a burdensome adjudication regime, or an agency that sees the opportunity to transfer jurisdiction to another equally or more expert agency may be able to free up resources to focus on more attractive tasks. This, in turn, could be conceived of as a form of empire building that, while not focused on the increase of overall jurisdiction, nonetheless allows an agency to grow its power in those substantive competencies it most values.

31. Shah, *supra* note 2, at 808.

32. Gersen, *supra* note 11, at 222 (2006).

33. Shah, *supra* note 2, at 845.

34. *Id.*

35. Gersen, *supra* note 11, at 213; *see also* Marisam, *supra* note 30, at 187 (noting that an agency may move to wield power in instances where the agency’s interests are threatened by another’s).

36. *See* Marisam, *supra* note 30, at 199 (suggesting that if an agency acts as a “free rider” in cooperative interagency systems, it may be “excluded from the cooperative exchanges in the future”).

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It is also possible that recipient agencies seek expertise in such adjudication as a way of strengthening claims in the future to a larger regulatory empire. Perhaps there is some recognition at the agency-wide level of rooted expertise in adjudication as qualifying the agency to lay claim to increased regulatory power in future, related matters.³⁷ However, it is unclear whether agency subcomponents and bureaucrats that implement (and gain expertise by) adjudication are indeed sought out for regulatory power—in other words, that increased adjudicatory responsibility truly translates to a better seat at the rule-making table. The set of examples explored here suggests, rather, that recipient agencies accept this transfer of adjudicative jurisdiction (and attendant responsibility) not in order to increase their sheer power, but instead to foster or strengthen relationships with the often larger and more powerful agency transferring the authority, or to seek future benefits from the larger agency such as bolstered resources, support or aid in obtaining congressional funding.

A. Publicly Available Agreements

Overall, a good set of conditions for a transfer to occur appears to be one in which a larger, more powerful agency with legislative authority to adjudicate has a pre-existing relationship with a smaller agency or agency subcomponent, and the former seeks to discharge a resource-intensive, relatively non-policy-making set of adjudications that fall within the latter's (perhaps even new) areas of expertise.

1. Seasonal Worker Visas

As noted in the introduction, the one example of an interagency transfer of adjudication authority that has received attention from the Article III courts is DHS's transfer of its authority to adjudicate H-2B nonimmigrant seasonal worker visas to DOL.³⁸ The H-2B visa program allows employers to petition for the admission of foreign workers into the United States to perform temporary nonagricultural work (1) if "unemployed persons capable of performing such service or labor cannot be found in this country,"³⁹ and (2) when doing so will not "adversely affect the wages and working conditions of similarly employed United States workers."⁴⁰ Congress charged DHS with

37. Cf. Gersen, *supra* note 12, at 212-14 (discussing inter-agency competition over jurisdiction resulting from judicial emphasis on administrative expertise).

38. 73 Fed. Reg. 78,104 (Dec. 19, 2008) (DHS) ("To better ensure the integrity of the H-2B program, this rule eliminates DHS's current practice of adjudicating H-2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification."); 73 Fed. Reg. 78,020 (Dec. 19, 2008) (DOL). Although DHS and DOL issued the regulations in December 2008, they did not take effect until January 18, 2009.

39. 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

40. 8 C.F.R. § 214.2(h)(6)(iii)(A).

implementation of the statute only after mandated “consultation with appropriate agencies of the Government.”⁴¹ Given that both of the above criteria required to adjudicate H-2B visa petitions are within the expertise of DOL, DHS decided DOL was an “appropriate agenc[y] of the Government” with which to consult.⁴² The agencies were not bound to shape their relationship in any way, since, as the Tenth Circuit noted in its decision, Congress did not specify “the nature or scope of that ‘consultation.’”⁴³

The court’s decision in this case, which hinges on a basic reading of the dictionary definition of “consult,”⁴⁴ finds that DOL was vested the authority to be the final adjudicator of claims without the statutory authority to do so:

DOL is not a subordinate agency of DHS. And there is no statute authorizing the subdelegation—indeed Congress gave DHS only the authority to consult with other government agencies. Absent Congressional authorization, DHS’s subdelegation in this case is improper.

In so concluding, we recognize DHS, as administrator of the INA, has broad discretion in filling statutory gaps, like the ones present in this case. But that discretion is not unlimited. It is circumscribed by the language of the statute and the general prohibition against subdelegation to outside parties absent congressional authorization. The statutory language in this case—“consultation”—cannot reasonably bear the construction DHS has given it—congressional authority to subdelegate its authority and responsibilities under the H-2B visa program to an outside agency.⁴⁵

What the court overlooks, in its narrowly textual reading of “consult,” is history indicating that the regulation authorizing the transfer of adjudication authority was in fact a concretization of a consultative relationship between DHS and DOL. Initially, DHS sought DOL’s advice on above-mentioned criteria by asking for a case-by-case certification of applications prior to final adjudication by DHS. Without the DOL certification, DHS would not grant a petition. After some time, DHS and DOL created a comprehensive policy based on what was previously a case-by-case consultation with DOL and promulgated regulations to concretize what had long been, in effect, a final adjudication of denials by DOL, due to the fact that DHS would not grant the petition unless DOL certified it. The transfer may or may not have withstood an analysis that targeted the quality of DOL’s certifications, given that DOL was the final arbiter of many decisions, but the type of consultation the agencies were

41. 8 U.S.C. § 1184(c)(1) (2012).

42. *Id.*

43. *G.H. Daniels III & Assoc., Inc. v. Perez*, 626 Fed. Appx. 205, 210 (10th Cir. 2015).

44. *Id.* at 210-11 (reading from the Oxford English and Black’s Law Dictionaries).

45. *Id.* at 212.

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engaging in was not unusual.⁴⁶ Indeed, to the extent the court's decision allows for a system in which the DOL determination is final in practice, notwithstanding a formal but rarely exercised option for appeal to DHS, it preserves only the appearance of DHS authority and thereby risks adding the inefficiencies of separate appeals processes without the gain associated with two robust, complementary paths to a decision.⁴⁷

2. Pharmaceutical Imports/Exports

In an interagency transfer of adjudication authority involving more than two agencies, the Department of Treasury, the U.S. Customs and Border Patrol (CBP) (a subcomponent of DHS), and the FDA have transferred among themselves the authority to adjudicate the legality of pharmaceutical imports and exports. Treasury was initially given the statutory authority to adjudicate claims involving the admission of illegal imported and exported drugs.⁴⁸ Under interagency agreement alone, Treasury delegated both its adjudicative and enforcement authority in these claims to the CBP.⁴⁹ This delegation may have occurred because of the desire to maintain certain responsibilities within the CBP that were originally part of the U.S. Customs Service (USCS), originally a component of the Treasury until the creation of the DHS and the transformation of the USCS into the CBP,⁵⁰ but this is not a justification offered by the interagency agreement itself.

In turn, the CBP further delegated the authority to refuse admission of illegal imported drugs to FDA field offices, but kept enforcement authority over these decisions (perhaps because the CBP has expertise in enforcement).⁵¹ Now, the FDA adjudicates these claims, but in the CBP's name—indeed, it literally “rubber stamps” claims adjudications with a seal reflecting the CBP leadership.⁵² If necessary, the FDA also has authority to conduct related import/export hearings.⁵³ In this way, the authority to adjudicate these claims

46. See Shah, *supra* note 2, at 846-50 (discussing arrangements in which agencies collaborate to further administrative adjudications).

47. I would like to thank Gillian Metzger for this insight.

48. 21 U.S.C. § 381(a).

49. FDA, REGULATORY PROCEDURES MANUAL § 9-9, at 36 (2013), <http://www.fda.gov/downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/UCM074300.pdf>.

50. See *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 414 F.3d 50, 51 n.1 (D.C. Cir. 2005); Gregory W. Bowman, *Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border*, 44 HOUS. L. REV. 189, 202 n.39 (2007).

51. See FDA, REGULATORY PROCEDURES MANUAL, *supra* note 49, at 36.

52. As the FDA's Regulatory Procedures Manual states: “Each FDA district shall have a facsimile stamp of the signature of the Regional or District Director of CBP prepared for this purpose and supplied to the appropriate personnel, or have written delegation of authority from the District Director of CBP to issue the Notice of Refusal of Admission under FDA personnel signature. A new stamp should be prepared each time there is a change of personnel in the Regional or District Director of CBP position.” *Id.*

53. *Id.* at 34-36

has, over time, been vested in more than one agency not originally contemplated by Congress for that purpose, and eventually landed in an agency exercising the adjudication authority of another. More specifically, while statutory language appears vague enough to allow the Treasury to delegate with some autonomy, this language does not delegate to Treasury the freedom to make a wholesale transfer of decision-making jurisdiction.⁵⁴

And yet, there are factors that may have contributed to this multi-step interagency transfer of adjudication authority that are consistent with the nature of the relationship among these agencies and that proffer functional benefits, even if Congress has not expressly authorized the transfer. For one, Treasury has long coordinated at the local level with the FDA in order to jointly improve their respective adjudication processes⁵⁵—for instance, the FDA provides some drug analysis services for Treasury.⁵⁶ The FDA may have been further motivated to enter the agreement to ensure that Treasury is supportive of the FDA's national structure and directives before Congress, or even willing to facilitate the improvement of the sometimes contentious relationship between the FDA and the Department of Health and Human Services (HHS),⁵⁷ as a result of the FDA's efforts on its behalf.

In addition, although the power to refuse illegal pharmaceutical exports was delegated by Congress to Treasury alone,⁵⁸ and “[p]rimary responsibility for administering the nations [sic] laws relating to import, export and the collection of duties” has been delegated to the CBP,⁵⁹ the transfer of authority to refuse the admission of illegal imported drugs to the FDA is based on the shared understanding that the FDA has an expertise in and should maintain some holistic responsibility for “the protection of the U.S. public regarding foods, drugs, devices, electronic products, cosmetics, and tobacco products.”⁶⁰

54. See Shah, *supra* note 2, at 889 (citing 21 U.S.C. § 381(a)).

55. See Memorandum of Understanding Between the Dep't of the Treasury, U.S. Customs Serv. and the Food & Drug Admin. (Mar. 20, 1974) (referencing a “system of individual agreements at the local level” between the Treasury and the FDA).

56. See *id.* (noting that Treasury has the ultimate authority over these adjudications, but that in practice the FDA accomplishes them, and suggesting that because the “system of individual agreements at the local level has been inefficient for both agencies . . . [B]oth agencies believe that a comprehensive delegation of authority for the enforcement of Section 801 should be accomplished”).

57. See 21 U.S.C. § 381(a) & (b) (describing the ways in which Treasury is required to bring information about drug imports and exports to HHS).

58. 21 U.S.C. § 381(a).

59. FDA, REGULATORY PROCEDURES MANUAL, *supra* note 49, at 2.

60. *Id.* at 9-10 (citing nonspecific statutory authority including the Federal Food, Drug, and Cosmetic Act, Fair Packaging and Labeling Act, Import Milk Act/Filled Milk Act, Federal Caustic Poison Act, Radiation Control for Health and Safety Act, Public Health Service Act, Federal Cigarette Labeling and Advertising Act, and the Comprehensive Smoking Tobacco Health and Education Act of 1986).

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3. Radiation Control Act Compliance

In a health and safety example of interest to both domestic and international institutions, the CBP has transferred to the FDA the CBP's authority⁶¹ to adjudicate decisions regarding whether to accept or reject declarations that products are compliant under the Radiation Control for Health and Safety Act⁶²—in particular, the responsibility to “determin[e] . . . compliance status, and the sampling procedures of imported electronic products subject to” this Act.⁶³ As the updated interagency agreement underlying this arrangement states:

Since the statute vests in the Secretary of the Treasury authority to deliver samples of imported products to FDA for analysis, the statute has always been construed as identifying the Secretary of the Treasury as having the authority to collect the samples and issue the corresponding “Notice of Sampling”. [sic] Similarly, since the statute vests in the Secretary of the Treasury the authority to destroy any article which has been refused admission, based upon the results of the FDA analysis, this language has also been construed as identifying the Secretary of the Treasury as having authority to refuse admission and issue the corresponding “Notice of Refusal of Admission”. [sic]

In actual practice, FDA personnel at most ports, collect the samples, issue the appropriate notice of sampling, and, where applicable, having determined that an article is in violation of the Act and may not be brought into compliance, issue a refusal notice. Actions by an FDA employee have been under written delegated authority received from the local District Director of Customs. This system of individual agreements at the local level has been inefficient for both agencies. Thus, to promote efficiency and uniformity, both agencies believe that a comprehensive delegation of authority for the enforcement of Section 801 should be accomplished.⁶⁴

The underlying relationship between the CBP and FDA in this example is similar to the one between DHS and DOL in the H-2B visa dynamic discussed earlier, in that the CBP delegated the authority to adjudicate violations of the Radiation Control for Health and Safety Act to the FDA on a case-by-case basis before agreeing to create a more comprehensive policy. The distinction between the regulations promulgated by DHS and DOL and this agreement

61. See Memorandum of Understanding Between the U.S. Customs Serv. and the Food & Drug Admin. (Mar. 20, 1974); Memorandum of Understanding Between the Dep't of the Treasury, U.S. Customs Serv. and the Food & Drug Admin. (Aug. 14, 1979).

62. See Radiation Control for Health and Safety Act, Pub. L. No. 90-602 § 358 (1968) (codified at 21 U.S.C. § 360(k) (2012)). This agreement also relies on the Economy Act for statutory justification.

63. See Memorandum of Understanding Between the Dep't of the Treasury, U.S. Customs Serv. and the Food & Drug Admin. (Mar. 20, 1974).

64. See Memorandum of Understanding Between the U.S. Customs Serv. and the Food & Drug Admin. *supra* note 61.

between the CBP and FDA is that the latter is not based in a specific reading of legislation (as in the case of DHS and DOL, on the authority to consult with “appropriate agencies of the Government”⁶⁵), but instead relies on a claim to unspecified broad statutory authority.⁶⁶

4. Title VII Claims

In another example referenced earlier, the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP), a subcomponent of the DOL that deals with federal contractors, have wrought an agreement that transfers the authority to adjudicate Title VII claims to the OFCCP. This agreement is like the DHS/DOL worker H2-B visa arrangement, in that it also focuses on the adjudication of matters concerning individuals. Under this interagency agreement, the OFCCP is authorized to adjudicate Title VII cases on behalf of the EEOC.⁶⁷ More specifically, the OFCCP may also “investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in . . . complaints/charges” that are filed with both the EEOC and the OFCCP.⁶⁸ To do this, the OFCCP makes an initial decision in the case by determining whether there is “reasonable cause” for the Title VII complaint.⁶⁹ If the OFCCP determines there is not, the case is closed without any EEOC involvement and without the option of appeal by the claimant.⁷⁰

While the EEOC’s and OFCCP’s authority to further their separate set of adjudications is likewise based in separate statutes,⁷¹ the agencies appear to be interpreting the shared goal underlying each adjudication regime as a basis for the intermingling and transfer of their separate adjudicative authorities.⁷² As such, this interagency agreement vests in the OFCCP authority to adjudicate Title VII cases without a direct statutory delegation of power to do so. Further, according to the agreement underlying the EEOC’s transfers of jurisdiction to adjudicate Title VII claims to the OFCCP, the EEOC may choose to act in accordance with guidelines indicating when they should take possession of the

65. 8 U.S.C. § 1184(c)(1) (2012); *see also* G.H. Daniels III & Assoc., Inc. v. Perez, 626 Fed. Appx. 205, 208 (10th Cir. 2015).

66. *Id.* (citing “Section 801 of the Federal Food, Drug and Cosmetic Act and the Recovery Act” as the only substantive authority for the agreement); 21 U.S.C. § 381 (2012).

67. *Id.* § 7(d) (Nov. 9, 2011) (“OFCCP will act as EEOC’s agent for the purposes of investigating, processing and resolving the Title VII component of dual filed complaints/charges . . .”).

68. *See* Memorandum of Understanding Between the Equal Emp’t Opportunity Comm’n and the U.S. Dep’t of Labor Office of Fed. Coordination of Functions (Nov. 9, 2011).

69. *Id.* at § 7(d)(3).

70. *Id.*

71. *See id.* at § 7(d).

72. *See id.*; *see generally* Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 903 (8th Cir. 1979) (validating an inter-agency MOU authorizing the two agencies to share their investigative functions).

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case, or it may not⁷³—in which case the OFCCP may, for instance, take on more Title VII cases than originally anticipated by the agencies when entering into the agreement or the agencies may continue to implement their informal authority to transfer cases in some other, also expansive way.⁷⁴ Therefore, even if the agreement were to have more than a tenuous link to specific legislation, the fact that the agencies have the discretion to apply the agreement at will dilutes any underlying statutory control over the agency activity.

Nonetheless, this agreement represents an effort by the two agencies to make their respective attempts to eradicate employment discrimination more efficient,⁷⁵ a collaboration that may have some basis in legislation.⁷⁶ Similar to the FDA's relationship to Treasury, the OFCCP in this example may have been interested in taking on adjudicatory responsibility on behalf of the EEOC in order to benefit the OFCCP's status. More specifically, this agreement may improve the OFCCP's reputation within its own agency, the DOL at large, not least because by adjudicating on behalf of the EEOC, the OFCCP is also cultivating the EEOC's view of and relationship with DOL leadership.⁷⁷

Further, these agencies also have a preexisting relationship, similar to agencies in agreements described earlier,⁷⁸ that led to this transfer of the full authority to adjudicate Title VII from the EEOC to the OFCCP in those cases filed with the OFCCP. The difference here, as compared to earlier examples, is that the transfer of authority did not constitute an increase in the magnitude of interagency interaction (moving from a case-by-case consultation or delegation to a wholesale one), but rather, a change in kind.

Historically, the OFCCP acted "as the EEOC's agent for the purposes of receiving Title VII complaints."⁷⁹ A number of individual claimants brought suit suggesting that even delegation of a discrete task to the OFCCP—namely, that of accepting Title VII claims on behalf of the EEOC—is in violation of statute.⁸⁰ Courts have responded in various ways that suggest the potential for

73. See Memorandum of Understanding Between the Equal Emp't Opportunity Comm'n and the U.S. Dep't of Labor Office of Fed. Contract Compliance Programs § 7(d) (Nov. 9, 2011).

74. See *id.*

75. *Emerson Elec. Co.*, 609 F.2d at 903-04 ("The common goal of the EEOC and the OFCCP is to eradicate employment discrimination. The agencies' areas of responsibility, however, are distinct.").

76. See *id.* (noting that "there is sufficient evidence to indicate that Congress intended the two agencies to cooperate and share information when possible" and citing statute and legislative history to suggest that the Civil Rights Act "contains ample evidence of intent to authorize cooperation and information exchanges between the EEOC and the OFCCP").

77. There are parallel instances in which the OFCCP took on a delegation of discrete tasks from the EEOC to make its "parent," the DOL, happy. See *Meckes v. Reynolds Metals Co.*, 604 F. Supp. 598, 601 (N.D. Ala.) *aff'd*, 776 F.2d 1055 (11th Cir. 1985); *Emerson Elec. Co.*, 904.

78. See, e.g., *supra* notes 38-46 & 61-66 and accompanying text.

79. See Shah, *supra* note 2, at 841.

80. See *Williams v. Wash. Metro. Area Transit Auth.*, 721 F.2d 1412, 1416-17 (D.C. Cir. 1983) ("Moreover, remand is necessary to determine whether OHR possessed the *apparent* authority to act on EEOC's behalf in this case. Unlike actual agency, which exists whether or not the

the delegation of this task to interfere with an individual's rights under administrative due process.⁸¹

Most recently, this delegation created a frustrating dynamic in which the OFCCP was able to accept claims under Title VII on behalf of the EEOC under interagency agreement, but individuals could not rely on this acceptance of claims by the OFCCP as evidence that the EEOC has received them per the statutory requirements, including in instances where the EEOC did not receive the claim due to the OFCCP's failure to transfer it.⁸² While the newest agreement described here—that the OFCCP may now not only accept Title VII claims, but adjudicate them fully on behalf of the EEOC—has not yet been litigated, it is perhaps a matter of time before a claimant is again caught in the grey area between statutory authority and the agencies' apparent authority under interagency agreement. On the other hand, while even nonsubstantive coordination and the partial delegation of tasks from the EEOC to the OFCCP was a controversial interpretation of statute⁸³ and the subsequent full transfer of the authority to adjudicate Title VII claims to the OFCCP could prove similarly problematic, it is also possible that this latter transfer could cure the issue caused by the former arrangement by eliminating the need for the OFCCP to transfer the claims and allowing it to remain in better control of the process by adjudicating them itself.

third party knows of or suspects an agency relationship, apparent agency depends in large part upon the representations made to the third party and upon the third party's perception of those representations. In other words, in the present case, one of the questions the district court must ask is whether Williams detrimentally relied on OHR's apparent authority to receive charges on behalf of the EEOC *at the time he lodged a charge with OHR*." (citations omitted)); *Meckes v. Reynolds Metals Co.*, 604 F. Supp. 598, 601 (N.D. Ala.) *aff'd*, 776 F.2d 1055 (11th Cir. 1985) (suggesting that a MOU provision stating that "[c]omplaints filed with OFCCP within the jurisdiction of EEOC which OFCCP refers to EEOC shall be deemed charges filed jointly with EEOC" is illegitimate in regards to age discrimination claims because the OFCCP has no jurisdiction over these claims); *see also Emerson Elec. Co.*, 609 F.2d at 904 ("The appellants assert that the Memorandum is . . . in defiance of congressional intent.").

