

# When and Why Agencies Must Decide for Themselves: Judge Williams's Restrictive Approach to Administrative Subdelegation

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Judge Stephen F. Williams, for whom I had the privilege of clerking from 2003-2004, was an extraordinary person: a gentleman, a scholar, a mentor, and a judge's judge. He was also one of the most important contributors to the development of administrative law doctrine in the last two generations. His opinions were careful, nuanced, and cogent. They were also grounded in strong normative commitments without ever being doctrinaire or rigidly ideological. Whether you agreed or disagreed with Judge Williams's analysis or conclusions in any given case, reading one of his opinions would enrich your understanding of the issues and clarify your thinking. His body of judicial opinions, together with his scholarly writings, are a rich source of insights. I can think of no more fitting tribute to Judge Williams than this Special Issue's exploration of his contributions to doctrine and jurisprudence, and I am honored to have been invited to participate.

For my contribution to this Symposium, I have chosen to focus on one of the cases from the term during which I was Judge Williams's clerk, *United States Telecom Ass'n v. FCC (USTA II)*.<sup>1</sup> This was a big and complicated case, involving multiple challenges to a rule that the Federal Communications Commission (FCC) had enacted to implement the 1996 Telecommunications Act. The aspect of the case on which I would like to focus here concerns the FCC's decision to subdelegate some of its decision-making authority under the Act to state regulatory commissions. The Act neither explicitly allowed nor explicitly prohibited this subdelegation of the FCC's authority. Some prior case law indicated that such subdelegations were forbidden, but other cases appeared to endorse certain forms of subdelegation, treating them as implicitly within the scope of the agency's delegated power.<sup>2</sup> The law in this area seemed (at least to me, a wet-behind-the-ears clerk) to be a confusing mess.

Judge Williams's *USTA II* opinion invalidated the FCC's subdelegation of its authority to state commissions.<sup>3</sup> But more important than the outcome itself, his opinion did two related things. First, it imposed

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1. 359 F.3d 554 (D.C. Cir. 2004).

2. See *infra* note 36.

3. 359 F.3d at 594.

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order and coherence on what had seemed like doctrinal chaos. Second, the opinion grounded its approach in foundational values, thereby connecting its doctrinal categorization scheme to a plausible vision of good government. In this short comment, I will try to elaborate on these themes. Part I will first provide some necessary background, explaining how and why the FCC ended up deciding to subdelegate some of its authority to state commissions. Part II then turns to Judge Williams's analysis of the subdelegation issue, summarizing his nuanced articulation of the doctrine and highlighting the substantive values that animate his treatment of the problem. Finally, Part III offers some broader critical reflections on Judge Williams's analysis of the subdelegation issue in *USTA II*.

### I. The Context

To understand the subdelegation issue as it arose in *USTA II*, it is necessary to delve a bit into the history of the FCC's attempts to implement certain provisions of the 1996 Telecommunications Act—provisions that were intended to introduce more competition into the provision of local telephone service.<sup>4</sup> Such service had long been thought to be what economists refer to as a “natural monopoly,” in which robust market competition is infeasible.<sup>5</sup> Intuitively, it would not be profitable for an entrant to build an entire local phone network from scratch to compete with the incumbent's existing network. But that traditional view may be misleading: a local phone network consists of multiple elements—including the local “loops” (wires) that connect customers to switches, the switches that route calls, and the trunk lines between switches—and although *some* of these elements may not be amenable to market competition, this may not be true for all of them. Indeed, some experts argued that it would be possible to foster genuine competition in local telephone markets as long as the incumbent local exchange carriers (ILECs) were required to provide new entrants—known as competitive local exchange carriers (CLECs)—with access to those specific network elements that have natural monopoly characteristics. The CLECs could then compete with the ILECs in providing the other elements of a local telephone network, and this competition, proponents argued, would lower prices and improve service.<sup>6</sup>

Congress embraced this approach in the 1996 Telecommunications Act. As relevant here, that Act required ILECs to provide CLECs with “access to network elements on an unbundled basis . . . on rates, terms, and

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4. Telecommunications Act of 1996, Pub. L. No. 104-104, pmbll., 110 Stat. 56, 56.

5. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999).