81. *See, e.g., Walker v. Novo Nordisk Pharm. Indus., Inc.*, 225 F.3d 656 (4th Cir. 2000); *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148, 152-53 (4th Cir. 1991) (penalizing claimant for not filing directly with the West Virginia Human Rights Commission (WVHRC), even though the agreement between the EEOC and the WVHRC "provides that 'the EEOC and the WVHRC each designates the other as its agent for the purpose of receiving charges'").

82. *See Walker v. Novo Nordisk Pharm. Indus., Inc.*, 225 F.3d 656 (4th Cir. 2000) ("Relying upon a Memorandum of Understanding ('MOU') between the OFCCP and the EEOC concerning the filing of complaints, and upon our prior decision in *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663 (4th Cir.1977), Walker asserts that by filing a complaint with the OFCCP, he tolled the time period for filing with the EEOC. We disagree. In rejecting Walker's claim that his EEOC claim was timely, we look to the plain language of Title VII and the MOU in effect at the time Walker filed his complaint with the OFCCP. Title VII requires that a charge be filed with the EEOC, which in turn triggers the investigatory and remedial process called for by the Act. *The Act does not, however, contemplate that filing a complaint with another agency can or should be deemed a filing with the EEOC . . .*" (emphasis added) (citations omitted)). The court decided this, despite the fact that it was a failure on the part of the government (the OFCCP) to transfer the claim to the appropriate adjudicating body (the EEOC). *See id.*

83. *See id.*

5. Workplace Hazard Claims

Finally, in one more example involving matters of health and safety, the DOL Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA), under authority of MOU, have agreed to transfer workplace hazard claims to each other, or take on cases themselves, depending on each agency's claimed level of resources and dependent somewhat (per these agencies' informal agreement) on which agency initially accepted the claim.⁸⁴ Technically, only the EPA is authorized to adjudicate claims under the series of Acts dealing with environmental risks that could potentially be related to workplace hazards,⁸⁵ while only OSHA has the power to adjudicate claims under the Occupational Safety and Health Act.⁸⁶ Further, OSHA apparently draws its authority to adjudicate the EPA's workplace hazard claims from only its organic statute,⁸⁷ while the EPA claims authority to adjudicate OSHA workplace hazard claims⁸⁸ on the basis of a vast number of statutes.⁸⁹ However, the exchange of these claims for various bureaucratic purposes or even in order to improve these agencies' collective decision making is not strictly authorized by statute.

84. Memorandum of Understanding Between the U.S. Dep't of Labor Occupational Safety & Health Admin. and the U.S. Env'tl. Prot. Agency Office of Enforcement § III(C) (Feb. 13, 1991).

85. These include, but are not limited to, the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2641 (2012) (governing the removal of asbestos); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (2012) (governing the release of air pollutants); the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012) (governing the pre-treatment and release of pollutants to water); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-75 (2012) (governing the release of hazardous substances and the abatement of toxic and hazardous waste sites); the Emergency Planning & Community-Right-To-Know Act, 42 U.S.C. §§ 11,001-50 (2012) (governing the storage, use and disposal of toxic and hazardous chemicals, including the reporting of accidental releases); the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-92k (2012) (governing the storage and disposal of hazardous wastes); the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (2012) (governing the treatment and distribution of portable water); the Federal Insecticide, Fungicide & Rodenticide Act, 7 U.S.C. §§ 136-136y (2012) (governing the manufacture and use of toxic and hazardous chemicals used for pest control); and the Toxic Substances Control Act, 15 U.S.C. §§ 2601-71 (2012).

86. See Occupational Health and Safety Act, 29 U.S.C. § 651 et seq. (1970).

87. See Memorandum of Understanding Between the U.S. Dep't of Labor Occupational Safety & Health Admin. and the U.S. Env'tl. Prot. Agency Office of Enforcement § III(C) (Feb. 13, 1991) (suggesting that OSHA's authority to play hot potato with the EPA is based on the "OSH Act, 29 U.S.C. 651, [under which] every employer has a general duty, under section 5(a)(1), to furnish employment and a place of employment which is free from recognized hazards that are causing, or likely to cause, serious physical harm. Every employer is also required, under section 5(a)(2), to comply with occupational safety and health standards promulgated by OSHA.").

88. See *supra* note 84 and accompanying text.

89. These include: the Asbestos Hazard Emergency Response Act; the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Response, Compensation and Liability Act; the Emergency Planning & Community-Right-To-Know Act; the Resource Conservation and Recovery Act; the Safe Drinking Water Act; the Federal Insecticide, Fungicide & Rodenticide Act; the Toxic Substances Control Act; the Underground Injection Control Act; and the Organotin Paint Act. See Memorandum of Understanding Between the U.S. Dep't of Labor Occupational Safety & Health Admin. and the U.S. Env'tl. Prot. Agency Office of Enforcement § III(C) (Feb. 13, 1991).

More specifically, this arrangement appears more traditionally a form of “coordination” than do the previous examples, because they involve relatively frequent communication between the agencies. Further, these back-and-forth transfers allow agencies to shift their responsibility to adjudicate claims, including some with significant administrative due process requirements, in part because of the vague way in which the agreement is worded. One example of a permissively worded section of the agreement is as follows:

There will be the *fullest possible* cooperation and coordination between EPA and OSHA, at all organizational levels, in developing and carrying out training, data and information exchange, technical and professional assistance, referrals of alleged violations, and related matters concerning compliance and law enforcement activity to ensure the health and well-being of the Nation’s workforce, the general public, and the environment EPA and OSHA may conduct joint inspections *as necessary* Such inspections may be scheduled *on an ad hoc basis* EPA shall respond to referrals from OSHA, and OSHA shall respond to referrals from EPA . . . *when appropriate*⁹⁰

However, the shared goal of the agencies—“to improve the combined efforts of the agencies to achieve protection of workers, the public, and the environment at facilities subject to EPA and OSHA jurisdiction”⁹¹—could theoretically benefit from even this sort of improvised, piecemeal interagency coordination.

6. Counterexample: National Origin Discrimination Claims

For the sake of comparison, included here is an agreement in which agencies are not transferring their adjudication authority, but rather coordinating in a manner that specifically retains each agency’s own statutory decision-making jurisdiction. The EEOC and DOJ Special Counsel for Immigration Related Unfair Employment Practices have entered into an interagency agreement to make information available and provide other assistance⁹² to one another that would be useful to the former’s adjudication of Title VII claims and the latter’s consideration of issues of national origin discrimination under the Immigration and Naturalization Act.⁹³ Their clear

90. Memorandum of Understanding Between the U.S. Dep’t of Labor, Occupational Safety & Health Admin. and the U.S. Envtl. Prot. Agency, Office of Enforcement § III(A-C) (Feb. 13, 1991) (emphasis added).

91. *Id.* § I.

92. See Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration Related Unfair Employment Practices (Dec. 18, 1997) (stating, for instance, that “the EEOC and the Special Counsel shall make available for inspection and copying to officials from the other agency any information in their records pertaining to a charge or complaint being processed by the requesting agency”).

93. See *id.*

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intention (at least on paper), however, is to maintain authority over those claims that they are legislatively empowered to adjudicate, and to ensure that neither agency mistakenly treads on the other's jurisdiction:

When, during the processing of a charge by either agency, it becomes apparent to the agency processing the charge that the charge or any aspect of the charge falls outside its jurisdiction, but may be within the jurisdiction of the other agency, the agency processing the charge will immediately dismiss as much of the charge as may fall within the jurisdiction of the other agency and, if the charging party has not declined referral, refer the dismissed aspects of the charge to the other agency, and notify the charging party and the respondent of the referral. In determining whether to refer such a charge or such aspect of a charge to the other agency, the agency processing the charge shall be guided by the attached Guidelines.⁹⁴

This delineated interest in maintaining separate jurisdiction to make the final determination on a claim distinguishes more common forms of coordinated interagency adjudication⁹⁵ from the types of transfers brought to light in this Article.

II. Impact on Agency Decision Making

This Part considers the potential drawbacks and benefits of the agreements introduced in the previous Part. Of relevance to this discussion is a defining characteristic of interagency transfers of adjudication authority: that when an agency gives away its decision-making power, it is no longer involved in the set of adjudications that it has transferred to another agency. This characteristic renders them fundamentally unlike agreements in which agencies delegate discrete tasks to other agencies or exchange competencies in service of both agencies' decision-making needs.⁹⁶

In interagency transfers of adjudication authority, the agency with the original jurisdiction is not, for instance, gathering outside information, outsourcing an analytic task in service of its own adjudication, or even just dicing and distributing those portions of its decision-making process over which it nonetheless has final authority.⁹⁷ Rather, the original agency fully transfers its authority to both further and complete an adjudication process to another agency. As will be discussed in this Part and the next, this criterion is

94. *See id.* at § III.

95. *See generally* Shah, *supra* note 2.

96. *See generally supra* note 14 and accompanying text (listing sources describing shared rulemaking, all of which involve only piecemeal interagency delegation).

97. *See* Shah, *supra* note 2, at 820-21 (providing an overview of these elements of many coordinated interagency adjudications); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1067 (2011); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003).

both important to the analysis of the drawbacks and benefits of these transfers to the quality of agency decision making, and crucial to a consideration of the constitutionality of these agreements—or, as the Tenth Circuit put it while deciding the DHS/DOL H-2B visa case, to a determination of whether an agency has the “congressional authority to subdelegate its authority and responsibilities.”⁹⁸

A. Rule of Law Concerns

Interagency transfers of adjudication authority could negatively impact the quality of administrative decision making and interfere with public law values. The next few subsections anticipate potential related problems by examining the agreements introduced in the previous Part and comparing them to similar dynamics in the delegation of responsibilities from agencies to the private.⁹⁹ The sector public/private delegation context both provides an instructive framework¹⁰⁰ for evaluation of interagency transfers of adjudication authority and serves as a bridge between its own and the agency coordination bodies of scholarship.¹⁰¹

98. G.H. Daniels III & Assoc., Inc. v. Perez, 626 Fed. Appx. 205, 212 (10th Cir. 2015).

99. Agencies delegate or outsource their responsibilities not only to one another, but also to private companies or nongovernmental organizations, even within coordinated interagency adjudications. For instance, DOJ has outsourced a portion of its responsibility to ensure due process for unaccompanied minors in immigration proceedings. See Office of Legal Access Programs, U.S. DEP'T JUST., <http://www.justice.gov/eoir/office-of-legal-access-programs> (last visited May 21, 2015) (illustrating how DOJ has intermittently funded a small (one- or two-person) in-house committee tasked with reaching out to non-governmental organizations, such as the Vera Institute, to connect a limited number of juveniles to limited forms of non-legal advocacy, among other responsibilities). Another responsibility of this office involves procuring those same experts to speak to detained noncitizens about how to advocate for themselves within the immigration process. See *id.*

100. On the one hand, as Harold Krent notes, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Supreme Court invalidated public/private delegations under the nondelegation doctrine in part because of the latitude that was given to private actors as part of the proposed statutory scheme. See also Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 510 (2011). While Krent suggests that questions specific to the nondelegation doctrine have not moved the Supreme Court to alter the nature of public/private delegation in any significant way since the early 1930s, *id.*, Lisa Bressman argues that a line of doctrine begun by *Schechter Poultry* may have revived the nondelegation doctrine in the public/private context by “invok[ing] the principles that underlie those cases and are traditionally captured by the concept of delegation: the requirement of limiting standards and the prohibition on private lawmaking.” Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1401 (2000). See, e.g., *AT&T Corp. v. Iowa Utilities Board*, 99 S. Ct. 721 (1999) (invalidating an FCC interpretation for failure to contain administrative limiting standards and for permitting private parties to fix the content of law). Bressman notes, however, that “it did so in a new way. Instead of striking down the statutory delegation . . . the Court . . . effectively required the agency to pick up where Congress had left off [by] supply[ing] the very limiting standards that had once been Congress’s responsibility.” Bressman, *supra*.

101. As of now, there is not much overlap between law and scholarship concerning interagency cooperation and agency delegation to private entities. As noted earlier, much of the agency coordination scholarship focuses on the ways agencies can work together when Congress has delegated the same regulatory space to more than one agency. Much of the private delegation scholarship, on the

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One consideration worth highlighting while reading these subsections is that, because these arrangements stem from explicit, concrete agreements between agencies, agencies may have the opportunity to cure many of these problems by constructing better agreements. Put another way, these drawbacks of transferring adjudication authority might be fixed (albeit not easily) by improving institutional design.¹⁰² Superior interagency contracts could create specific standards and procedures to ensure fidelity to beneficial agreements, legislative standards and administrative norms in spite of agencies' competing self-interest or desire to improve efficiency and effectiveness.

1. Accuracy Costs

As an initial matter, interagency transfers of adjudication authority may harm administrative decision making to the extent that agency burden shifting in any capacity can have a negative effect, including as a result of shirking, drift, or capture.¹⁰³ For instance, wholesale agency transfers of jurisdiction to adjudicate could reduce the quality of administrative decision making if the reasons for the transfer are only self-interested and not motivated by agencies' interest in high-quality outcomes, or if the agency miscalculates the benefits of the transfer. Or, agencies might be motivated to transfer authority for purposes of convenience or resource conservation more so than a fundamental belief that the agency to which jurisdiction is being transferred has comparable or greater capacity to adjudicate the claim. For example, regarding the transfer of Title VII cases from the EEOC to OFCCP, it is unlikely that the DOL subcomponent has the same depth of knowledge as the EEOC in this arena. Thus, the EEOC's motivation to reduce its own, immense caseload may have played an outsized role in the consideration of whether to transfer this authority. Then again, that EEOC has a high enough volume of cases that it is difficult for EEOC officials to devote sufficient time to cases may offset the benefits of EEOC expertise,¹⁰⁴ allowing the transfer to benefit both the agency's self-interest and adjudication regime.

other hand, focuses on governmental authority to delegate to private entities, and the constitutional and policy concerns that arise from this delegation. Questions about the authority to delegate occupy less of the agency coordination scholarship.

102. This suggestion draws from the institutional design school of thought, which "asks how to 'divid[e] the government into units that will provide the best possible set of public policies and government services' [and] treats policy outcomes as a function of the architecture of adjudicative institutions." Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1421 (2012) (quoting David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 958 (2004)); see also Sah & Stiglitz, *supra* note 12; Todd L. LaPorte & Paula M. Consolini, *Working in Practice but Not in Theory: Theoretical Challenges of "High-Reliability Organizations"*, 1 J. PUB. ADMIN. RES. & THEORY 19, 21-22 (1991).

103. "Public employees might shirk and focus on leisure rather than work. They might drift and emphasize their own preferences rather than agency goals. Finally, they might get captured and execute the desires of a third party." Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 889 (2014).

104. I would like to thank Aziz Huq for this insight.

Agencies may also face some pressure from those they regulate to strengthen the involvement of agencies that, traditionally, have handled the types of issues being adjudicated or are that are otherwise more sympathetic to the third party's interests. Even agencies motivated to transfer their adjudication authority for substantive reasons may initiate transfers that inadvertently deteriorate the quality of administrative decision making. For instance, CBP may have transferred its decision-making power to the FDA in more than one instance due to the CBP's knowledge of and respect for the FDA's expertise, or pressure from private entities who are more comfortable conducting business under oversight of a better established agency like the FDA. Still, whether the CBP was correct in doing so is less certain in some cases than in others. While it makes some intuitive sense to transfer to the FDA the power to adjudicate claims concerning the legality of pharmaceutical imports and exports, it is not as clear that the FDA (as opposed to another agency with more pointed expertise) should be put in charge of adjudications under the Radiation Control for Health and Safety Act.¹⁰⁵ In sum, any of these factors could lead to power placed into the hands of an agency more poorly suited to accomplish the adjudication than the agency to which the authority was initially delegated.

2. Democratic Accountability

By altering decision-making structures and transferring jurisdiction in a manner not anticipated by Congress or the public, agencies may be able to distance themselves from both the intentions and restrictions of legislation, including standards, reporting requirements, and political pressures, and thus also remain unaccountable to related constitutional expectations, administrative precedent and legislative policy. More specifically, agency-to-agency transfers of power also create opportunities for insulated agencies to act in self-interested ways that differ from the expectations of the public to which the executive branch must remain accountable. A similar dynamic—and related interest in limiting the authority of unelected and politically unaccountable actors who may exercise power in self-interested ways—drives the principal-agent theory underlying private nondelegation doctrine. In the public law context, the principal is arguably civil society (perhaps as represented by the legislative branch, for nondelegation purposes).¹⁰⁶

After an agency transfers its decision-making authority to another agency, the public may be unaware of and at least a few steps removed from the entity with actual power over the delegated process. For instance, were the CBP to have kept the transferred authority to adjudicate the legality of drug imports

105. Here, the CBP may have taken advantage of a pre-existing relationship with the FDA in order to continue to further bureaucratic aims best served by burden shifting.

106. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 64-80 (2014).

and exports (instead of retransferring it to the FDA), the CBP's overwhelming interest in securing the border may have skewed its decision making. Initially, this may have comported with the desires of the partisan Congress that drafted the initial legislation, or with the intention of Treasury in handing over this set of adjudications. But if it did not, in fact, improve the quality of adjudication, Congress and affected businesses may not have identified this problem, let alone pressured the CBP to broaden its analysis.

In the public/private delegation context, there are also concerns about how accountable the private delegate will be, in part because it is unclear whether constitutional tenets govern the private entity or not.¹⁰⁷ In contrast, all executive agencies are ostensibly bound by the same administrative and constitutional conventions (such as state action doctrine), whose breadth could improve accountability in an agency delegate even though it may not reach private actors. Similar to the public/private setting, however, the agency authority to which adjudication responsibility has been transferred wholesale via interagency agreement may be shielded from expectations and accountability to the quality of process that are required by statute (if not those required constitutional conventions).

Indeed, just as a private agent is not governed by constitutional law that applies only to public principals, an agency receiving adjudication authority may not be, in fact, under strict control of the legislation that gave authority to the transferring agency. For example, it is unclear whether the reporting and information-gathering requirements that the EEOC must comply with have been implemented adequately by the OFCCP in its adjudication of Title VII claims. In general, this matter is likely compounded in interagency transfers of adjudication authority by the fact that the original agency retains neither responsibility for nor oversight of the process,¹⁰⁸ which may also contribute to underperformance as measured by legislative and quality-based accountability standards, unless and until Congress or the courts demanded specific accountability.

Interagency transfers of adjudication authority may also erode interbranch transparency. Transferring jurisdiction without explicit legislative consent or judicial knowledge creates opacity in the process, which then becomes more difficult to track since it is no longer within the purview of the initial statutory delegation. This reduction in external awareness of what executive branch agencies are doing provides cover for agencies to act in unanticipated and

107. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370-71 (2003) (suggesting, ironically, that only if the government has a significant hand in the private entity's activities, do constitutional norms apply). Metzger suggests that where the risk of abuse by a private entity is perhaps greatest because of minimal government involvement, constitutional accountability is lowest. *Id.*

108. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009) (discussing similar principal-agent problems in both the intra-agency and in arguably more tenable interagency instances in which an agency retains authority to regulate other agencies).

perhaps unacceptable ways, as suggested by public choice theorists.¹⁰⁹ Over time, the meaningful, substantive influence of those constituencies that are particularly interested in the administrative adjudication regime at issue may become limited. Therefore, interagency transfers of adjudication authority may stymie stakeholders' attempts to check the executive branch, for instance, by pulling fire alarms that notify Congress of the wayward behavior of the agencies at issue.¹¹⁰

Further, these transfers may also implicate accountability to legislative intent unrelated to the quality of the decision-making process. After all, agencies' various areas of substantive expertise, policy interests, interpretations of law, ideals of administrative due process, etc. may vary (sometimes greatly) from one another, and these unique characteristics of agencies certainly factor into legislative decisions to delegate authority. Therefore, Congress may have substantive reasons for delegating power to agencies that do not emphasize efficiency or effectiveness that are underemphasized by the agency to which the adjudication has been transferred. For instance, there is some evidence that Treasury may have been the initial delegate of the power to issue notices to refuse pharmaceutical imports because of its power to bring issues arising in this context to the attention of the Secretary of HHS,¹¹¹ an ability that neither the CBP nor the FDA may have to as great an extent as Treasury.

Legislators may also delegate authority to agencies on the basis of specific political goals. For example, Treasury may also be relatively politically conservative or otherwise motivated to apply the statute aggressively or in a manner preferred by the partisan Congress that passed the legislation in the first place. Or, Congress may be motivated by an interest in assigning both an adjudicative and enforcement function to the same agency, a goal that would be subverted by an agency that transferred its adjudication function but kept its power to enforce those decisions—for instance, when the CBP transferred its jurisdiction to refuse illegal pharmaceutical exports, but nonetheless maintained its authority to enforce those decisions.¹¹²

109. Public choice theorists conceive of “agency policymaking as anti-democratic and of agencies as shirkers to be reined in by the courts.” Freeman & Spence, *supra* note 106, at 81. In this view, “agency independence implies a democratic deficit: the elected branches, Congress and the President (the principals), struggle to control an agency (the agent), whose actions may reflect shirking and moral hazard.” *Id.* at 64; see also George A. Krause, *Legislative Delegation of Authority to Bureaucratic Agencies*, in THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 521-544 (Robert F. Durant ed., 2010) (discussing related principal-agent problems in the legislature’s delegation of policymaking to the executive branch).

110. See *infra* note 113.

111. See *supra* note 57 and accompanying text.

112. See *supra* note 51 and accompanying text. There may be benefits to this separation, see Shah, *supra* note 2, at 838 (suggesting, in regards to immigration, a “trial-level agency acting as neutral adjudicator [and] as prosecutor before the appellate agency later in the same adjudicative process [may] elide[] administrative due process”), but it may nonetheless be counter to legislative intent underlying the delegation of both forms of authority.

More generally, Congress may have goals such as the desire to be responsive to their constituencies, an impulse to empower a friendly agency, or an intention to gain control over a subcommittee by diverting responsibility in a targeted manner.¹¹³ These aims may lead to the creation of specific policy¹¹⁴ that may more successfully realize Congress's favored purposes if agencies do not divert their delegated power away from themselves.¹¹⁵ For instance, there is some evidence that Congress delegated the responsibility to adjudicate Title VII claims to the EEOC, instead of splitting it, so that the more limited resources of other, politically favored agencies (such as the OFCCP) would not be overly burdened.¹¹⁶ In addition, Congress may wish to "stack the deck" or otherwise ensure that delegated processes unfold as intended even after the political make-up of the legislature has changed,¹¹⁷ an intention that may also be diluted by an interagency transfer of authority.

113. Scholars have argued that Congress uses a variety of tools to control agency policymaking: limiting agency discretion through specific language, structuring agencies in ways that favor particular outcomes, structuring the agency in such a way that it automatically favors particular interests, engaging in direct oversight by congressional committees, and enabling interest groups to alert Congress to agency misbehavior by implementing "police patrols" or, arguably less effective in regards to interagency transfers of adjudication authority, pulling "fire alarms." See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 130-34 (1990) (describing techniques for oversight, including "use of formal procedures or processes"); Matthew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation*, in CONGRESS: STRUCTURE AND POLICY 409, 411-13 (Matthew D. McCubbins & Terry Sullivan eds., 1987) (describing how explicitly specifying agencies' regulatory scope, instruments, and procedures limits discretion); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2229-30 (2005); Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99-101 (1992); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

114. That Congress may create policy by committee and through institutionally-oriented delegation has been fairly well-substantiated in various political science literature. See David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 952 (1999); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988); see also, e.g., STANLEY BACH & STEVEN S. SMITH, *MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES* (1988); DAVID MAYHEW, *THE ELECTORAL CONNECTION* (1974); WALTER OLESZEK ET AL., *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (10th ed. 2016); STEPHEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* (1989); Arthur T. Denzau & Robert J. Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 740 (1983); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agencies, and the Status Quo*, 33 PUB. CHOICE 27 (1978); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979).

115. See Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999).

116. See *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 904 (8th Cir. 1979); SENATE COMM. ON LABOR AND PUBLIC WELFARE, *Legislative History of the Equal Employment Opportunity Act of 1972*, at 916-17 (Nov. 1972).

117. McCubbins, Noll and Weingast noted:

First, the agency's structure and process should create a political environment that *mirrors* the politics at the time of enactment; that is, interests that are active participants in the debate over the original legislation should be given representation through the structure and process of the agency so that each will be protected against

Finally, agencies may feasibly choose to transfer their decision-making power to further self-interested or political aims that benefit from sidestepping delegated legislative authority. On the one hand, this may not harm the quality of administrative adjudication—for instance, if agencies’ motivations (such as a desire to transfer a responsibility to a better-funded agency) align with transfers that benefit the quality of the process. On the other hand, this may also allow an agency to redefine its jurisdiction in ways that thwart Congress’s ability to “manipulate its jurisdiction so that it is more or less sensitive to particular interests.”¹¹⁸

One way to thwart potential accountability problems would be to require agencies to issue regulations to concretize interagency transfers of adjudication power, as in the DHS/DOL H-2B work visa example. This could improve accountability *ex ante* by allowing for a notice-and-comment process that may help agencies to shape their agreement in response to the public’s concerns, as well as *ex post* by creating a more solid record and an agreement that, by virtue of its greater accessibility (as compared to an MOU), might be one to which agencies are more easily held accountable by the public and by courts. There, however, are a few caveats to this approach. The first, a practical one, notes that there is no guarantee the public will pay attention to the issuance of rules such as this, or that the agencies involved will incorporate any suggested changes. The second, more substantive concern is that the trade-off for gains in accountability will be a loss in

undesirable policy drift Second, the structure and process of an agency should *stack the deck* in favor of the groups who, among those significantly affected by the policy, are also favored constituents of the coalition that caused the policy to be adopted. And third, agency policies should exhibit an *autopilot* characteristic in the sense that as the preferences of the constituencies enfranchised in the agency’s structure and procedure change, so too will the agency, freeing Congress and the President from having to enact new legislation to achieve that end. The implication of this is not that policy is necessarily stable, but that it will change only to the extent that either the preferences of the agency’s enfranchised constituencies change or a constituency simply withers away and no longer takes advantage of its structural and procedural advantages.

Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444 (1989); see also Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 261, 264-71 (1987); Pablo T. Spiller & John Ferejohn, *The Economics and Politics of Administrative Law and Procedures: An Introduction*, 8 J.L. ECON. & ORG. 1, 6-7 (1992) (examining how administrative procedures ensure that the agency follows its original legislative mandate).

118. Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POL. 239, 258 (2012); see also Randall Calvert, Mathew McCubbins & Barry Weingast, *A Theory of Political Control of Agency Discretion*, 33 AM. J. POL. SCI. 588, 604 (1989) (finding that the appointment process, including inter alia “the structuring of the agency itself, the denomination of its powers and jurisdiction” influences the agency’s ultimate policy choices); David B. Spence, *Managing Delegation Ex Ante: Using Law To Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 415-16 (1999) (“[P]oliticians can ‘hardwire’ the agency in favor of a particular policy perspective through structural choices, including . . . establishing its internal organizational structure, and choosing its location within the larger executive branch. These choices tend to have an effect on the preferences of those who come to work within the agency.”).

agencies' ability to respond efficiently to impending needs and crises that create obstacles to the implementation of adjudication regimes.

3. Due Process

Dynamics in the public/private context suggest also that agencies are likely to use delegation in order to work around systematic, administrative, and even constitutional barriers—such as due process—to accomplish “distinct policy goals that . . . would [otherwise] either be legally unattainable or much more difficult to realize.”¹¹⁹ Such workarounds constitute a form of executive aggrandizement.¹²⁰ Indeed, in the privatization setting, courts have suggested that agencies must retain some power or oversight over private actors to ensure that private entities do not act in self-interested ways that deprive individuals of rights.¹²¹

Interagency transfers of adjudication authority may also burden agencies with additional agency tasks that impact the quality and transparency of the process for the individual. For instance, pre-adjudication determinations must occur prior to the transfer of workplace hazard claims between the DOL and EPA.¹²² Further, the effort of investigating the claim during a pre-adjudication is wasted because the transferring agency does not use this information to resolve further process in any way, and the receiving agency has to conduct a repetitive investigation and establish its own analysis as in order to adjudicate.¹²³ In addition to the inefficiency of this process, which requires agencies to duplicate each other's efforts, the process likely delays the final adjudication of the claim by either agency. Regardless of whether the claim is eventually returned to the original agency or completed by the agency to which it was transferred, the end result is an increase in the adjudication timeline that affects those seeking resolution of their claims by the agency.

119. Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717 (2010).

120. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517, 571 (2015) (suggesting that a form of executive aggrandizement involves “agency leaders . . . employing various privatization practices that have the effect of co-opting select public participants and defanging civil servants,” which allows them to “disabl[e] their institutional rivals”).

121. See *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Biener v. Calio*, 361 F.3d 206, 215-17 (3d Cir. 2004); *Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1455 (2d Cir. 1991); *Silverman v. Barry*, 727 F.2d 1121, 1126 (D.C. Cir. 1984); *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 666-67 (4th Cir. 1989); *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983); *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); see also Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 950 (2014).

122. See Memorandum of Understanding Between the U.S. Dep't of Labor Occupational Safety & Health Admin. and the U.S. Envtl. Prot. Agency Office of Enforcement, *supra* note 84.

123. See *id.*

If, in addition, agencies become careless with or deprioritize values like transparency, this may lead to structural changes that emphasize short-term gains over fundamental ideals of high-quality process and democratic accountability.¹²⁴ Because these transfers obscure the adjudication process by relocating it to another agency via informal agreements that are rather difficult to trace, they may also provide cover to agencies that purposefully constrain individual rights protections or other values of administrative procedure in favor of efficiency, political gain, or bureaucratic goals.

More specifically, agencies might inadequately uphold duties to provide consistent notice, response, and due process to individual claimants if there is no oversight or even specific language in the interagency agreement to hold them accountable. For instance, while the OFCCP is required to provide claimants with a notice of right-to-sue if the agency rejects a Title VII claim, there is no specification as to the timing and manner of the notice.¹²⁵ In addition, a handful of courts have acknowledged the potential for substantive and procedural due process violations resulting from the delegation of Title VII adjudicatory tasks by the EEOC through MOU.¹²⁶ Even if a stakeholder outside of the executive branch catches an agency's poor decision making, it may be particularly difficult to improve the quality of the process for various reasons, including the difficulty of holding the receiving agency accountable to Congress and the inability of Congress to take the reins nimbly once its original administrative structure has been warped.

Interagency transfers of adjudication authority may also create obstacles for those individuals seeking information and consistency in their administrative law processes, similar to and perhaps beyond the challenges related to due process. For instance, at least one court has suggested that an individual claimant may be penalized if the OFCCP fails to uphold its duty under MOU to accept claims on behalf of the EEOC (without any obligation to adjudicate them on behalf of the EEOC).¹²⁷ More specifically, a lack of external recognition regarding which agency has the claim in question and, as such, knowledge of which stage in the adjudication process the claim is, may plague those interested in the quality and outcomes of the adjudication throughout the process.

Overall, these rule of law concerns have the potential to render interagency transfers of adjudication authority harmful to the quality of administrative adjudication, and to erode judicial values and expectations underlying the transfer of certain judicial functions to the executive branch—

124. See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 93 (2012).

125. Memorandum of Understanding Between the Equal Emp't Opportunity Comm'n and the U.S. Dep't of Labor Office of Fed. Contract Compliance Programs § 7(d)(3) (Nov. 9, 2011).

126. See *supra* note 80 and accompanying text.

127. See *supra* note 82 and accompanying text.

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values that include transparency and faithful accountability to the law.¹²⁸ Indeed, none of the interagency agreements underlying the transfers examined in this Article specify guidelines that prevent an agency from abusing the process by simply transferring cases indiscriminately. For instance, the MOU underlying the transfer of workplace hazard claims between the DOL and EPA is imprecise enough¹²⁹ to allow for bad-faith agency behavior. Even with the best of intentions, these agencies may transfer their adjudication authority without specifying whether and how the recipient agency will uphold the criteria purportedly set forth in the MOU, and thus, whether the transfer will, in fact, benefit the adjudication process.¹³⁰ Further, the language of this or any interagency agreement may be purposefully vague, for reasons including the transferring agency's hopes that the recipient agency will come to grow in its relevant expertise¹³¹ and thus take responsibility for the entire set of adjudications over time.

B. Functional Benefits

Having explored potential drawbacks of interagency transfers of adjudication authority, this Part now considers how these transfers may improve the quality of agency decision making if agencies can draw on them to “adapt[] to changed conditions[] and realiz[e] new policy goods.”¹³² As noted throughout this Article, interagency transfers of adjudication authority may be driven by an agency's self-interest in shifting its adjudicatory responsibility to an agency with which it has an ongoing relationship¹³³—for instance, for purposes of convenience and efficiency, or even to avoid the expenditure of bureaucratic resources and accountability for the process. These agreements may also be based on the genuine desire to increase the quality of the adjudication process. Importantly, these two sets of aims are not necessarily mutually exclusive. Even if agencies make these arrangements for the “wrong” reasons or not in keeping with the public's expectations, interagency transfers of adjudication authority may nonetheless benefit the quality of administrative decision making.

An agency could feasibly be motivated by self-interest to make an interagency transfer of adjudication authority that also benefits the quality of

128. See Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

129. See, e.g., *supra* note 90 and accompanying text.

130. See *id.*

131. Gersen, *supra* note 12 at 213-15.

132. Huq, *supra* note 18, at 1618, 1686 (arguing that “dynamic interaction between institutions creates many opportunities for bargains over institutional allocations” and that such “deals are often (if not always) a desirable means of resolving constitutional ambiguities, adapting to changed conditions, and realizing new policy goods”).

133. See *supra* notes 46, 55, 56, 66, 79 and accompanying text.

the adjudication. For example, if Treasury wishes to transfer its authority to adjudicate the legality of pharmaceutical imports due to claims of a comparable lack of relevant resources, nationwide presence, or leadership bandwidth, then transferring adjudication authority to an agency with more of these or other related resources, like the FDA, would both satisfy Treasury's self-interest and benefit the affected processes. Indeed, transfers such as these may allow agencies to act based on their self-interest as well as on-the-ground information identifying agencies better qualified to house a particular administrative decision-making process than the one to which Congress originally delegated the decision-making authority.

1. "Primarily Responsible" Agency

Agency decision making is generally better if there is an entity that is responsible for it.¹³⁴ However, the opportunity for adequate agency oversight of most forms of coordinated interagency adjudication is limited due to the extensively decentralized nature¹³⁵ of administrative adjudication. One potential benefit of interagency transfers of adjudication authority is the extent to which they allow for the emergence of a responsible agency that is able to oversee and ensure the quality of the process.

Even in the intra-agency context, administrative adjudication is fairly decentralized, at least more so than rulemaking.¹³⁶ Interagency coordination, for the most part, decentralizes adjudication processes even further by extending the delegation of adjudicatory tasks to multiple bureaucrats housed in separate agencies.¹³⁷ Further, the influence of bureaucrats from different agencies brings with it varying views, loyalties, and interests that may diverge from those of the agency or agencies adjudicating the final claim, more so than do the interests of bureaucrats tasked to further an adjudication process from within the same agency.

134. See Christopher B. McNeil, *Executive Branch Adjudications in Public Safety Laws: Assessing the Costs and Identifying the Benefits of ALJ Utilization in Public Safety Legislation*, 38 IND. L. REV. 435, 472 (2005) (suggesting that specialized ALJs improve agency decision making); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 (2001) (suggesting that the quality of decentralized forms of administrative action turn on this "feature of agency process, traditionally ignored in administrative law doctrine and scholarship—that is, the position in the agency hierarchy of the person assuming responsibility for the administrative decision").

135. Shah, *supra* note 2, at 878-79. Note that coordination and centralization are not the same thing. For instance, a process can be centralized in one agency, which directs and is primarily responsible for the quality of the process, while benefiting from coordination ensuring that other agencies' resources or expertise have a positive impact on the process. While the relationship between agency coordination and decentralization is not well documented, I am not the first to consider "decentralized coordination" among agencies. See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 943, 948 (2003) (considering the idea that agencies could solve myriad social problems by means of "decentralized coordination").

136. See Magill & Vermeule, *supra* note 97, at 1068, 1075 (arguing that administrative adjudication is decentralized).

137. See Shah, *supra* note 21, at 832, 860.

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Because of the decentralized nature of many coordinated interagency adjudication processes, an agency may shirk some of its duties in any given adjudicative process, either by passing them to another agency ad hoc, or by lowering its commitment to its delegated tasks in a way that requires another agency to pick up the slack. However, this agency also retains its apparent authority. This dynamic, in turn, may dilute the actual responsibility of the shirking official or agency to the process, and contribute to inconsistent interagency communication, conflicts of interest, and the likelihood of error.¹³⁸ Since the multiple agencies involved in these processes are not in strictly vertical relationships with one another, not negotiating how best to parcel out authority shared under the same agency roof, and not subject to a consistent system of checks,¹³⁹ there is no one obvious agency overseer to ensure each agency in the process maintains certain standards.

Interagency transfers of adjudication authority, however, establish and maintain greater process centrality than do other forms of coordinated interagency adjudication. They do so by allowing an agency to transfer a process in its entirety to another agency. These agreements also memorialize and make somewhat more formal the ways in which agencies might burden-shift, which can increase the independence of the recipient agency because the agency need not engage in long-term “bargaining” or compromise solutions required in other forms of interagency negotiation. Further, the recipient agency may approach its duties with a heightened sense of responsibility in order to benefit in the future as the result of more collaborative arrangements.¹⁴⁰ Thus, these transfers create opportunities to sustain or reestablish responsibility for a process in the agency to which power has been transferred.

Indeed, a broad statutory basis for agency coordination—and in particular, for the transfer of jurisdiction—may even help reduce agencies’ impulses to shirk their decision-making responsibility.¹⁴¹ Further, in interagency transfers of authority, once an agency has transferred the authority to adjudicate a claim fully into the hands of another agency and recentralized the process, there are

138. See Shah, *supra* note 21.

139. In rulemaking, multi-agency processes may “increase the reliability of bureaucratic performance” by providing “for monitoring and reporting of agent behavior by competing agents themselves.” See Gersen, *supra* note 12, at 214 (2006). However, in many forms of coordinated interagency adjudication, there is often “no entity to which to report problematic agency behavior, especially in ad hoc procedures . . .” Shah, *supra* note 2, at 849.

140. See *supra* note 30 and accompanying text.

141. “If Congress wants to take advantage of agency knowledge, but is concerned that agencies will shirk and fail to invest heavily enough in the development of expertise,” allowing for the manipulation of jurisdiction per Gersen’s suggestion—but by agencies themselves—could help manage that possibility. Gersen, *supra* note 21, at 712; see also *supra* note 144. Gersen and others discuss the potential for Congress to manipulate agency jurisdiction, but allowing agencies to do so themselves might help accomplish the same goals without requiring Congress to develop and oversee the structural changes itself. By allowing agencies to take advantage of vague statutory authority in order to burden-shift, interagency transfers of adjudication authority thwart the legislative expectation that agency self-manipulation of jurisdiction will, as Gersen puts it, limit agencies’ “shirk[ing] and fail[ure] to invest heavily” in the implementation of an administrative adjudication regime. *Id.*

theoretically no more opportunities to burden-shift on the sly. Admittedly, in practice, certain transfers may allow shirking on the basis of vague or incomplete guidelines, potential pitfalls in communication, and the negative impact on due process that may accompany the back and forth movement of a number of claims. However, this could be cured by more explicit agreements, which other forms of coordinated adjudication do not have the option to draft.

For instance, although the authority to refuse illegal pharmaceutical exports was passed from agency to agency (Treasury to the CBP to the FDA), it was eventually housed in the FDA,¹⁴² which is in fact fully responsible for the quality of these decisions and has an unencumbered opportunity to oversee this process nationwide (a task at which it is particularly adept). Or, in regards to the transfer of Title VII claims: if the OFCCP has been granted the authority to adjudicate any given Title VII case on behalf of the EEOC, it need not (and should not expect to) rely on the EEOC to ensure the quality of the process and resulting decision, as it had in the past.¹⁴³ Nor can it shirk responsibility to the claimant, for instance, to properly transfer the claim to the proper adjudicator,¹⁴⁴ as easily as it might in cases where the EEOC maintains even apparent responsibility for the process.¹⁴⁵ Even in an instance which responsibilities are consolidated, agencies may be empowered to take control over matters they would otherwise have marked as outside their control. To take another example, the teaming up of OSHA and the EPA in handling workplace hazard adjudications, including with some amount of bartering to consolidate and share their responsibilities in order to make them more manageable for both agencies, may not only foster administrative efficiency but also improve the quality of decision making by increasing the bandwidth of each agency.