6. See David J. Teece, *Telecommunications in Transition: Unbundling, Reintegration, and Competition*, 1 MICH. TELECOMM. & TECH. L. REV. 47, 64-68, 69-72 (1995).

conditions that are just, reasonable, and nondiscriminatory . . . .”<sup>7</sup> With respect to the rates that ILECs could charge CLECs for use of the ILEC network elements, the FCC adopted a formula that was quite favorable to the CLECs.<sup>8</sup> As for the question of which elements must be made available, the Act stated that the FCC, in making this determination, must “consider . . . whether . . . the failure to provide access to such network elements would impair the ability of the [CLEC] to provide the services that it seeks to offer.”<sup>9</sup> The key word in this passage is “impair.” Under what conditions would lack of access to an ILEC’s network element “impair” the CLEC’s ability to provide the services it wants to offer? Over the next several years, the FCC tried, and tried, and tried again to come up with an approach to determining “impairment” that would satisfy the courts.

The first time around, the FCC declared that a CLEC would be “impaired” by lack of access to a network element if that lack of access would reduce the CLEC’s service quality or raise its costs.<sup>10</sup> The Supreme Court found this to be an unreasonable interpretation of the word “impair.”<sup>11</sup> So the FCC tried again, this time stating that a CLEC would be “impaired” if lack of access to the ILEC’s element “materially diminishes” the CLEC’s ability to provide the services it seeks to offer.<sup>12</sup> On the basis of this definition, the FCC ordered ILECs to provide unbundled access to many network elements, including (as most relevant here) the switches that connect residential and small business consumers to the local networks.<sup>13</sup> In *United States Telecom Ass’n v. FCC (USTA I)*,<sup>14</sup> the D.C. Circuit, in an opinion also by Judge Williams, held that the Commission’s approach was unlawful for two principal reasons. First, with respect to the definition of “impair,” the court held that the addition of the “materially diminishes” modifier was insufficient, because it did not address the more important problem with the FCC’s interpretation of “impair”: the failure to connect the impairment determination to cost differentials that are “linked (in some degree) to natural monopoly.”<sup>15</sup> In other words, the court held that “impairment” exists only when the element in question has

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7. § 251(c)(3), 110 Stat. at 62.

8. 47 C.F.R. § 51.505 (1997). That formula, known as total element long-run incremental cost (TELRIC), was challenged by the ILECs but upheld by the Supreme Court. *Verizon Commc’ns v. FCC*, 535 U.S. 467 (2002).

9. § 251(d)(2), 110 Stat. at 63.

10. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 15695 (1996), *vacated in part*, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

11. *AT&T Corp.*, 525 U.S. at 389-92.

12. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd. 3696, 3725 (1999).

13. *Id.* at 3808.

14. 290 F.3d 415 (D.C. Cir. 2002).

15. *Id.* at 427.

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“characteristics that would make genuinely competitive provision of [the] element’s function wasteful,” not when the new entrant faces substantially higher costs for reasons that would apply to any new entrant in a market.<sup>16</sup> Second, the court faulted the FCC’s decision to issue broad unbundling requirements that would apply “in every geographic market and customer class, without regard to the state of competitive impairment in any particular market.”<sup>17</sup> After explaining why the degree of impairment with respect to the identical network element might differ across jurisdictions and market segments, the court held that the Act required “a more nuanced concept of impairment than is reflected in findings . . . detached from any specific markets or market categories.”<sup>18</sup>

And so the FCC tried yet again. In its 2003 Triennial Review Order,<sup>19</sup> the Commission adopted a definition of impairment that seemed designed to fit exactly with what the D.C. Circuit had said in *USTA I*. The FCC declared that a CLEC would be “impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.”<sup>20</sup> But what about the *USTA I* court’s holding that the FCC was obligated to take into account the possibility of variations across markets? Here, the FCC noted that if the evidence in the record showed little geographic or market variation in the degree of impairment with respect to a particular element, the FCC would issue a nationwide impairment (or non-impairment) finding with respect to that element.<sup>21</sup> Furthermore, if the record was sufficient to enable the FCC to make more granular, market-by-market impairment determinations, the FCC would do so.<sup>22</sup> But for those elements where the record neither supported a nationwide impairment determination nor contained sufficiently “granular” information to enable the FCC to make more targeted and disaggregated findings in specific markets, the FCC announced that it would delegate impairment determinations to state regulatory commissions.<sup>23</sup> In this latter category of cases, the FCC could make a provisional nationwide ruling (impairment or non-impairment) with respect to the element in question, but the state commissions would be able to make a different determination.<sup>24</sup>

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16. *Id.*

17. *Id.* at 422.