2. Agency Expertise

Interagency transfers of adjudication authority may also increase the level of expertise ultimately brought to bear in a set of adjudications by allowing agencies to transfer jurisdiction to those with greater substantive and procedural expertise, including those that have acquired this over time.¹⁴⁶ Expertise may include, for instance, a greater facility with fact-finding and related investigation, with the application of policy to initial-level decision making, or even with how best to maintain a consistent, nationwide system of

142. See *supra* notes 48-62 and accompanying text.

143. See *supra* note 83 and accompanying text.

144. See *supra* notes 80-82 and accompanying text.

145. See *id.*; see generally, *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 903 (8th Cir. 1979).

146. See Gersen, *supra* note 12, at 213-15 (noting that agency expertise can change over time). Even the primary agency to which Congress may have delegated the authority to interpret a statute or some other function need not be or remain the most expert in either that statute or function. See *id.*

administrative decision making. For instance, the EEOC may be interested in transferring Title VII claims to the OFCCP to take advantage of its growing expertise (at least as related to federal contractors) in these types of claims.¹⁴⁷ In regards to the evaluation of pharmaceutical imports and exports, the decision to delegate final responsibility to the FDA was based on the recognition that the FDA has the most focused expertise in the matter at hand, including a national presence and depth of knowledge.¹⁴⁸ Further, the transfer of Radiation Control for Health and Safety Act claims from the CBP to another agency, perhaps one with greater expertise in this arena, makes some sense (notwithstanding the fact that the FDA may not be that ideal agency).

Further, these agreements allow agencies to put their heads together in order to come up with a more effective decision-making regime than Congress may have effected through the transferring agency. Shared delegation may not only help avoid the cost of “creating a new agency to address multiple issues,”¹⁴⁹ but could also mean the ultimate outcome the two agencies reach may be less biased¹⁵⁰ and “closer to the outcome lawmakers would negotiate if they were to bargain among themselves than would occur if the original agency possessed all of the authority.”¹⁵¹ In these ways, transfers may also serve to increase agency expertise in any given adjudication regime, when Congress’s initial delegation may not have done so as effectively. One caveat to this theory is that agency expertise may be brought to bear—if not in equal measure, then at least to a useful degree—without an agency transferring its decision-making jurisdiction entirely. That having been said, it is more difficult to ensure the consistent influence of expertise on those processes in which agencies consult with or seek information from other entities ad hoc.

3. Ameliorating Coalitional Drift

One more way in which interagency transfers of adjudication authority may serve administrative interests is by allowing agencies to guard against coalitional drift in those circumstances in which an agency is pulled towards the partisan preferences of future legislatures and away from the substantive goals of its enacting Congress.¹⁵² More specifically, these transfers serve to

147. See, e.g., *supra* notes 43-46 and accompanying text.

148. See Memorandum of Understanding Between the U.S. Customs Serv. and the Food & Drug Admin. (Aug. 14, 1979); Shah, *supra* note 2, at 29-30.

149. Freeman & Rossi, *supra* note 1, at 1142.

150. See generally Robert Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007) (suggesting that “intersystemic” governance may also reduce biases in the application of law).

151. Freeman & Rossi, *supra* note 1, at 1142.

152. See Renan, *supra* note 12, at 258 (“Coalitional drift is the difference between the policy preferences of the enacting Congress and the policy preferences of a future Congress.”); see also Macey, *supra* note 113, at 94 (“[B]ecause of shifting preferences, monitoring by subsequent political coalitions will not be a reliable tool for protecting previously obtained political gains.”).

increase bureaucratic drift from,¹⁵³ and thus to dilute the impact of, overly-politicized future legislatures.¹⁵⁴ To be clear, this subsection does not argue in favor of enacting legislative coalitions over contemporary coalitions as a general matter.¹⁵⁵ Rather, it argues that agencies should have the opportunity to push back against contemporary coalitions that seek to limit their effectiveness—in particular, through budget cuts—for unprincipled reasons. As many have suggested, bureaucratic drift occurs when policy implemented by agencies differs from ongoing legislative preferences.¹⁵⁶ The common story about bureaucratic drift is that it is to be avoided by ensuring as much legislative control of agencies' structural dynamics as possible.¹⁵⁷ What this perspective neglects, however, is the extent to which "political institutions are also weapons of coercion and redistribution . . . the structural means by which political winners pursue their own interests, often at the great expense of political losers."¹⁵⁸

153. This idea is complementary to the theory that coalitions that put procedures in place to control bureaucratic drift leave themselves open to coalitional drift. See Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 501-04 (1989);

154. See David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407 (1997) (hypothesizing that agencies are dominated by powerful congressional committees, with the result that agency policy reflects the preferences of current legislative committees, as opposed to the preferences of the enacting Congress).

155. Engaging in this large debate is beyond this Article's scope, although it is worth noting briefly that scholars have argued successfully in favor of contemporary coalitions. See, e.g., Einer R. Elhauge, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 202-03 (2009) (noting that when "a President has entered a binding executive agreement with another nation, the last-in-time rule applies so that a conflicting law enacted by Congress . . . after the conclusion of the agreement renders the agreement invalid under domestic law").

156. See, e.g., Horn & Shepsle, *supra* note 153, at 501-02; see also Renan, *supra* note 12, at 257.

157. See, e.g., Macey, *supra* note 113, at 100 (explaining that agency design can be used to minimize "bureaucratic drift" and that "the politicians who create administrative agencies can limit future agency costs not only by establishing procedural and substantive rules under which such agencies must operate, but also through the initial organizational design of the agency itself"); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 113-15 (1992); Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 279 (2007) (describing bureaucratic drift as a "risk" and a "threat"); Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, LAW & CONTEMP. PROBS., Spring 1998, at 109, 126 (referring to bureaucratic drift as a "problem"); McCubbins et al., *Administrative Procedures as Instruments of Political Control*, *supra* note 117, at 273-74 (elected politicians should use administrative procedures in addition to or instead of monitoring and sanctions to achieve bureaucratic compliance); Renan, *supra* note 12, at 259 ("Through a mix of structural and procedural controls enacted in legislation, the argument goes, Congress ameliorates bureaucratic drift." (emphasis added)).

158. Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 213 (1990); see also Matthew McCubbins, Roger Noll, and Barry Weingast, *The Political Economy of Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1710 (A. Mitchell Polinsky & Stephen Shavel eds., 2007); Macey, *supra* note 113, at 94 (defining bureaucratic drift as "elected officials' concern that administrative agencies will act in ways contrary to their interests[,] [which] prompts them to develop complex rules to control the future conduct of agencies").

One potential response to this theory is that agencies should be duly managed by legislatures over time, and that appropriations decisions are one way to do so.¹⁵⁹ Put another way, for instance, “congressional investigations into the performance of an agency may take place through annual budgetary process, the reauthorization of an agency’s programs, and watchdog agencies such as the Office of Management and Budget and the General Accounting Office.”¹⁶⁰ But overseeing an agency’s performance in order to make substantive changes that benefit bureaucratic effectiveness¹⁶¹ (even in order to pacify powerful stakeholders), and hamstringing an agency based on political motives symbolize two separate types of legislative values. This Article privileges the former. Congress should step out from behind appropriations decisions and voice, by means of an explicit change to statute,¹⁶² its intention to handicap an agency.

Arguably, privileging substantive statutes over appropriations legislation does not increase accountability and transparency either. For instance, given the more stringent requirements of enacting legislation to curtail executive branch actions, appropriations bills may serve as a mechanism for ensuring majoritarian accountability.¹⁶³ However, in instances where Congress uses appropriations decisions to *cripple agency effectiveness* in the pursuit of political aims, agencies are justified in seeking ways to push back in order to continue to fulfill their substantive core directives as effectively as possible.

Further, an ideal shared by the legislative and executive branches is “to ensure that administrative agencies generate outcomes that are consistent with the original [legislative] understanding.”¹⁶⁴ Given the widely-held theory that legislative delegation to agencies can cause bureaucratic drift,¹⁶⁵ arguably, taking control of administrative structure via a systematic and coherent form of agency *re-delegation* in the face of turnover in the legislature can be a means for agencies to withstand the perversions of subsequent legislatures proactively

159. See David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1489 (2015) (“Agency executives that run afoul of Congress can be hauled before unfriendly committees, have their budgets cut, and be shackled with a variety of constraints on agency activities and spending.”).

160. Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 672 n.2 (1992); see also McCubbins et al., *Structure and Process*, *supra* note 117, at 434.

161. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, *supra* note 117, at 273-74 (suggesting that elected politicians should use administrative procedures in addition to or instead of monitoring and sanctions to achieve bureaucratic compliance).

162. See Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEGAL STUD. 331, 334 (2013); Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 935 (2008) (“A future legislature might amend or repeal the statute once control of the legislature shifts.”).

163. I would like to thank Gillian Metzger for this insight.

164. Macey, *supra* note 160, at 671-72.

165. See, e.g., Gersen, *supra* note 157, at 282 (2007); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1114 (2002).

in order to circle back to the core, substantive institutional mandates¹⁶⁶ assigned to the agency by the Congress that enacted the administrative adjudication program.¹⁶⁷

One hypothesis in this vein is that interagency transfers of adjudication authority may allow an agency to work around instances in which it would otherwise have to shirk its responsibilities because of recent limitations in resources designated to an agency. Examples of this might include cases where Congress has begun to reduce funding to an agency for political reasons, to divert money elsewhere in response to newly influential lobbyists, or as punishment (unrelated, perhaps, to the importance of the administrative mandate that Congress has decided to defund), but has nonetheless continued to vest in the agency the responsibility to implement the original adjudication regime. For example, there is some evidence that Congress has limited EEOC funding for the implementation of an effective Title VII regime. By transferring a set of adjudications to the OFCCP—an entity that Congress itself once determined has a similar mandate to the EEOC¹⁶⁸—the EEOC is able to better implement its Title VII directive and to alleviate coalitional drift. This may be the case especially to the extent that enabling legislation does not clearly stack the deck¹⁶⁹—for instance, in this case, when a later Congress’s appropriations decision reduces the EEOC’s ability to fulfill its original legislative mandate.

Overall, whether these transfers of adjudication authority are initiated in order to conserve resources, to further seemingly more efficient and expert administrative decision-making processes, or to respond to bureaucratic stasis and legislative pressure, the dynamic is one that may hold promise, in some cases, for better administrative decision-making arrangements. That having been said, additional information is required to determine whether and how interagency transfers of adjudication authority impact the quality of administrative decision making—including whether an evolution in the detail

166. See Moe, *supra* note 158, at 230 (“Structural items can be traded for policy items, and vice versa In the resulting package, the agency gets a structure and a mandate, but the former is not designed or adopted because it is a means to the latter.”).

167. It is worth noting that few have considered the influence of interagency interactions on this dynamic, and that no one thus far has considered the impact of the interagency transfer of decision-making power on bureaucratic or coalitional drift. See, e.g., Renan, *supra* note 12, at 259 (discussing the impact of agencies sharing their resources on bureaucratic drift); see generally Freeman & Rossi, *supra* note 1.

168. See *supra* note 7.

169. This idea is encapsulated by scholarship that criticizes McNollgast’s seminal theory (“[b]y structuring who gets to make what decisions when, as well as by establishing the process by which those decisions are made, the details of enabling legislation can stack the deck in an agency’s decision-making”) by suggesting that enabling legislation does not necessarily clear a path free of coalition drift. Matthew McCubbins, Roger Noll, & Barry Weingast, *supra* note 158; but see, e.g., Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 671 (1998); Glen O. Robinson, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Political Uses of Structure and Process*, 75 VA. L. REV. 483, 484 (1989); Spence, *Managing Delegation Ex Ante*, *supra* note 116, at 415; Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, LAW & CONTEMP. PROBS., Winter 1994, at 127, 131.

and quality of the agreements themselves or proactive oversight might change their impact. As such, this Part opens the door to additional analysis of these arrangements and related dynamics.

III. Establishing Legitimate Authority

“Administrative law, at root, is the process by which otherwise-unencumbered agency officials are legally and politically constrained in an effort to prevent abuse and to confer legitimacy on the power that is exercised.”¹⁷⁰ Whether or not their actions benefit the quality of public law, agencies, like the rest of the executive branch, may act only when suitably authorized¹⁷¹ and checked.¹⁷² Even if interagency transfers of adjudication authority benefit the quality of administrative decision making, this does not necessarily mean agencies have the power to make those transfers legitimately, in keeping with separation of powers and the nondelegation doctrine.

This Part explores various ways in which agencies might establish proper authority for interagency transfers of adjudication authority, given that Congress has never explicitly given agencies the power to transfer their entire jurisdiction to adjudicate decisions in any area of administrative law. After arguing that these transfers are not part and parcel of power inherent to the executive branch to delegate within a single agency, it determines that these transfers are only valid if agencies can find mooring for the transfers in statute. Finally, this Part settles on legislative delegations to agencies of authority to coordinate with other agencies as a legitimate source of power for these interagency arrangements.

A. Unsatisfying Sources of Authority

The specific question explored in this subsection is whether agencies have thus far drawn from legitimate authority in transferring their decision-making power. To further its inquiry, it examines how interagency transfers of

170. See Jon D. Michaels, *supra* note 120, at 532; Aziz Z. Huq, *Libertarian Separation of Powers*, 8 NYU J.L. & LIBERTY 1006, 1033 (2014) (suggesting that institutional innovations are intolerable if they cause the executive to “fundamentally aggrandize itself”).

171. Only Congress or an authorized interpretation of the constitution may empower the executive branch to act. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 240 (suggesting that the “executive branch . . . may act only pursuant to authority given by legislation or an enumerated constitutional power”); see also JACK GOLDSMITH, *POWER AND CONSTRAINT* 207-08 (2012); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1707-20, 1731-32 (2011).

172. This tension has roots in the counterefficiency theory, which suggests that the protection of the separation of powers may require limiting the efficiency of governmental processes. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (“Justice Brandeis’ oft-quoted version of separation of powers elevated the counterefficiency argument to the status of dominating principle when he said that the purpose of separation of powers was ‘not to promote efficiency but to preclude the exercise of arbitrary power.’” (discussing *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

adjudication authority are both similar to and unique among ways in which agencies more commonly delegate partial authority to one another. This subsection's exploration of the constitutionality of these interagency transfers also contributes to the very limited body of work examining structural constitutional issues arising from agency coordination.¹⁷³

1. Intra-Agency Delegation Power

Generally, Congress is the branch of government empowered to structure administrative authority.¹⁷⁴ However, intra-agency adjudication processes often involve extra-statutory delegation initiated by bureaucrats. Indeed, initial delegations of authority to interpret statutes are given to the agency's "statutory delegatee," often a political appointee.¹⁷⁵ And yet, Congress certainly does not expect busy executive branch leaders such as the Attorney General or Secretary of HHS to carry out the delegated responsibilities him- or herself.¹⁷⁶ These duties, thus, are subdelegated further—often automatically and en masse—to

173. Freeman and Rossi have noted that agency coordination (namely, within rulemaking) may have implications for the separation of powers doctrine, but none, thus far, have explored those implications. See Freeman & Rossi, *supra* note 1, at 1137; cf. Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National-Security State*, 83 U. CHI. L. REV. 199, 199 (2016) (noting that the "concentrat[ion] and consolidat[ion]" of entities across the "the public-private divide, the federal-state divide, and the political-civil servant divide within government agencies" should be more closely examined "for reasons pertaining to constitutional separation of powers"). This exploration is useful, given the traditional assumption in the literature of a monolithic government. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579, 581-82 (1984) ("Once one descends below the level of the branch heads named in the Constitution—Congress, President, and Supreme Court—separation of powers ceases to have descriptive power."); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions."). More recently, some have come to describe the elements of intra-branch administrative design as an "internal separation of powers" within the executive branch. See, e.g., Michaels, *supra* note 120; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009). The literature also "demands a separation of powers doctrine recognizing a fourth coordinate branch of constitutional government." Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 719 (1997). As such, it has also begun to acknowledge the influence of individual executive agencies. See, e.g., Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1047 (2006) (noting that "many federal agencies operate as miniature versions of the tripartite federal government, with the authority to legislate (through rulemaking), adjudicate (through administrative hearings), and execute agency policies (through agency enforcement) [and] this unique structure raises separation of powers concerns."); Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 502 (2014); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1392 (1992).

174. See U.S. CONST. art. I, § 8, cl. 18; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1183 (1992); Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 891 (2012).

175. Barron & Kagan, *supra* note 134, at 245.

176. See Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 430-51 (2015).

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mid- and lower-level adjudicators, including but not limited to administrative law judges.¹⁷⁷

Once the statutory delegatee transfers an intra-agency adjudication to, for instance, the mid-level adjudicator, the decision-making process is for the most part spearheaded by that adjudicator (who is both insulated from and accountable to the initial political appointee). However, the adjudicator may also further delegate parts of the adjudication process to others. Further, a civil servant out in the field or an enforcement-minded group of bureaucrats may investigate or fact-find for the adjudicator, help determine the relevant statutory application to assist the adjudicator, or resolve portions of the adjudication at hand in place of the adjudicator.

Yet, despite the extent of intra-agency delegation, it is uncertain whether agencies may transfer their adjudication authority across agency borders, “in the absence of congressional authorization,”¹⁷⁸ even to accomplish similar administrative goals. Along these same lines, it is also unclear whether agencies have the power to separate their adjudicative and enforcement functions when Congress has purposefully delegated both to the same agencies, even if there are benefits to the separation.¹⁷⁹ Further, while coordinated interagency adjudication may involve agencies delegating tasks to one another of their own volition,¹⁸⁰ courts have thus far taken a stance against the idea that these arrangements are part of agencies’ intrinsic executive authority by distinguishing them from intra-agency delegation.

More specifically, the Supreme Court and D.C. Circuit have determined that agencies have the authority to delegate internally absent congressional language authorizing the coordination, but that delegation to an “outside party,” which includes delegation from one agency to another agency at the same level of government, is impermissible as an exercise of purely executive power.¹⁸¹

177. See, e.g., F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 213-14 (2013); Barron & Kagan, *supra* note 134.

178. See, e.g., Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1268 (1988) (focusing on administrative adjudication).

179. See *supra* note 112.

180. In an antitrust example based in interagency agreement alone, DOJ and the Department of Transportation collaborate, under MOUs, to decide whether to accept air transport mergers. See *State of American Aviation, Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure*, 113th Cong. 1 (2013) (statement of Susan L. Kurland, Assistant Secretary for Aviation & International Affairs, U.S. Dep’t of Transp.), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg88515/html/CHRG-113shrg88515.htm>. Although DOJ usually has authority over antitrust controversies, here the agencies work together to determine whether airline mergers will violate antitrust laws because of the DOT’s obvious expertise in airline safety and security. See *id.* Agencies may also informally share tasks with or delegate tasks to one another in order to increase the capacity of both agencies involved. See generally Renan, *supra* note 12.

181. “While courts have generally adopted a presumption that interprets statutory silences in favor of subdelegation [or intra-agency delegation,] in the absence of clear congressional language, interagency redelegation is presumptively barred.” Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 893-97 (2012); see also, *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) (articulating that “the Executive Branch is not permitted to administer the [delegating statute] in a manner that is inconsistent with the administrative structure that Congress

This means that while intra-agency delegation may be accepted as part and parcel of agencies' executive branch powers regardless of underlying statutory authority, interagency delegation has not been similarly understood thus far.¹⁸² Because interagency transfers of adjudication do not involve the more ordinary act of delegating discrete tasks, but rather, consist of wholesale transfers of adjudicative power, courts are perhaps even less likely to accept an interagency transfer of adjudication authority as a permissible manner in which agencies may instigate changes to administrative structure.

This inquiry is further complicated by the fact that by transferring authority wholesale, interagency transfers of adjudication authority allow agencies to determine and restructure the boundaries of their jurisdiction by themselves, which may also be impermissible as an independent exercise of executive power. In general, the courts are empowered to constrain agencies' self-definition of jurisdiction, particularly in regards to administrative adjudication.¹⁸³ Further, there is perhaps a set of adjudicative jurisdictional determinations that agencies may never make for themselves.¹⁸⁴ This may include agencies defining their own authority under super-statutes¹⁸⁵ and jurisdiction under Administrative Procedure Act itself.¹⁸⁶

While the Supreme Court recently decided, in *City of Arlington v. FCC*, that agencies may be granted *Chevron* deference to negotiate the scope of their own authority in some instances, it also determined that this is constitutionally permissible only as long agencies act "based on a permissible construction of the statute."¹⁸⁷ Further, a vocal minority of the Court made clear the concern

enacted into law"); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent. But the cases recognize an important distinction between subdelegation to a subordinate and [re]delegation to an outside party There is no such presumption covering [re]delegations to outside parties."); *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783-84 (D.C. Cir. 1998).

182. This is the case even though the constitutional distinction between intra-agency and interagency delegation to *adjudicators* is particularly unclear, given that adjudicators have protections against removal in either scenario. (I would like to thank Gillian Metzger for this insight.)

183. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 943 (2011) (noting that the Supreme Court decision that is most often credited with the rise of the current scheme of appellate review of administrative adjudication, *Crowell v. Benson*, determined that Article III is satisfied only "as long as all questions of law and key 'jurisdictional' facts are subject to de novo review by an Article III court").

184. See *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (concretizing the transition of judicial functions to the executive branch, which defined "jurisdictional" to mean "[i]n relation to administrative agencies, the question in a given case is whether it falls within the scope of the authority validly conferred").

185. See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

186. See Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003) ("[T]here is a set of interpretive questions as to which the agency's views are irrelevant, except to the extent that any litigant's views are considered; an example is the interpretation of the Administrative Procedure Act itself").

187. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

that agencies may be accumulating too much power if allowed to determine their own jurisdiction under any circumstances.¹⁸⁸ This case implies, at least, that when agencies transfer their decision-making jurisdiction to other agencies, they are in danger of overstepping the proper bounds of executive power unless moored in legislation. The majority's recent decision confirming the constitutionality of Obamacare echoed this sentiment by reflecting the view of the dissent in *City of Arlington* that agencies should not be allowed to define their own jurisdiction.¹⁸⁹

2. The Economy Act

In at least one interagency transfer of adjudication authority, agencies use the Economy Act¹⁹⁰ as authority for their agreements.¹⁹¹ The purpose of the legislation is "to permit the utilization of facilities and personnel belonging to one department by another department or establishment and to enact a simple and uniform procedure for effecting the appropriation adjustments involved."¹⁹² Indeed, the Economy Act is arguably the foundation of the "interagency marketplace"¹⁹³ because it encompasses myriad ways in which agencies may trade competencies.¹⁹⁴ Further, the "Act was designed to address intra-executive outsourcing, and so its constraints generally focus on the *transfer* of funds or legal authority from one agency to another."¹⁹⁵

Legislative history shows that Congress drafted this vague, broadly applicable statute in order to provide agencies leeway to interact (and eventually, to coordinate), because it believed that this could be useful for the implementation of a variety of legislative interests.¹⁹⁶ Further, the Government

188. *See id.*

189. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (striking down the IRS's efforts to define its own jurisdiction); *supra* note 187 and accompanying text.

190. Economy Act, 47 Stat. 382 (1932) (codified as amended at 31 U.S.C. § 1535 (2012)).

191. *See, e.g., supra* note 62 (noting that the transfer of authority from the CBP to the FDA to determine claims under the Radiation Control for Health and Safety Act claims authority from the 1932 Economy Act, as well as another broad statute, the Public Health Service Act).

192. *Hearings on H.R. 10199 Before the Comm. on Expenditures in the Exec. Departments*, 71st Cong. 3 (1930), reprinted in 57 COMP. GEN. 674, 678 (1978).

193. Marisam, *supra* note 174, at 887.

194. *See id.* at 887-88 (suggesting that "by allowing agencies to obtain services from each other in exchange for money, the Act lets agencies tap into each other's expertise and infrastructure [and that] the Act allows agencies to save money by hiring other, more efficient agencies to perform tasks for them."); Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 583 (2010) (arguing for the "need to recognize coordination as an increasingly important impetus for regulatory action").

195. *See Renan, supra* note 12, at 266.

196. *See, e.g., H.R. REP. NO. 71-2201*, at 2-3, quoted in 57 COMP. GEN., at 674 (1978) ("Very substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this bill will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities on [their] own."). Indeed, while an "outsourcing agency cannot use an Economy Act agreement to fund work that it would

Accountability Office (GAO) suggests that “the objective of the statute is to permit an agency to take advantage of another agency’s experience or expertise,”¹⁹⁷ which is a primary benefit of interagency transfers of adjudication authority.¹⁹⁸ The GAO has also determined that agencies themselves should be able to decide whether they are qualified to enter into Economy Act agreements¹⁹⁹ and that they must be written,²⁰⁰ both of which are cornerstones of interagency transfers of adjudication authority. However, while the Economy Act promotes interagency coordination, it also establishes a “comprehensive set of procedures and rules that constrain exchanges in the interagency marketplace.”²⁰¹ For one, the goal of the Act does not include providing opportunities for agencies “merely to ‘dump’ either work or funds or to avoid legislative restrictions.”²⁰²

Overall, the Act does not appear to have contemplated the types of exchanges created by interagency transfers of adjudication authority. For instance, the establishment of a fair exchange of funds is a primary focus of the Act²⁰³ as well as many paradigm agreements based on the Act.²⁰⁴ A particular

not itself be authorized to undertake [n]or can the outsourcing agency obtain under the Economy Act services from another agency that its own enabling statute prohibits,” this implies that the agency *can* outsource any number of tasks that has been charged with accomplishing itself. Renan, *supra* note 12, at 266.

197. See 3 U.S. Gen. Accounting Office, GAO-08-987SP, Principles of Federal Appropriations Law 12-27 & 12-46 (3d ed. 2008) <http://www.gao.gov/special.pubs/d08978sp.pdf> (citing 23 COMP. GEN. 935, 937-38 (1944)) [hereinafter GAO Red Book].

198. See *supra* note 146-151 and accompanying text.

199. See GAO Red Book, *supra* note 197, at 12-28.

200. An Economy Act transfer should be anchored in a “written order or agreement in advance, signed by the responsible administrative officer of each of the departments or offices concerned.” 13 COMP. GEN. 234, 237 (1934). “A written agreement is important because, as in any contract situation, the terms to which the parties agree, as reflected in the writing, establish the scope of the undertaking and the rights and obligations of the parties.” GAO Red Book, *supra* note 197, at 12-30.

201. See Marisam, *supra* note 174.

202. GAO Red Book, *supra* note 197, at 12-27. Specifically, there must be an “absence of any statutory prohibitions or restrictions which would obstruct performance.” GAO Red Book, *supra* note 197, at 12-28.

203. Much of the language of the Act focuses on appropriations. See generally, 31 U.S.C. § 1535. Further, Congress specified that proper appropriations reimbursement was an important factor motivating the passage of this bill. See H.R. REP. NO. 71-2201, at 2–3 (1931), *quoted in* 57 COMP. GEN., at 674 (1978) (“Heretofore the cost of such services as have been performed by one department for another has frequently been paid for out of the appropriations for the department furnishing the materials and services. This is unfair to the department doing the work. All materials furnished and work done should be paid for by the department requiring such materials and services [The bill’s funding provisions] will hold each department to strict accountability for its own expenditures and result in more satisfactory budgeting and accounting.”); see also, GAO Red Book, *supra* note 197, at 12-30 to -43 (focusing on the importance of fiscal matters and costs to Economy Act agreements).

204. See, e.g., U.S. Dept. of Commerce, National Oceanic and Atmospheric Administration, *Economy Act for Purchasing Goods or Services*, <http://www.gc.noaa.gov/documents/mou-economyact.pdf>; U.S. Army Corps of Engineers, *Determination and Findings (D&F) for an Interagency Acquisition Under the Economy Act FAR 17.502-2*, <http://corpslakes.usace.army.mil/partners/pdfs/NWD%2022-15%20Economy%20Act%20DF%20templates%202016.pdf>; U.S. Department of the Treasury, Financial Management Services, *Interagency Agreement—Agreement between Federal Agencies*, http://corpslakes.usace.army.mil/partners/pdfs/Form%207600%20IAA_General_Terms_Conditions.pdf;

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concern is lowering cost for the outsourcing agency²⁰⁵ and ensuring the proper de-obligation of appropriations for the agency performing the task,²⁰⁶ for services such as interagency details of personnel²⁰⁷ and the provision of raw materials.²⁰⁸ This emphasis on cost is not reflected in any of the interagency transfers of adjudication authority agreements discussed in this Article, as none of them mention a payment structure, include a cost-benefit analysis of any sort (let alone one that establishes the monetary benefits of the transfer to the government), or discuss appropriations in any meaningful way. Of course, it is possible that the implicit interest in reducing costs that may drive agencies to initiate transfers of their adjudicative authority has basis in these Economy Act provisions.

Perhaps more importantly, “an agency may not transfer administrative functions to another agency under the aegis of the Economy Act.”²⁰⁹ While the GAO admits that “[t]he difficulty in applying the rule is that no one has ever attempted to define the admittedly vague term ‘administrative function’ in this particular context,” it nonetheless asserts that the Economy Act “prohibit[s] transfer of an entire appropriation,”²¹⁰ in particular, those “functions with respect to which an agency has authority to make ‘final and conclusive’ determinations.”²¹¹ A crucial matter is that the outsourcing agency should retain “ultimate control” over the transferred function.²¹² A similar reading of the Act

U.S. Army Corps of Engineers/Northwestern Division, *Determination of Best Procurement Approach*, <http://corpslakes.usace.army.mil/partners/pdfs/NWD%2022-15%20Economy%20Act%20DBPA%20templates%202016.pdf>. For additional templates, see Economy Act Sample Templates at <http://corpslakes.usace.army.mil/partners/economy-templates.cfm>.

205. See, e.g., GAO Red Book, *supra* note 197, at 12-29 (suggesting “that agencies document the two determinations called for by [the Economy Act,] 31 U.S.C. §§ 1535(a)(2) and (a)(4) (interest of the government and lower cost)”).

206. See, e.g., *id.* at 12-43 to -46.

207. See *id.* at 12-54 to -59.

208. See *id.* at 12-59 to -62.

209. *Id.* at 12-70; see also Civ. Serv. Comm’n, B-45488, at 3 (Comp. Gen. Nov. 11, 1944) (“The theory . . . is that there is inherent in a grant of authority to a department or agency to perform a certain function, and to expend public funds in connection therewith, a responsibility which, having been reposed specifically in such department or agency by the Congress, may not be transferred except by specific action of the Congress. The soundness of this principle is without question.”). Under the Economy Act’s 1920 predecessor, the Comptroller of the Treasury had also held that “a particular duty placed on one branch of the Government by enactment of Congress or going to the essence of its existence” could not be transferred to another agency without statutory authority. 27 COMP. DEC. 892, 893 (1921); see also 8 COMP. GEN. 116 (1928).

210. GAO Red Book, *supra* note 197, at 12-71; see also Decision of July 7, 1923 (no file designation), 23A MS 101, *quoted in* 8 COMP. GEN. 116, 118 (1928).

211. GAO Red Book, *supra* note 197, at 12-71; see also Civ. Accounting and Auditing Div., B-156010-O.M. (Comp. Gen. Mar. 16, 1965) (deciding that the transfer of debt collection responsibilities under the Federal Claims Collection Act was not authorized by the Economy Act); B-117604(7)-O.M. (Comp. Gen. June 30, 1970) (noting that while debt collection services can be provided under the Economy Act); 17 COMP. GEN. 1054 (1938) (holding, in a case predating the Federal Claims Collection Act, that there was no authority for an agency to transfer its debt collection responsibilities).

212. GAO Red Book, *supra* note 197, at 12-71; see also Civ. Serv. Comm’n, B-45488, at 5 (Comp. Gen. Nov. 11, 1944) (determining that while the Army would handle certain funds on the Civil Service Commission’s behalf, the fact that the “responsibility for the performance of the

suggests that agency-to-agency delegation is permitted only if “(1) the agency ‘retains responsibility’ over the tasks; (2) the tasks are not part of the agency’s primary administrative functions; and (3) the tasks do not involve significant decision-making authority.”²¹³ In any case, the GAO declares, “[a]n agency can acquire services under the Economy Act, but cannot turn over the ultimate responsibility for administering its programs or activities.”²¹⁴

This interpretation of the Economy Act appears to prohibit wholesale transfers of power between agencies. Further, whether or not the transferred authority may be considered part of the original agency’s primary administrative functions or involves significant decision-making authority may not be consistent across the board, and could vary on a case-by-case basis. Based on these inquiries, the Economy Act may also damn larger regimes, like the wholesale transfer of drug import and export adjudications from Treasury to the CBP to the FDA, or those that implicate individual rights, including rights under Title VII. Thus, while the Economy Act provides some evidence that Congress has long sought to empower agencies to interact in ways that benefit the quality and functionality of governance, it does not constitute an unimpeachable basis for interagency transfers of adjudication authority.

3. Quasi-Judicial Authority

Finally, it is worth noting briefly that while these transfers may appear more defensible due to the fact that they impact adjudicative functions, they are nonetheless ultimately shaped by legislative authority. In the early part of the twentieth century, agencies began to adopt roles typically reserved for the judiciary,²¹⁵ arguably with the blessing of judges²¹⁶ and to the benefit of certain

function generally would remain” in the Commission qualified the transfer of functions from the Commission to the Army as authorized under the Economy Act).

213. Marisam, *supra* note 174, at 887.

214. *Id.* at 12-72.

215. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923 (1988); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 602 (2007); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 779 (1986). The Supreme Court’s decision in *Crowell v. Benson* spurred this trend. *Crowell v. Benson*, 285 U.S. 22, 53 (1932) (suggesting that Congress could delegate adjudicative decision making to agencies provided that Article III judges were given review of the proceedings); see also Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 594 (1985); Merrill, *supra* note 183, at 980 (“*Crowell* is said to be the ‘first case that broadly approved transfers of trial jurisdiction from courts to agencies,’ making it the ‘fountainhead’ for later decisions legitimating the role of the modern administrative agencies, thereby ‘pav[ing] the way’ for administrative agencies to act as adjudicators of a wide array of statutory claims.”).

216. “For example, the Court developed through common-law adjudication an ‘appellate review’ model of administrative agency oversight as a means to avoid being called upon to decide ‘matters that were not properly judicial but were rather ‘administrative’ in nature.” Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 68 (2015); see also Merrill, *supra* note 183 at 944, 990.

adjudications.²¹⁷ Over time, adjudication by the executive branch has increased.²¹⁸ Further, as agencies' judicial functions have expanded, so have the administrative procedures through which agencies make legal decisions. This growth in informal agency decision making has occurred in response to limited agency resources; rapid increases in the number, form, and subject matter of agency adjudications;²¹⁹ and because of political and other complexities.²²⁰

Further, rather than seeking to reclaim legal decision-making power from agencies, the "judiciary has accommodated, if not encouraged, this procedural evolution by according agencies broad discretion over the structure of their decision-making procedures and declining to impose significant constitutional or statutory constraints on that choice."²²¹ The result is that courts have allowed, over time, greater agency autonomy to engage in adjudication, and fewer procedural constraints on the adjudicatory process itself.

However, while the executive branch's power to perform "judicial" functions is fairly expansive,²²² neither an agency's authority to coordinate within a decision-making process nor its potential ability to transfer its full jurisdiction to adjudicate to another agency flows from its quasi-judicial power. As an initial matter, since an agency's option to adjudicate in any given substantive area is determined in the first instance by statute, it is only with adequate legislative delegation that agencies may exercise the substantial quasi-judicial powers that Article III courts have afforded them. More specifically, as noted earlier, the transfer of adjudicative authority involves an agency engaging in the self-determination of administrative jurisdiction. Thus, even if Article III courts choose to be permissive of this activity,²²³ it is nonetheless at best circumscribed by the limits of legislative delegation of judicial authority to agencies, and at worst unconstitutional.²²⁴

217. See Levy & Shapiro, *supra* note 16.

218. See *id.* ("[A]dministrative agencies have assumed an increasingly important role in the legal regulation of economic and social activity, supplanting many of the functions previously performed by other governmental institutions, particularly the courts.").

219. *Id.* at 499; see also *id.* at 475 (discussing the types of intra-agency "activities that overlap with the domain of judicial trials" and noting that if "not for administrative agencies, a significant component of all three types of these activities would be handled through judicial trials").

220. Even intra-agency adjudication processes are complicated by agencies' "size and scope, their strong institutional cultures, their attachment to past practice, the complexity of the issues they decide, the distribution of information within them, the interests of their permanent employees in avoiding political influence, and the existence of long-term relationships between employees and outside parties." Barron & Kagan, *supra* note 134, at 249. These matters are intensified as the personnel, politics, and interests of multiple agencies are added to the mix.

221. Levy & Shapiro, *supra* note 16, at 473. For instance, courts have accommodated this shift by developing "a flexible approach to what process is due that permits relatively informal procedures in many cases" and by confirming that "ambiguous statutes will seldom trigger the APA's formal adjudication provisions." *Id.* at 499.

222. See *id.*; Merrill, *supra* note 171 at 247. But see *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

223. See *supra* note 183 and accompanying text.

224. See *supra* notes 184-189 and accompanying text.

B. Legitimacy in Interagency Coordination Authority

Until now, this Section has focused on the uncertain foundations for interagency transfers of adjudication authority that agencies have relied on thus far in the formation of these arrangements. This subsection suggests, however, that at least one set of agencies relied on sound authority to further this type of transfer: DHS and DOL, in the first example explored in this Article.²²⁵ As discussed earlier, these agencies based their transfer of authority to adjudicate H-2B season nonagricultural worker visas from DHS to DOL on legislative authority granted to DHS to interact with another agency of its choosing in order to adjudicate these petitions.²²⁶ While this regulatory agreement draws from a preexisting case-by-case consultation between DHS and DOL, this subsection proposes that interagency transfers of adjudication authority more broadly be considered a legitimate interpretation of authority to coordinate or consult under certain circumstances that will be outlined in the rest of this Part and in the next.

1. Flexibility in Authority to Coordinate

Agencies' opportunities to interact of their own volition have grown as Congress has continued to delegate to specific agencies the flexible authority to coordinate with others. Agencies participate in coordinated rulemaking on the basis of imprecise statutory authority, a practice that relieves Congress from having to put forth effort²²⁷ or overcome political obstacles in order to provide more specific instruction to agencies. Congress may also anticipate or intend flexibility in collaborative adjudication processes, to the extent they resemble coordinated rulemaking by encouraging agencies to jointly contribute resources to reach a common outcome.²²⁸ And indeed, agency roles in those coordinated interagency adjudication processes that most closely resemble joint rulemaking

225. See *supra* notes 4-6 and accompanying text.

226. See *supra* notes 38-46 and accompanying text.

227. See Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 567 (2009) ("When Congress enlists the aid of agencies to set regulatory policy, it might do so because it lacks the requisite time and expertise to formulate the details of such policy."); Gersen, *supra* note 12, at 211 ("Congress could produce policy internally, but given limitations of time, resources, and the potentially lower costs of bureaucratic production, delegation to agencies will often prove a more desirable alternative."); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 722-23 (1985) (explaining that popular explanations for legislative delegation include complexity of issues and avoidance of costs embedded in regulation itself).

228. See *id.* at 846; This work dovetails with the set of political theory that views redundancy as both useful to constraining agency shirking and beneficial to outcomes on its own terms. See, e.g., JONATHAN B. BENDOR, *PARALLEL SYSTEMS* 209-45 (1985); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Katyal, *supra* note 173, at 2314-27; Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969); O'Connell, *supra* note 12; Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1463 (2011); Ting, *supra* note 12; James Q. Wilson, *BUREAUCRACY* 274 (1989).

are almost always flexible.²²⁹ Congress may even compel agencies to interact on the basis of vague authority.²³⁰ For instance, DHS was not only authorized to consult with other agencies in regards to its adjudication of H-2B visas, but also charged with doing so, with any agency of DHS's choosing.²³¹ DHS selected DOL because of the obvious expertise the DOL has concerning seasonal worker visas.²³²

Under the somewhat rare circumstances²³³ in which courts have questioned whether interagency agreements to coordinate in adjudication are permissible constructions of statute, they have rejected the idea that these policies are implicitly banned by Congress. For instance, while evaluating the constitutionality of interagency coordination in furtherance of the adjudication of claims for Clean Water Act permits, the D.C. Circuit debated the general question of whether "inter-agency consultation and coordination" is an impermissible construction of statutory intent in any circumstance.²³⁴ Here, the appellate court reversed the district court's judgment with impassioned language in favor of interagency coordination. While this and other D.C. Circuit cases also suggest that whether interagency coordination in adjudication is a reasonable interpretation of statute in any instance is not yet settled doctrine,²³⁵ this avenue for agency coordination has certainly not been foreclosed.

229. See Shah, *supra* note 2, at 890-91 (Appendix A); see, e.g., *supra* note 180.

230. As Jennifer Selin has suggested in correspondence:

In my work on the *Sourcebook* and in developing my measure of agency independence[, I found] 45 of the 321 agencies in my data are *required* to get outside approval from another agency or political actor before taking specific actions. This suggests that Congress can and does differentiate between the flexible language of "coordinate" and "consult" and the mandatory language of "with the approval of" or "shall jointly," and ultimately serves to support your argument that Congress may have expectations that agencies interact on the basis of coordinating authority in order to improve the administrative process.

Email from Jennifer L. Selin, Professor, Univ. of Illinois, to the Author (June 13, 2016, 11:19 EDT) (on file with author); see also DAVID E. LEWIS & JENNIFER L. SELIN, *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES*, WASHINGTON, DC: ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (2012).

231. See *supra* note 41 and accompanying text; see also G.H. Daniels III & Associates, Inc., 626 Fed. Appx. 205, 209-10 ("Section 1184(c)(1) of the INA says DHS shall determine whether to allow for the admission of H-2B workers 'after consultation with appropriate agencies of the Government.'").

232. See *id.* at 210 ("DHS must determine the 'if' and 'when' of the statute, something within the expertise of DOL. . . . DHS, quite sensibly, relies on that expertise."); see also *supra* note 42 and accompanying text.

233. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001) ("The Supreme Court has applied the doctrine only when Congress has delegated power directly to the President—never when Congress has delegated power to agency officials.")

234. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 246-49 (D.C. Cir. 2014).

235. See *id.*; see, e.g., *Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep't of the Treasury*, 638 F.3d 794, 803 (D.C. Cir. 2011).

However, the D.C. Circuit has taken the view that “overlapping” or shared statutory authority²³⁶ may not be adequately interpreted by any one agency.²³⁷ For instance, in the rulemaking context, courts have been skeptical of deferring to any one agency’s exercise of shared authority,²³⁸ and instead have sought to establish that Congress, in fact, delegated the authority primarily to one agency (and, perhaps, did not intend the apparent overlap).²³⁹ Also, when the Supreme Court has addressed conflicting agency interpretations of the same statute in joint rulemaking, its analysis has focused on determining which agency Congress intended to empower.²⁴⁰ Further, in a case concerning a collaborative form of coordinated interagency adjudication under the McKinney-Vento Homeless Assistance Act, in which HHS was empowered to evaluate applications under the Act at the same time as the General Services Administration, the court determined, bluntly, that if “multiple agencies are charged with administering a statute, a single agency’s interpretation is generally not entitled to *Chevron* deference.”²⁴¹

Because of a lack of overlapping authority in interagency transfers of adjudication authority, the more pertinent question is whether Congress intended to allow agencies to transfer their singular authority to other agencies under any circumstances, and if so, how best to establish this intent.²⁴² Thus far, two courts of appeals, albeit in just one decision each, have suggested that

236. See *supra* note 14 and accompanying text.

237. Sharkey, *supra* note 13, at 355.

238. Arguably, “the *Chevron* framework implicitly presumes that only one agency—if any at all—should be accorded deference in statutory interpretation.” William Weaver, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275, 292 (2014). According to the Court, granting deference in situations where multiple agencies “share[] responsibility for the administration of the statute . . . would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all.” *Rapaport v. Dep’t of Treasury*, 59 F.3d 212, 216-17 (D.C. Cir. 1995). Catherine Sharkey argues, further, that this stance has been referred to as the “traditional view,” and has been “taken to heart by the lower federal courts.” Sharkey, *supra* note 13, at 342-43.

239. Catherine Sharkey, *In the Wake of Chevron’s Retreat*, at 20 (unpublished manuscript) (on file with author) (“*King* might have provided the Chief Justice an opportunity to solidify [a holding that] the Act jointly authorized IRS and HHS to administer various sections of the statutes, sometimes in tandem. Thus, no one of them should be granted *Chevron* deference. But the Chief Justice did not seize this chance and instead simply concluded that the IRS . . . deserved no deference.”).

240. See *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144 (1991) (addressing two conflicting agency interpretations of a provision in OSHA, despite the fact that both were explicitly delegated authority under statute); *Gonzalez v. Oregon*, 546 U.S. 243 (2006) (suggesting that a *Chevron* analysis requires determination of the administrative actor in which Congress sought to vest interpretive power).

241. *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 122 (D.D.C. 2010); see also *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988); Sharkey, *supra* note 13, at 354.

242. Alternatively, these transfers might be constrained on the basis of a “nondelegation canon” limiting agency power. See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) (“Reports of the death of the nondelegation doctrine have been greatly exaggerated. Rather than having been abandoned, the doctrine has merely been renamed and relocated. Its current home consists of a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own.”).

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legislatively delegated authority to coordinate does not give agencies the power to transfer their statutorily defined decision-making jurisdiction. Decades ago, while examining the relationship between the EEOC and OFCCP, the Eighth Circuit maintained that the EEOC has statutory authority to “coordinate” with the OFCCP and other agencies,²⁴³ but determined, nonetheless that the “primary responsibility for enforcing the requirements of Title VII rests with the EEOC.”²⁴⁴ In addition, as noted earlier, the Tenth Circuit found DHS’s transfer of the authority to adjudicate H-2B worker visas to be an impermissible subdelegation and not a reasonable interpretation of statutory authority to consult with another agency.²⁴⁵

2. Interagency Transfers as Coordination

Despite the aforementioned decisions of the Eighth and Tenth Circuits, agencies’ transfers of adjudicative power should be justified as part and parcel of legislatively delegated authority to coordinate, consult, or otherwise interact. Broadly speaking, interagency transfers of adjudication authority should be understood as based legitimately in authority to coordinate to the extent they further the ideals of good governance that drive Congress to authorize agencies to interact with one another, especially if there is normative value to preserving and encouraging their growth.

Arguably, interagency transfers of adjudication authority could lead to better administrative decision making if stakeholders focus on policing agency action rather than on the substance of the statutory delegation itself.²⁴⁶ A presumption that authority to coordinate permits interagency transfers of adjudication authority would encourage this approach. And while this presumption does not cast aside nondelegation principles altogether in favor of agency self-governing mechanisms,²⁴⁷ it does rely on an understanding of

243. *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 904 (8th Cir. 1979); *see also supra* note 76.

244. *Id.* at 905.

245. *See supra* notes 4-6 and accompanying text.

246. *See Bressman, supra* note 100, at 1402 (championing “the emergence of a new delegation doctrine” that focuses on “how (or how well) the law is been made” rather than on “who ought to make the law” because this approach “reinforces a certain conception of democracy [and] ensures that agencies exercise their delegated authority in a manner that promotes the rule of law, accountability, public responsiveness, and individual liberty. Furthermore, it advances these values without having either to prohibit delegation or to approve delegation wholesale”); Linda D. Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 857 (2009) (suggesting that if the U.S. Constitution had included an explicit separation of powers clause, “the rise of the modern administrative agency would have been impossible,” because of the fact that agencies take on apparently legislative and judicial functions); Metzger, *supra* note 107, at 1484 (championing the idea that standards that prevent abuse, encourage transparency, and improve accountability arguably represent an effort to adapt nondelegation doctrine to the realities of the modern administrative state in the public-private delegation context).

247. One example would be the Due Process Clause, which many argue is more active and useful than the nondelegation doctrine. *See Sotirios A. Barber, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* (1975); Bressman, *supra* note 100, at 1442; Rebecca L.

traditional principles of structural constitutionalism that incorporates an appreciation of how agency-led changes to administrative frameworks, including burden shifting, can positively impact administrative process.

At their core, interagency transfers of adjudication authority are similar to more typical forms of coordination anticipated by this type of authority. As Part I illustrates, such arrangements often draw on preexisting, synergistic interactions between agencies seeking to consolidate their work, improve their relationships, or perhaps even to work together in order to optimize the impact of limited funding, access to resources or national outlets, or expertise.

Thus, although these agreements involve giving away decision-making jurisdiction, they may nonetheless uphold Congress's intention that agencies interact in order to carry out their mandates better if agencies are able to use these arrangements to maximize the functionality of adjudicative processes while also maintaining accountability and keeping rule of law concerns at bay. Put another way, when these agency burden-shifting agreements improve the implementation of administrative adjudication, they fulfill Congress's core expectation that agencies interact on the basis of coordinating authority in order to improve the relevant administrative process²⁴⁸ *even if* the interaction diverges from the paradigm of agencies coordinating by collaborating or competing for power.

Finally, at least a few current regimes could be anchored in the authority to coordinate. As explained earlier, DHS and DOL based their regulation concretizing interagency transfers of adjudication authority on legislation enabling interagency coordination. Other forms of coordination authority legitimize agencies making these transfers on the basis of more informal agreements, and with a variety of agencies. For instance, per the Civil Rights Act, "[t]he [EEOC] shall have power to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals."²⁴⁹ Further, at least one court has suggested that an agreement under this language could be created simply by a Memorandum of Understanding—in other words, that the EEOC may shape its coordination

Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553 (1991) (linking the nondelegation doctrine to due process); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 121 (2011) (arguing in general that "congressional delegation of lawmaking powers can be reconciled with the Constitution's republican design but only if courts set aside the conventional wisdom that Articles I and II alone constrain congressional delegation" under the nondelegation doctrine); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479 (1989); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 649, 694 (1986) (arguing that "due process is most satisfactory" of the available mechanisms for oversight of public/private delegation "because due process traditionally includes a concern about the underlying problem with private delegation: the self-interested decisionmaker"); Volokh, *supra* note 121, at 940, 955 (suggesting that the "non-delegation doctrine seems to have much less bite than the Due Process Clause in potentially controlling private delegations of regulatory power").

248. See *supra* note 230.

249. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253-266 (codified as amended at 42 U.S.C. § 2000e-3(g)(1) (2012)).

with other agencies informally.²⁵⁰ These conceptions of coordinating authority, although piecemeal, nonetheless lend credence to the current practices associated with agencies' creation of transfer arrangements.

IV. Fostering Beneficial Arrangements

This Article argues in favor of allowing agencies to create innovative burden-shifting agreements. However, it also acknowledges that even potentially beneficial endogenous changes to agency decision-making structures may run counter to overarching norms of administrative law and even modernized principles of structural constitutionalism if not properly checked. Unlike joint rulemaking²⁵¹ and other types of coordinated interagency adjudication,²⁵² however, interagency transfers of adjudication authority have few interagency, and no consistent interbranch or public, checking mechanisms.

This Part presents a proposal for structured judicial review of these transfers, on a case-by-case basis, to encourage the development of interagency transfers of adjudicative authority that genuinely uphold the ideals of good governance that motivate congressional delegation to agencies of the power to interact with one another (coordinate, consult, etc.). The emphasis on congressional intent in this context serves as a useful, if imperfect, proxy for the substance of law, the public's expectations of how law should be enforced, and the contours of legislative authority, all of which are crucial to any consideration of whether an agency is in danger of appropriating legislative power.

First, this Part considers the suitability of each branch to evaluate these arrangements, and settles on the judicial branch as the most practical option for ensuring that agencies are both engaging in high quality decision making and properly checked for constitutional purposes, due to its traditional role as overseer of administrative adjudication and arbiter of separation of powers concerns. Then, this Part draws from recent insights suggesting more proactive court review of agency activity in order to outline a framework for consistent judicial oversight. These recommendations are grounded in the understanding that some of the major benefits of interagency transfers of adjudication authority, such as the potential emergence of a responsible agency and the intensification of agency expertise, align with principles of judicial review that courts already use to evaluate agency activity. These include both a theory of judicial deference and hard look review, the latter of which is particularly

250. See *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 903-04 (8th Cir. 1979).

251. See Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 210 (2013) (noting that in joint rulemaking, "interagency comments, elevation procedures, and vetoes are all tools that agencies have deployed effectively to minimize negative consequences from other agencies' actions").

252. See Shah, *supra* note 2, at 814-20.

suiting to courts' examination of administrative decision-making processes. This is not to say that oversight from the other branches of government is not potentially complementary. In particular, executive oversight that improves the quality of coordination,²⁵³ thus making it more likely to pass judicial muster, may be worth implementing as well.²⁵⁴

A. Interbranch Checking Mechanisms

Congress, the executive branch itself, or courts could help determine whether interagency transfers of adjudication authority are beneficial and legitimate. After exploring each of these options, this subsection settles on the judicial branch as the most suitable overseer of these novel interagency agreements for various reasons, including the judiciary's relative flexibility and lack of bias. Overall, the framework proffered in this Part suggests that courts evaluate the quality of these wholesale transfers in order (in larger part, if not only) to determine whether they are sufficiently rooted in statutory authority to coordinate, and that Congress and the executive branch may offer some partial oversight and management that support courts' efforts.

1. Congress

Congress could control interagency transfers of adjudication authority *ex ante*.²⁵⁵ For instance, theoretically, these transfers could be constrained up front by more specific legislative language. The difficulty with this solution is that Congress may not become aware that an agency transfer of adjudicative power has occurred,²⁵⁶ given the difficulty of locating these agreements.²⁵⁷ Legislators may also choose to oversee agency agreements *ex post* (for instance, by holding hearings, asking the GAO to investigate, and using appropriations riders to curtail certain agency actions²⁵⁸). Still, even if legislators are made aware of this activity,²⁵⁹ they may not be able—or wish—to engage in agency-level management.²⁶⁰ For instance, Congress may prefer to leave the specified application of legislation up to the discretion of agencies²⁶¹ and may even

253. Shah, *supra* note 2, at 850-81 (arguing for oversight of only the quality, not the substance, of interagency coordination in adjudication).

254. See Kagan, *supra* note 233, at 2372-85 (suggesting that courts use deference doctrine and hard look review to privilege those agency activities benefiting from upper-level executive oversight).

255. See *supra* note 113 and accompanying text.

256. There is little legislative history to indicate that Congress knows much about it.

257. See discussion, *supra*, p. 11.

258. I would like to thank Anne Joseph O'Connell for this insight.

259. See *supra* note 113.

260. See *supra* note 196, 230 and accompanying text.

261. "Congress is not free from particularistic legislation . . . neither does it devote its energies solely to narrow, individually tailored policy at the expense of larger issues." Epstein & O'Halloran, *supra* note 114. Mark Tushnet has suggested, more broadly, that a "large-scale

intend to allow agencies to act on their own knowledge, notwithstanding that how much power and freedom Congress may indeed delegate to agencies is up for debate.²⁶² Beyond this, the legislature's ability to effectively check these agreements is limited, even if it were so inclined. For one, as the previous Part suggests, agencies currently draw their authority to make these arrangements from a variety of fragmented legislative sources, and there is no consistency in Congress's approach to drafting legislation such that it may serve as a tool to help agencies determine which exercises of discretion are permissible, let alone constrain those that are not. This problem could feasibly be avoided if agencies were to adopt the practice of basing these agreements in authority to

administrative state is possible even without delegation, as long as the legislature is able to enact laws containing sufficiently detailed guidelines for bureaucracies." Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 109 (1999). In addition, as Metzger notes, "Congress will often delegate quite broad authority to administrative agencies to set policy, whether because those are the only terms on which legislative agreement could be reached, uncertainty and lack of information preclude more limited delegations and create a need for agency expertise, or members of Congress seek to gain political credit and minimize political blame." Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1323 (2012).

262. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2076-78 (1990) (arguing that "Chevron applies only in cases of congressional delegation of law-making authority" and that "an important separation of powers function [is served] by requiring legislative rather than merely administrative deliberation . . ."). Arguably, if the statute does not have an "intelligible principle" or clarity of intent, it may constitute an impermissible delegation of open-ended power. See David Horton, *Arbitration As Delegation*, 86 N.Y.U. L. REV. 437, 470 (2011) (noting that "when Congress passes an open-ended statute that gives agencies the freedom to fill the gaps . . . the Court will strike down [this] public delegation if Congress has failed to articulate an 'intelligible principle' to limit the agency's discretion"). On the one hand, scholars have suggested that the import of the nondelegation doctrine has waned. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) ("A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001) ("It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (stating that the nondelegation doctrine "has had one good year, and 211 bad ones (and counting)"); Fallon, *supra* note 215, at 984 ("[T]he so-called 'nondelegation doctrine' [purports] to forbid substantially standardless delegations of lawmaking power to administrative agencies[;] [however][,] leading commentators regard the nondelegation doctrine as defunct."); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003) ("A statutory grant of authority to the executive branch or other agents can never amount to a delegation of legislative power. Agents acting within the terms of such a statutory grant are exercising executive power, not legislative power. The standard nondelegation doctrine, which holds that statutory grants of authority 'amount to' or 'effect' a delegation of legislative power if they are too broad or confer excessive discretion, is no more than a vague and ultimately uncashable metaphor."). Still, it has enjoyed some recent attention from scholars like Larry Alexander, Saikrishna Prakash, and Cynthia Farina, who focus on agency power (notwithstanding that the nexus of the nondelegation doctrine and agency coordination remains underexplored by the literature). See generally, e.g., Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (suggesting that many agency delegations are problematic because they may run afoul of the spirit of the nondelegation doctrine); see also Fallon, *supra* note 215, at 984 ("Although leading commentators regard the nondelegation doctrine as defunct, standardless delegations can lead to varieties of arbitrariness in the development and enforcement of law that the judicial branch should, under the separation of powers, be able to check."); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARRV. J.L. & PUB. POL'Y 87 (2010). Note, however, that the Supreme Court's views on the impact of the nondelegation doctrine on agency activity are sparse.

coordinate, but only if Congress could structure this authority to establish nuanced control of agencies' transfer agreements.

As general matter, a statutory provision explicitly banning agencies from giving away their decision-making power to other agencies—whether included in language authorizing coordination or in an amendment to the Administrative Procedure Act (APA) or the Economy Act—may be too blunt an instrument, functionally, in that it would preclude agencies from engaging in even the most high-quality and beneficial of transfers. Further, a heavy-handed approach might also encourage legislative appropriation of executive power.²⁶³ Another possibility is a statute requiring agencies to submit proposals for such transfers to Congress and forcing agencies to wait for approval to implement these transfers. However, perhaps even more so than requiring agencies to concretize their agreement via the regulatory process (as opposed to simple interagency agreement),²⁶⁴ improvements in accountability and the benefits of specified legal authority may be offset by reductions in agencies' ability to respond nimbly to the needs they seek to solve via the transfer. Alternatively, allowing the transfers to go into effect unless Congress passes a joint resolution of disapproval or takes similar action²⁶⁵ may mean that legislative oversight is stymied in practice by congressional inaction²⁶⁶ or other hiccups in the implementation of the reviewing legislation.

263. An analogous example is a super-statute like the REINS Act, which would effectively strip executive agencies of their rulemaking authority, requiring that they submit rule proposals to Congress for approval or rejection. Supporters of the REINS Act argue that it would restore legislative power to Congress and therefore implement the separation of powers as constitutionally intended. See Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 135 (2013) (arguing that the REINS Act "would implement the constitutional ideal that the legislature makes the laws" and "would merely reclaim, for Congress, powers that Congress was not required to delegate"). Those opposed to the REINS Act have suggested that it may be for violating the separation of powers. See Sally Katzen, *Why the REINS Act is Unwise If Not Also Unconstitutional*, REG BLOG (May 3, 2011), <http://www.regblog.org/2011/05/03/why-the-reins-act-is-unwise-if-not-also-unconstitutional> (suggesting that the Act may run afoul of the Court's previous separation of powers jurisprudence on two grounds—first, because it "involve[s] an attempt by Congress to increase its own powers at the expense of the executive branch", and second, because it "impermissibly interfere[s] with the President's exercise of his constitutionally appointed functions," including the obligation to faithfully execute the laws—and noting that developing and issuing regulations implementing legislation passed by Congress is part of the executive branch's duty to faithfully execute the laws).

264. See *supra* Section II.A.2.

265. I would like to thank Jennifer Nou for this suggestion. Cf. Congressional Review Act, 5 U.S.C. § 801 (1996) (prescribing special expedited procedures, which limit debate in the House and ban a Senate filibuster, for consideration of the resolution, for Congressional consideration of an agency rule); Richard S. Beth, U.S. Congressional Research Service, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act* (RL31160; Oct. 10, 2001).

266. Cf. Stuart Shapiro, *The Congressional Review Act, Rarely Used and (Almost Always) Unsuccessful*, THE HILL, Apr. 17, 2015 (discussing the Congressional Review Act (CRA), an oversight tool that Congress may use to overturn a rule issued by a federal agency that has only been implemented once); see also MAEVE P. CAREY ET AL., CONG. RESEARCH SERV., R43992, *THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS* 4 (2015) (discussing additional obstacles to the successful implementation of the CRA).

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However, language that is specific to an area of administrative law or an agency, and that explicitly holds agencies to standards for coordination, could benefit transfers of adjudication processes (and in particular, transfers of administrative adjudication that is not reviewable by courts).²⁶⁷ Given its limited bandwidth, Congress could target those statutes that authorize the administrative adjudication of public rights, which courts review less often than they do the administrative adjudication of private rights—although prioritizing the adjudication of private rights²⁶⁸ might better protect individual claimants and thus better uphold this core value of adjudication.

Finally, legislative attention to outcomes may not improve the legitimacy of the process anyway.²⁶⁹ For instance, these transfers may lead to positive outcomes that efficiency-minded overseers like the GAO are inclined to preserve despite other costs. Further, given Congress's limitations, it is far from certain that congressional oversight would encourage even functionally beneficial outcomes.²⁷⁰ Moreover, substituting congressional judgment for agencies' on-the-ground knowledge of shifts in agencies' capacity for decision making may leave processes stagnant and agency actors waiting for congressionally led updates that never come, and that in turn stifle agency innovation.

2. Executive

By some accounts, executive leadership is in the best position to implement certain agency-checking mechanisms.²⁷¹ Indeed, I advocate for executive oversight in my previous work,²⁷² which deals primarily with coordinated interagency adjudication involving collaboration and other forms of shared authority that do not necessarily implicate constitutional concerns. Even in regards to interagency transfers of adjudication authority, which

267. See *infra* note 352 and accompanying text.

268. See, e.g., Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 574 (2007); see also Fallon, *supra* note 215, at 962; Merrill, *supra* note 183, at 984; see generally Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569 (2013) (arguing that Article III courts should apply more robust review to agency adjudication where private rights are at stake).

269. See Gersen, *supra* note 21, at 713 (suggesting that a focus on outcomes does not necessarily reduce burden shifting).

270. Freeman & Spence, *supra* note 106, at 2-3 (noting that "congressional dysfunction . . . [has] reduced [the] probability that Congress will update regulatory legislation in response to significant new economic, scientific, or technological developments," and that this has important implications for the most well-known, by Congress, of administrative functions—rulemaking).

271. See, e.g., Kagan, *supra* note 233, at 2339; Nou, *supra* note 17, at 65 ("The executive branch . . . has a singular figurehead who can be held accountable and represents the national interest; it possesses a wide range of expertise; it is relatively expedient and wields a number of formal and informal sticks that can help to encourage compliance.").

272. Shah, *supra* note 2, at 850-81 (arguing for oversight of only the quality, not the substance, of interagency coordination in adjudication).

concern wholesale transfers of authority that have a greater potential for constitutional illegitimacy, the executive branch could serve to organize or even check interagency transfers of adjudication authority—for instance, via upper-level oversight of interagency coordination,²⁷³ or by deploying the Office of Legal Counsel (OLC) to engage in some manner of mediation,²⁷⁴ as it does when agencies fight over rulemaking power. On the one hand, there has been criticism of the feasibility of White House oversight of coordinated interagency adjudication as a whole.²⁷⁵ On the other hand, executive oversight, for instance, by the Office of Information and Regulatory Affairs (OIRA) or a similar office²⁷⁶ or the Administrative Conference of the United States,²⁷⁷ could raise the quality of some types of administrative decision making. In addition, such oversight could perhaps inadvertently protect against potential agency violations of constitutional precepts by minimizing interagency conflicts, improving transparency and raising the profile of claimants' rights in coordinated interagency adjudication.

One problem with this solution is that agencies may be less motivated to seek such arbitration (for instance, by OLC or OIRA) because they have already decided how best to apportion authority. Further, it is unclear how effective, or how motivated,²⁷⁸ the executive branch would be in limiting its own power vis-à-vis the other branches, for instance, by curtailing its own agencies' efforts to define their jurisdiction. This is not to say that executive oversight is unable to play a role in furthering a disciplined application of separation of powers.²⁷⁹ However, the President's role in this capacity is more commonly motivated by the desire to protect executive branch powers from allegations that they are abusive so as to preserve them, not to limit them to maintain the integrity of the other two branches.²⁸⁰

273. *Id.* at 850-81.

274. I would like to thank Josh Chafetz and Anne Joseph O'Connell for this insight.

275. POSNER, *supra* note 2, at 45-46 (critiquing Shah's proposal that there be executive oversight of coordinated interagency adjudication).

276. See Nou, *supra* note 17, at 65 (suggesting that "calls for the establishment of executive branch institutions either modeled on or expanding the role of the Office of Information and Regulatory Affairs (OIRA) to address one coordination ailment or another are increasingly common—and justly so"); see also Kagan, *supra* note 233, at 2331-46; Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1874-75 (2013).

277. See Nou, *supra* note 17, at 72-74.

278. See Verkuil, *supra* note 172, at 326; see also Fitzgerald, *supra* note 173, at 721.

279. See Strauss, *supra* note 173, at 597 ("Whatever arrangements are made, one must remain able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress. The central inquiry is to identify those relationships that are necessary, either to conform with the constitutional text [of separation of powers] or to preserve the possibility of the President's continuing effectiveness.").

280. See Richard A. Nagareda, *Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience*, 55 U. CHI. L. REV. 591, 606 (1988).

Another potential concern is that executive oversight might contribute to policy drift,²⁸¹ for instance, by allowing the President to favor those agreements that support her own political values (or otherwise lead to lock-in effects²⁸²) or the executive branch's interests.²⁸³ Finally, apportioning extensive power to the President to determine herself how to parcel out power to agencies could mark a return to previous era, but without legislative constraints of that era. Prior to *INS v. Chadha*, the President often determined the assignment of power to agencies.²⁸⁴ "The President's authority to reorganize bureaucratic structures had an important string attached, however: the legislative veto."²⁸⁵ This practice abated after the courts determined that this reassignment power allowed the executive to infringe on the legislative power to determine agencies' enforcement jurisdiction; in the process, the legislative veto was also eradicated.²⁸⁶ A return to this dynamic could be problematic in instances in which Congress intended to delegate power to a certain agency and might, as was an implicit concern around the time of *Chadha*,²⁸⁷ afford the president legislative authority (or otherwise aggrandize executive power²⁸⁸) in violation of separation of powers.

3. Judiciary

While "[e]xecutive oversight promotes coordination between different parts of the executive branch, [it is] judicial review [that] embodies a vision of separation of powers."²⁸⁹ Indeed, judicial review has long been understood as an important, relatively impartially rendered mechanism for checking executive

281. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation* 104 COLUM. L. REV. 2142 (2004) (defining policy drift as "the danger that agencies will promote policies that diverge from those intended by the enacting legislature").

282. See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 114-115 (2000).

283. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 38-41 (1971).

284. Renan, *supra* note 12, at 236 ("Since its inception in the 1930s and until *Chadha*, presidential reorganizations were a core tool of presidential administration. Presidents routinely deployed the reorganization power delegated by Congress, submitting over 100 plans between 1932 and 1984." (citations omitted)).

285. *Id.* at 236-37.

286. See *id.* at 237; see also *INS v. Chadha*, 462 U.S. 919 (1983).

287. See *id.* at 974 (White, J., dissenting).

288. There is data showing that, in order to check the Executive, "Congress does not delegate wholesale to the Executive[,] Congress takes a major role in specifying the details of policy[, and that when] Congress does delegate, it also constrains executive discretion with restrictive administrative procedures." Epstein & O'Halloran, *supra* note 114, at 985.

289. Catherine M. Sharkey, State Farm "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight, 89 N.Y.U. L. REV. 1589, 1591 n.1 (2014) (citing Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1367-69 (2013); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 440)).

power.²⁹⁰ Further, Article III courts are empowered²⁹¹ and encouraged²⁹² to hold unlawful those agency actions that violate constitutional precepts, and are flexible enough to grow to do so,²⁹³ perhaps even more than the legislative branch.²⁹⁴ Since agency decisions outside normal procedures may escape public oversight and the ambit of the APA, judicial review of administrative policies' constitutionality is "essential to a properly functioning democracy."²⁹⁵ There are certainly challenges to sorting out the mechanism for review of interagency transfers of decision-making power, in part because they lie at the intersection of coordination²⁹⁶ and administrative adjudication.²⁹⁷ However, the lack of settled doctrine on interagency coordination²⁹⁸ and recent Supreme Court²⁹⁹ and

290. See Merrill, *supra* note 183, at 943; Nagareda, *supra* note 280, at 627 (1988) ("Pursuant to separation of powers principles, courts can safeguard the prerogatives of other institutions to engage in experimentation within the bounds of law."); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1158 (2000) ("The Constitution[] grant[s] specific powers to permit the checking of one department by another [including] federal courts' power of judicial review"); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 452 (1991) (suggesting that "[i]t is our position that the centrality of the separation of powers concept to American political theory should be recognized, and that as a result the Court's enforcement of that concept needs to become considerably more vigorous than it has been in the recent past"); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 57 (1965) ("Judicial protection from official oppression, whatever its form, remains a primary need. 'To stand between the individual and arbitrary action by the Government,' said Mr. Justice Jackson, 'is the highest function of this Court.'"). But see Huq, *supra* note 18, at 1686 ("Courts are not well positioned to make judgments about the limits of intermural bargains and have historically exercised poor judgment in discerning the likely effects of intermural deals.").

291. See 5 U.S.C.A. § 706(1)(B) (2012).

292. "[T]he notion of checks and balances retains descriptive power and . . . utility within the constraint of accepting the reality of the existing government." Strauss, *supra* note 173, at 582. For instance, separation of powers theory focusing on conflicts of interest suggests that "rules against bias or interest and the right to a fair hearing [to] help control the exercise of executive power." Verkuil, *supra* note 172, at 307 (suggesting in general that "the presence of a conflict of interest argues in favor of branch separation or, at the individual public official level, of separation of functions within the particular branch").

293. "Part of the reason for [the appellate review model's] success is its adaptability." Merrill, *supra* note 183, at 945.

294. See Raso & Eskridge, *supra* note 128, at 1727 (noting also that judicial "deference regimes are more like canons of statutory construction, applied episodically but reflecting deeper judicial commitments, than like binding precedents, faithfully applied, distinguished, or overruled").

295. See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2072 (2011).

296. "Judicially developed principles and doctrines of [deference to] administrative law [are particularly] puzzling" within the context of administrative adjudication; certainly, "an inquiry into actual congressional intent" while evaluating any complicated interagency process will not be simple. Magill & Vermeule, *supra* note 97, at 1032; see also *id.* at 1061-72 (discussing the complex interaction between intra-agency relationships and fundamental deference doctrine).

297. See Barron & Kagan, *supra* note 134, at 203 (examining the complexities of the judicial evaluation of administrative adjudication).

298. See *supra* notes 233-245 and accompanying text.

299. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (suggesting that the IRS would never have been empowered to implement Obamacare: "The tax credits are among the Act's key reforms [W]hether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to

scholarly insights encouraging more proactive judicial oversight of agencies³⁰⁰ have rendered judicial review “ripe for reassessment.”³⁰¹

The rest of this Part suggests ways in which courts may draw from longstanding frameworks of judicial review to evaluate whether interagency transfers of adjudication authority adequately uphold the tenets of good governance that underlie grants of authority to agencies allowing them to coordinate, consult, or otherwise interact with another agency. There are no clear, universal legislative benchmarks for the development of this framework, as standards of good governance are imprecise and unspecified in statutes espousing coordination, like the Economy Act.³⁰² Further, without substantive context, such as legislative history pertinent to the grant of authority to coordinate, it may be difficult for courts to rank the merits of competing aims (for instance, efficiency versus attention to legal nuance, expertise-based versus political approaches, bureaucratic versus ideological aims, etc.).

The solution this subsection proposes is that courts apply norms of good governance that doctrines of judicial review have already identified as indicative of whether agencies have acted according to legislative expectations. By offering courts a standard based in current doctrine, this approach allows judicial oversight of interagency transfers of adjudication authority to draw from an already existing model, instead of forcing courts to reinvent the wheel. Over time, hopefully, agencies and courts will engage in a system of feedback and self-correction in which agencies seek to be responsive to past judicial decisions by formulating transfers that are more likely to pass courts’ muster. Further, courts’ decisions could attract the attention of Congress, which may then seek to create some broad limits on agencies that (for instance) appear to be abusing the opportunity to coordinate by repeatedly establishing low-quality transfers.

assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.” (citations omitted)); *see generally* *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (holding that the EPA interpreted the Clean Air Act unreasonably by refusing to consider the cost of regulating power plants); *see also* Merrill, *supra* note 183, at 983 (suggesting that the Supreme Court is trending towards less deference to agencies).

300. *See* Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058 (1990) (“[O]ur data . . . indicate a growing tendency of reviewing courts to defer to agencies [and] also suggest that the Supreme Court’s *Chevron* decision has reinforced that deference.”); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 984 (1992) (reconciling their data with Schuck’s and Elliott’s work to suggest that lower courts are particularly deferential).

301. Freeman & Rossi, *supra* note 1, at 1137 (“Courts do have important roles to play in ensuring that coordination stays within lawful bounds and policing its potential impact on the separation of powers.”); Nou, *supra* note 17, at 66.

302. *See, e.g., supra* notes 201-04 and accompanying text.

B. A Framework for Judicial Oversight

This subsection illustrates how the functional benefits of interagency transfers of adjudication authority, including the possible emergence of a “responsible agency” and improved agency expertise, are also characteristics of administrative process privileged by fundamental doctrines of judicial review. Thus, this subsection suggests that courts should draw on these principles to ensure that agencies engage in interagency transfers of adjudication authority that are both high quality and legitimate. This proposal also draws from the recognition that Article III courts expect bureaucrats to maximize or uphold competencies like technocratic expertise and efficiency, and norms of due process, while adjudicating administrative cases.

Overall, if there is a tension between legitimacy and efficiency values, the transfers should not be affirmed by the courts. In other words, if the transfer is legitimate but not beneficial, or beneficial but not legitimate, then it does not embody a reasonable interpretation of the statute. For purposes of evaluation, legality is the primary concern, and efficiency secondary, with the caveat that if an agency bases its interagency transfer of adjudication authority on a delegation of power to coordinate with other agencies, that the legitimacy question is more likely to be resolved summarily. An ideal outcome of established judicial review in this arena would be one in which judicial oversight serves to encourage and shape, not deteriorate, agencies’ efforts to burden-shift in functionally beneficial and constitutionally viable ways.

1. Standing

First, it is important to consider whether and why private parties might wish to contest the transfers of adjudication authority, and how courts’ attention may be drawn to review such agency processes, given that some adjudication processes rearranged by interagency transfers of adjudication authority may not be subject to established Article III appeals.³⁰³ For instance, the decisions resulting from the interagency agreement allowing DOL and the EPA to adjudicate each other’s workplace hazard claims³⁰⁴ appear to be appealable to Article III courts. However, at least a few agreements are not—in particular, the FDA’s adjudication of drug import and export claims on behalf of

303. See Berger, *supra* note 295, at 2072 (“[A]gency decisions outside normal procedures often escape extra-agency oversight and the ambit of the [Administrative Procedure Act].”); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-86 (1982) (noting that the proper separation of powers between the executive and judiciary is disturbed when a non-Article III court may “issue final judgments, which are binding and enforceable even in the absence of an appeal”).

304. See Memorandum of Understanding Between the U.S. Dep’t of Labor Occupational Safety & Health Admin. and the U.S. Envtl. Prot. Agency Office of Enf. § III(C) (Feb. 13, 1991) (creating an apparent right for claimants to appeal the co-adjudication of workplace hazard claims by DOL/EPA to Article II courts); OSHA Act of 1970, 29 USC 655(f).

Interagency Transfers of Adjudication Authority

Treasury,³⁰⁵ and the OFCCP's adjudication of Title VII claims on behalf of the EEOC.³⁰⁶ Further, litigants may have an interest in protesting the transfers either prior to adjudication of their claims or in response to the quality of that adjudication, and for a variety of reasons. The lawsuit brought against the EEOC for transfer to the OFCCP of the authority to accept Title VII claims on behalf of the EEOC represents both of these forms of litigant interests.³⁰⁷

Regarding the former, agencies follow different procedures and evidentiary rules, so litigants may gain an advantage by pursuing adjudication before a particular agency. For instances, if Congress delegates adjudication to an agency with a claimant-friendly procedure, the claimant might seek to protest the transfer of that adjudication to another agency with a different set of procedures. As for litigating the transfer after the fact of adjudication, private parties may seek to nullify the original transfer in response to problems with accountability to legislative expectations or with due process, which were discussed earlier as potential drawbacks of these transfers, or for any number of problems in the quality of the agency determination that are specific to the substance of the adjudication at issue.

Arguably, the agency is not absolved of accountability to those affected by its transfer of adjudication authority even if a litigant is unaware of the ways in which a transfer has or may negatively impact the adjudication process, does not have or has lost standing (for instance, as a seasonal worker³⁰⁸), or lacks the knowledge or resources to challenge the transfer. Thus, claimants affected by these agreements should have options for pursuing a remedy. One could be by way of affirmative litigation under the APA. For instance, in the transfer of authority from DHS to DOL involving the adjudication of H-2B (seasonal, non-agricultural) worker visas, the claimants brought suit under two theories: one, that the DOL's adjudication was unlawful under the APA and that the transfer of adjudication power from DHS to DOL was an "impermissible subdelegation."³⁰⁹ Lawsuits could also be brought by individuals on the basis of claims particular to the substance of the adjudication at issue. One example of this is the set of specific challenges brought against the original MOU between the OFCCP and EEOC, in addition to the claim that the interagency agreement went beyond the agencies' statutory authority.³¹⁰ Class action lawsuits, for

305. See Memorandum of Understanding Between the U.S. Customs Serv. and the Food & Drug Admin. (Aug. 14, 1979); Memorandum of Understanding Between the Dep't of the Treasury U.S. Customs Serv. and the Food & Drug Admin. (Mar. 20, 1974).

306. See Memorandum of Understanding Between the Equal Emp't Opportunity Comm'n and the U.S. Dep't of Labor Office of Fed. Contract Compliance Programs § 7(d) (Nov. 9, 2011).

307. See *supra* notes 79-81 and accompanying text.

308. See *G.H. Daniels III & Assocs., Inc.*, 626 Fed. Appx. 205, 215 n.11 (10th Cir. 2015) (finding seasonal workers' argument—that the DHS transfer of adjudication authority to DOL was illegitimate under the APA—to be moot due to passing of seasonal time period).

309. *Id.* at 207-09, 215.

310. "The appellants challenge the Memorandum on the grounds that (1) it is a substantive regulation that is beyond the authority of the agencies involved; (2) it impermissibly

instance in response to problems in larger adjudication schemes like immigration or Social Security, also present a possible option. These avenues, although often time- and resource-intensive, may be the best way to draw attention to problematic transfers administrative adjudication authority.

Conversely, given the burdensome nature of these types of lawsuits, a lack of such cases does not necessarily indicate that an adjudication regime (for instance, the federal system of awarding Social Security benefits³¹¹) is problem-free. There may not be the public will to rally behind those harmed, or those harmed may not realize they have recourse. As a result, courts might choose to increase their supervision of or even take back some of the judicial power that has been transferred to agencies, unless certain standards are implemented to ensure quality, consistency and the protection of rights in agency-led changes to administrative decision making.

2. Encouraging Agency Responsibility (*Mead* Doctrine)

Once a court has the opportunity to review an interagency transfer of adjudication authority, administrative deference doctrine is a traditional lens through which it could evaluate them. In particular, *United States v. Mead*³¹² is responsive to “the heavy reliance of agencies today on . . . decentralized forms of administrative action,” thus making it particularly relevant to coordinated interagency adjudication as a whole.³¹³ Further, *Mead* is useful to courts struggling with whether to defer to the results of informal agency activity,³¹⁴ because it can help determine whether Congress “implicitly delegated the relevant authority” even “absent an express delegation.”³¹⁵ In addition, *Mead*

circumvents the relevancy requirement imposed on the EEOC by Title VII of the Civil Rights Act of 1964; (3) it violates the Federal Reports Act; (4) it abridges the appellants’ privilege against disclosure of self-evaluative reports; and (5) it violates the Trade Secrets Act.” *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 902 (8th Cir. 1979).

311. I would like to thank Nicholas Parrillo for this insight.

312. *United States v. Mead Corp.*, 533 U.S. 218 (2001). The doctrine referenced, *United States v. Mead Corp.*, is “the most important administrative law decision in many years . . .” Vermeule, *supra* note 186, at 347; see also Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527 (2014); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (suggesting that a salient feature of the *Mead* decision is that agency adjudication activity outside of rulemaking and formal adjudication merits *Chevron* deference only if circumstances evidence that Congress intended to delegate authority to agencies to accomplish this action and noting that Justice Souter’s majority opinion in “*Mead* establishes a finely graded structure of deference with three categories or tiers: *Chevron* deference, *Skidmore* deference, and no deference” and noting, also, that “Justice Scalia’s dissenting view, by contrast, would have recognized only two tiers: *Chevron* deference and no deference at all.”). In the *Skidmore* decision, the Supreme Court determined that an information bulletin with standards and guides was not authorized under the Fair Labor Standards Act. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Thus, decisions regarding how workers were paid (for instance, overtime or during “periods of inactivity”) made on the basis of those guidelines did not merit *Chevron* deference. *Id.* at 138.

313. See *supra* notes 136-139.

314. Barron & Kagan, *supra* note 134, at 202.

315. Vermeule, *supra* note 186, at 352 (“[T]he central point of *Mead* is to establish a series of indicators that reviewing courts must use to discern when, absent an express delegation of

may be applied to “reward, through more deferential judicial review, interpretations offered by more responsible officials,”³¹⁶ preferably as a result of thorough procedure.³¹⁷ Also, given that *Mead* is not a very deferential standard,³¹⁸ this form of review would ensure these interagency agreements are not rendered haphazardly or overly often.

In regards to interagency transfers of adjudication authority, this principle could be applied to determine whether there is a responsible agency that has taken sufficient control of the coordinated adjudication process in question, and that can accordingly be held accountable for its quality.³¹⁹ In this way, the doctrine could be used to privilege those transfers of power that result in an agency taking meaningful responsibility for the quality of the process. Under this framework, a court could evaluate whether Congress clearly intended the initial agency to keep the adjudicative power in question (or, less likely, clearly intended for it to be transferred). After this evaluation, courts could engage with traditional principles of administrative deference by determining whether the agency is precluded from making a transfer (either based on explicit limitations in the statute or due to some specific, constitutional constraint) and, in the likely situation in which this is not the case, whether the agency’s implementation of ambiguous legislation (in particular, legislation empowering the agency to coordinate) is reasonable.

One current interagency transfer of adjudicative authority that would benefit from this evaluation is the agreement between the EEOC and OFCCP regarding transferring Title VII adjudication authority. As discussed earlier, these agencies have faced litigation for low-quality coordination and related failure to accomplish tasks related to adjudication.³²⁰ If they are able to show that transferring full decision-making authority to the OFCCP has led it to take

authority authorizing the agency action in question, Congress should nonetheless be taken to have implicitly delegated the relevant authority.”).

316. Barron & Kagan, *supra* note 134, at 201-202 (citing *Mead Corp.*, 533 U.S. at 243) (arguing that *Mead* suggests that “internal agency nondelegation doctrine should determine the rigor of judicial review of an agency’s interpretive decisions [by allowing courts to] distinguish among exercises of this authority based on the identity of the final agency decision maker and then to reward, through more deferential judicial review, interpretations offered by more responsible officials.”); see also Magill & Vermeule, *supra* note 97, at 1046 (“Under *Mead*, *Chevron* applies if and only if Congress has demonstrated an intention to delegate law-interpreting power to the agency. Whether courts will find [that the agency holds law-interpreting authority] depends, in part, upon procedural proxies . . .”).

317. See Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 251 (2016) (noting that *Mead* suggests that courts favor “agency fidelity to more formal, thorough administrative procedures”).

318. “Rather than taking ambiguity to signify delegation, *Mead* establishes that the default rule runs against delegation.” Vermeule, *supra* note 186, at 348; see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1088 (2008).

319. See Barron & Kagan, *supra* note 134; cf. Berger, *supra* note 295, at 2058-74 (arguing that that judicial deference to agency action in individual rights cases should hinge in part on how the agency does its job, and that courts should consider factors including oversight, transparency, expertise, thoroughness, and use of formalized procedures).

320. See *supra* note 82 and accompanying text.

full responsibility for the process,³²¹ these agencies could establish legitimacy under this inquiry for their most recent interagency agreement.

In addition to improving any particular administrative adjudication process before the court, this approach could help create a feedback loop that shapes agencies' transfers of power over time. Indeed, while a number of scholars contend that the factors put forth in *Mead* are vague,³²² there is evidence that agency officials are responsive to courts' determinations under *Mead*.³²³ As such, they may structure future agreements in response to signals garnered from judicial review. It is worth noting, however, that the use of *Mead* and/or any traditional *Chevron* inquiry may obscure other potential problems which could impair the court's ability to determine whether the agency merits deference.³²⁴

3. Privileging Agency Expertise (Hard Look Review)

The benefits of administrative expertise have long animated the movement of adjudication responsibilities from the judicial branch to the executive branch.³²⁵ The Court's recent decision in *King v. Burwell* suggests, in particular, that agency expertise may be key to a court's determination that the authority to coordinate legitimately empowers an agency to transfer its decision-making authority to another equally or more expert agency.³²⁶ Here, the Court notes that an agency is unlikely to hold the decision-making authority in question because it does not have the requisite expertise to make the relevant

321. See, e.g., *supra* notes 143-145.

322. Vermeule, *supra* note 186, at 349; Hickman *supra* note 312, at 528-29 ("Scholars have criticized *Mead* and its progeny as 'unfortunate,' 'flawed,' and 'incoherent'; a 'mess'; 'complicated,' 'unclear,' and 'prone to results-oriented manipulation . . .'. Separately, courts and scholars have struggled with *Mead*'s application at times, [in part because] the Court's rhetoric about *Mead* has been inconsistent, [but more importantly, because *Mead* constitutes a] meta-standard."); see generally Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

323. "[R]ecent empirical research by Lisa Bressman and Abbe Gluck suggests that the practices and intentions of congressional staffers charged with drafting legislation strongly support the intuitions driving *Mead* as well as *Chevron*—that Congress often but does not always intend to delegate primary interpretive responsibility to administering agencies rather than courts." Hickman, *supra* note 312, at 529; see also, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013).

324. See, e.g., 1185 Ave. of Ams. Assoc. v. RTC, 22 F.3d 494, 497 (2d. Cir. 1994) (expressing difficulty in establishing what would otherwise be a straightforward *Chevron* Step One question in a case where "Congress has entrusted more than one federal agency with the administration of a statute" (citations omitted)).

325. See *supra* note 217; Almendares, *supra* note 118, at 239 ("[B]road [legislative] delegations of policymaking authority are part of a strategy that allows the public to take advantage of the agency's expertise.").

326. Sharkey, *supra* note 239, at 21 (suggesting that the holding in *King* "argues in favor of the court's careful assessment of various forms of coordinated agency action—which might run the gamut from informal consultation, to cross-referencing respective policy determinations in rulemakings, to joint rulemaking—in order to determine which is (or are) the relevant agency (or agencies) with expertise" to make the relevant determination).

decision,³²⁷ despite the fact that the agency consulted closely with the agency from which it was transferred decision-making power.³²⁸ “The [King] Court’s insistence of relative expertise is reminiscent of . . . *Gonzales v. Oregon*,” in which the Court implied that required expertise combined with coordination could result in deference to an agency’s actions.³²⁹

One fundamental doctrine of judicial review, hard look review,³³⁰ both privileges expertise³³¹ and has been found to improve the quality of

327. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (“It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”).

328. See Sharkey, *supra* note 239 at 19.

329. *Id.* at 17 (quoting *Gonzales v. Oregon*: “The deference here is tempered by the Attorney General’s lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment”); see Gersen, *supra* note 12, at 225 (commenting, in reference to *Gonzalez*, “[w]hen one agency has greater expertise than another agency, it is not ludicrous to suggest that courts should defer to the more expert one”).

330. This doctrine is a standard of judicial review of agency activity articulated by the Administrative Procedure Act. See 5 U.S.C. §706(2)(A) (2012). The Supreme Court, in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Insurance Co.*, gave greater content to and strengthened this standard by stating:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. 29, 43 (1983). Justice Kagan has commented:

The current version of that doctrine subjects all agency decision making, irrespective of provenance or pedigree, to wide-ranging judicial review for errors of process: the courts take a hard look at whether the agencies themselves have taken a hard look at the range of evidence, arguments, and alternatives relevant to an issue, and have made and explained a reasoned policy choice based on these considerations.

Kagan, *supra* note 233, at 2380. See also Merrill, note 300, at 1020 n.195 (noting that the general tenets of the ‘hard look’ doctrine include that “agencies must offer detailed explanations for their decisions” and “they must allow effective participation by affected interests”); Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 181-82 (noting the same). For examples of “hard look” review in the Supreme Court, see *Bowen v. American Hosp. Ass’n*, 476 U.S. 610, 627 (1986); *Motor Vehicles Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 41-44 (1983); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105-06 (1983).); Sharkey, *supra* note 289, at 1613-15.

331. Hard look doctrine “reflects an ideal vision of the administrative sphere as driven by experts . . .” Kagan, *supra* note 233, at 2380; see also Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 924 (1980) (“The ‘hard look’ doctrine has been instrumental in raising the consciousness of judges to the view . . . that “[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . .”); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1447 (2013) [hereinafter Seidenfeld, *Role of Politics*]; see also Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 493-94 (1997); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 491 (2002); see also Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1773-74 (2012) (“[In] hard-look review . . . an agency’s expertise serves an important role by helping to legitimize its activities.”).

administrative adjudication, in part because of its emphasis on the evaluation of agency process.³³² Both of these criteria could be made relevant to the assessment of policies authorizing interagency transfers of adjudication authority. During judicial evaluation of an agency's justification for an interagency transfer of adjudication authority, agencies could be asked to show that the transfer maintains agency accountability (by elevating the recipient agency's quality of oversight of the process) and intensifies the expertise brought to bear in the transferred set of adjudications. For instance, a court might approve the informal transfer of power from Treasury to the CBP and then to the FDA in the case of pharmaceutical import and export determinations, given that the FDA may amplify the application of relevant expertise to the adjudication of these decisions. Or, a court may decide that by transferring the adjudication of Title VII cases to an office in DOL that deals primarily with federal contractors (the OFCCP),³³³ the EEOC sacrificed agency expertise for its own procedural convenience, resource conservation, or some other bureaucratic aim that does not adequately honor legislative intent. If courts approve of interagency transfers of adjudication authority in which expert agencies end up with primary responsibility for the process, this would complement judicial deference doctrine's potential to open up "policy discretion for agencies that have significant expertise in the fields they regulate."³³⁴ As a result of the application of hard look review in this context, courts may also, over time, encourage agencies' overall intensification of their "exercise of . . . authority within [their] substantive field[s]."³³⁵

There are certainly obstacles to effective hard look review of interagency transfers of decision-making power. First, judges may not have the resources,³³⁶ technical expertise,³³⁷ or time to determine whether an agency process is

332. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1812 (2013) (suggesting that hard look analysis has increased "the incentive for agencies to raise the quality of their [cost-benefit analyses]" and has thus improved the development and implementation of agency adjudication); see also Michaels, *supra* note 317, at 274-78 (advocating for judicial policing of process over more substantive, "merits"-focused review).

333. See OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP), <http://www.dol.gov/ofccp/aboutof.html> (last visited Dec. 3, 2016).

334. Gersen, *supra* note 12, at 228.

335. See *City of Arlington*, 133 S. Ct. 1863, 1874 (2013).

336. For instance, while a close examination of the record is often the way that judges familiarize themselves enough with a case to evaluate it under hard look, the only "record" that exists within interagency transfers of adjudication authority consists of the interagency agreement itself, or informal documentations of the interagency communication allowing the agencies to implement the agreement. Estreicher, *supra* note 331, at 905-7 ("[T]he reviewing court must immerse itself in the record in order to determine whether the agency's findings and conclusions enjoy the required degree of factual support and reasoned articulation. . . . [J]udicial compliance with a congressional directive of substantive review necessitates sufficient familiarization with the record to permit bona fide assessment of the saliency of a challenge.").

337. Michaels, *supra* note 317, at 277. The D.C. Circuit has also suggested that courts should be wary of engaging in technical analyses of agency adjudications. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973) ("[T]he necessity to review agency decisions, if it is to be more than a meaningless exercise, requires enough steeping in technical matters to

justifiable.³³⁸ To mitigate these problems, courts might hold a presumption against deference in these cases³³⁹ or place the burden primarily on the agency to justify its process,³⁴⁰ thus taking the onus off judges to launch full-scale investigations into whether these processes are legitimate exercises of authority. This could lead to agencies' allocating resources to justify those processes that are likely to be scrutinized under hard look³⁴¹ and that may even implicate complementary legal or constitutional questions.

And yet, it may benefit administrative adjudication if judges have to work harder to evaluate interagency transfers of adjudication authority and agencies begin to prioritize the quality of and establish proper authority for these agreements, other coordinated interagency adjudication processes, and future, unforeseen agency-led changes to administrative decision-making structures. This may be especially true given the fact that these processes have the potential to both reduce transparency and fidelity to legislative and constitutional expectations, as noted throughout this Article, and also to impact individuals and stakeholders seeking substantive and procedural competency from the executive branch.

determine whether the agency 'has exercised a reasoned discretion.'"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) (warning that "substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable").

338. See MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* 151-56 (1988); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 548 (2003) ("Many have characterized the use of the hard look doctrine as an excuse for courts to substitute their generalist judgment for the specialized judgment of agencies."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388-94 (1986); Peter L. Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538, 540 ("Those who are against hard look review believe with Steven [sic] Breyer that it calls on judges to perform a function for which they are not well-suited; or with Martin Shapiro, that review's inevitable tendency to focus on only a limited number of issues in a complex proceeding invites a distortion of agency effort and a quite imperfect view of agency process").

339. This approach would be complementary to the application of *Mead* suggested earlier in this subsection. See *supra* notes 312-318 and accompanying text.

340. See Kagan, *supra* note 233, at 2380 ("[T]he courts take a hard look at whether the agencies themselves have taken a hard look at the range of evidence, arguments, and alternatives relevant to an issue, and have made and explained a reasoned policy choice based on these considerations."); Estreicher, *supra* note 331, at 906 ("[T]he primary focus of the 'hard look' doctrine is on whether the agency took the requisite 'hard look.'"); J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 40 (2010) (noting that "'hard look' doctrine insist[s] that agencies make their reasoning process explicit"); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1876 (2012) (noting that hard-look review is "a demand by courts for technical accounts"); Stephen Breyer, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 62-63 (1993) (describing the virtues of apolitical expertise in the administrative process); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 108 (arguing that courts play an "expertise-forcing" role when agencies fail to provide a technical justification for their decisions).

341. See Strauss, *supra* note 338, at 540 (noting that another critique of hard look is that "the programmatic impact on the agency of hard look review is at best mixed and probably productive of misallocated resources—too much time spent on too few rules, excessive effort in a few instances producing under-regulation (that is, the absence of funds to make any effort) in others"); see also R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 361-73 (1983).

Theoretically, hard look review could also dissuade agencies from developing experimental coordination arrangements,³⁴² including potentially beneficial interagency transfers of adjudication authority or other changes to administrative decision-making processes, in part because substantiating the legitimacy of these unusual decision-making structures³⁴³ may be prohibitively difficult (especially when it requires efforts from multiple agencies).³⁴⁴ As a practical matter, however, hard look is perhaps unlikely to throw a significant wrench into agency innovation because “it allows an agency to gather and consider any information that is relevant to its policy decision.”³⁴⁵ Accordingly, the anticipation of hard look review may not necessarily obstruct agencies from developing new decision-making structures, but, hopefully, lead them to more comprehensively account for and coherently structure their interagency decision-making policies,³⁴⁶ so that they can better explain to courts later why the process is, in fact, reasonable.³⁴⁷ As agencies begin to structure more transparent coordination policies, courts may become better positioned to evaluate those policies by referring, in future cases, to past successes.³⁴⁸ This, in turn, may also create a feedback loop in which agencies structure future

342. See Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 980 (2011) (implying that hard look review can curb agency procedural experimentation).

343. Jason Marisam, *Duplicative Delegations*, 63 ADMIN L. REV. 181, 228 (2011) (noting that hard look review seeks to ensure that agencies act on “relevant information” in their decision making).

344. Cf. Sharkey, *supra* note 289, at 1594-95 (making a similar argument in the coordinated rulemaking context).

345. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1217-18 (2012) (referring to hard look review as a boon to modern government partly for this reason).

346. See Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 853, n.127 (2013) (noting that “‘hard look’ judicial review deters agencies from implementing policies rashly or without factual basis[,] [which] implies that the agencies are keenly aware of the impending (and near-certain) judicial review and set their policies accordingly”); see also Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, *supra* note 331, at 499-502 (1997); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992).

347. See Seidenfeld, *Role of Politics*, *supra* note 331, at 1456 (noting that “[i]t is well understood that courts vary the effort they use and the rigor they apply to hard look review, depending on such factors as the importance of the decision and the judges’ evaluation of the trustworthiness of the agency involved to provide careful and unbiased analyses”); Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 758 (2006) (describing hard look review as “an evaluation of the government’s explanation of the reasoning supporting that decision”); see also Meazell, *supra* note 331, at 1773 (noting that hard look review “gives agencies an incentive to provide full descriptions of their work during the . . . adjudicatory process”); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 778 n.86 (2008); Jodi L. Short, *supra* note 340, at 1819 (“*State Farm’s* version of hard-look review not only made reason giving central to administrative policymaking but also made clear what kinds of reasons will suffice.”).

348. Cf. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1823 (2013) (suggesting that coordination in the rulemaking context should be “legitimately transparent such that other institutions like courts and Congress can serve as effective checks”).

agreements to prioritize the impact of agency expertise in order to increase the possibility of deference.³⁴⁹

There are, also, longstanding arguments that hard look review can contribute to the formation of suboptimal administrative arrangements due its contribution to agency ossification, although these claims may be overstated.³⁵⁰ In any case, to the extent hard look review contributes to ossification or leads to increased inefficiency in agency processes, these drawbacks may impose a counterintuitively beneficial set of constraints on agencies seeking to transfer their statutory authority to other agencies. Put a different way, that in-depth judicial review may also force agencies to slow down and more critically consider (perhaps even in prospective fear of review) whether these power-transfer arrangements are of normative value may be a preferred outcome (or, at least, an unavoidable side-effect of the quality-boosting effect of hard look³⁵¹). Indeed, greater efforts from courts and agencies may be “the price we pay for delegating highly complex important public policy decisions to unelected administrative agencies,”³⁵² however beneficial this delegation is.

Conclusion

By challenging dominant assumptions about administrative dynamics, including agency coordination, interagency transfers of adjudication authority represent a future in which agencies sometimes shift their responsibilities to one another, often informally, instead of competing to grow their domain. These and other forms of interagency burden-shifting could deteriorate administrative transparency and accountability, and they also constitute an

349. Cf. Sharkey, *supra* note 13, at 329 (describing this potential in the joint rulemaking context).

350. For a discussion of some studies that suggest the ossification thesis has been overstated, see Sharkey, *supra* note 239, at 38 n.162 (citing Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 964 (2008) (concluding, on the basis of an empirical examination of administrative agency rulemaking, drawing upon the semi-annual Unified Agenda of Federal Regulatory and Deregulatory Actions published between 1983 and 2003, “that the administrative state is not greatly ossified”)); and Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421 (2012) (concluding, based on analysis of federal agency regulations promulgated by the Department of the Interior between 1950 and 1990, that the ossification hypothesis is supported by “mixed and relatively weak” evidence).

351. For an excellent argument in favor of traditional hard look as well as an intensified hard look review, see Sharkey, *supra* note 289. For citation of data that suggests hard look has led to positive results in the quality of agency rulemaking, see Sharkey, *supra* note 239 (citing William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 396 (2000) (concluding, on the basis of empirical study of rulemaking remands issued by the D.C. Circuit between 1985 and 1995, that hard look review “generally did not significantly impede agencies in the pursuit of their policy goals”)). See also E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 13 (2005); Elizabeth Fisher et al., *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681 (2015).

352. Jordan, *supra* note 351, at 444.

exercise of executive power that risks trespassing on fundamental legislative authority. Further, by allowing this agency dynamic to grow, the government and the public risk the backchannel exercise of bureaucratic discretion that may become both profoundly diffuse and difficult to constrain when it becomes necessary to do so.

And yet, interagency transfers of adjudication authority are not synonymous with harmful shirking. Rather, these endogenous changes to agency jurisdiction have the potential to benefit the quality of administrative decision making by allowing agencies to resettle power amongst themselves based on their in-the-trenches knowledge of their own resources and capacity. As noted earlier, there are practical and functional advantages of interagency transfers of adjudication authority that would be lost if agencies were completely prevented from acting on their own assessment of how to improve administrative process. Further, preventing agencies from making these agreements may result in fewer agency innovations and perhaps even harm the evolution of administrative decision making.

This Article argues that agencies should base interagency transfers of adjudication authority on their legislatively-sanctioned power to coordinate with one another. Indeed, the power to coordinate grants agencies the flexibility to improve administrative adjudication in promising new ways while ameliorating the possibility that agencies might act outside of their jurisdiction while doing so. Further, adequate oversight of this framework could ensure that agency instigated alterations to administrative decision-making structures are both functionally beneficial and constitutionally permissible. In addition, if the government and stakeholders pay attention to the novel and increasingly complex decision-making arrangements that agencies are developing amongst themselves, they may encourage not only effective interagency transfers of adjudication authority, but also other types of high-quality interagency burden-shifting arrangements.