18. *Id.* at 426.

19. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd. 16,978 (2003) [hereinafter Order], *corrected by* Errata, 18 FCC Rcd. 19,020 (2003), *vacated in part*, *USTA II*, 359 F.3d 554 (D.C. Cir. 2004).

20. *Id.* at para. 84.

21. *Id.* at para. 187.

22. *Id.* at para. 188.

23. *Id.* at paras. 186-90.

24. *Id.* at paras. 190, 493-94.

The FCC employed this approach with respect to mass-market switches.<sup>25</sup> The FCC made a provisional nationwide finding that CLECs would be “impaired” within the meaning of the Act, unless they had access to ILEC switches.<sup>26</sup> This finding was based primarily on the costs of physically disconnecting loop lines from one switch and connecting them to a different switch.<sup>27</sup> The Commission, however, recognized the possibility that such costs might vary substantially across different markets, and so the FCC empowered state commissions to override its impairment determination if the particular facts and circumstances so warranted.<sup>28</sup> The Order stated that the FCC would “exercise oversight of state commissions as they make these determinations,” and that parties aggrieved by state commission determinations could seek review by the FCC.<sup>29</sup> However, the Commission did not provide much additional detail regarding the FCC’s role in overseeing and reviewing these state commission decisions.<sup>30</sup>

And so, after that long and winding path, we arrive at the crucial legal issue that Judge Williams and his D.C Circuit colleagues confronted in *USTA II*: was the FCC’s subdelegation of its decision-making authority to the state commissions lawful?<sup>31</sup> The answer, Judge Williams wrote for the court, was no.<sup>32</sup> And in explaining why, his opinion both provided the most comprehensive synthesis to date of the doctrine on subdelegation of agency authority, and also sketched, albeit subtly, the underlying normative commitments that, in his view, ought to shape judicial treatment of this and similar issues.

## II. The Decision

At first blush, it might seem straightforward that the FCC had acted unlawfully when it subdelegated its authority to make impairment determinations to state commissions. After all, the Telecommunications Act declares that “[i]n determining what network elements shall be made available . . . *the Commission* shall consider . . . whether . . . the failure to

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25. *Id.* at paras. 419, 493-94.

26. *Id.* at para. 419.

27. *Id.* at paras. 464-75.

28. *Id.* at para. 493-94. The Order did provide somewhat more guidance. First, the Order instructed state commissions to eliminate the unbundling requirement if the marketed contained at least three CLECs, or at least two third parties that offered access to their switches on a wholesale basis. Order at paras. 495-505. (The state commissions, however, had broad discretion to determine the relevant market for purposes of applying this rule.) Second, the Order instructed states to consider more generally whether competition in mass market switching might be made feasible, for example by undertaking certain measures to substantially reduce the costs associated with the disconnection and reconnection of the loops. Order at paras. 506-20.

29. *Id.* at para. 426.

30. *Id.*

31. *USTA II*, 359 F.3d 554, 564 (D.C. Cir. 2004).

32. *Id.* at 564-65.

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provide access to such network elements would impair the ability of [the CLEC] to provide the services that it seeks to offer.”<sup>33</sup> By subdelegating to the states, it would seem that the FCC had abdicated its statutory responsibility to consider whether lack of unbundled access would impair CLEC participation in the market. And this is indeed what the D.C. Circuit ultimately held.<sup>34</sup> But the issue was not quite so simple because, as the FCC pointed out,<sup>35</sup> there are a great many cases—Supreme Court and D.C. Circuit cases, as well as cases from other circuits—that seem to permit subdelegation of authority, even without express statutory authorization.<sup>36</sup>

Judge Williams’s *USTA II* opinion, however, carefully and cogently distinguished the cases that might seem to suggest that federal agencies have the presumptive implicit authority to subdelegate the responsibilities delegated to them by Congress. The opinion did so by articulating a framework that allows the sorting of cases into different categories.

For starters, the opinion distinguished cases in which an agency official, vested with authority under a federal statute, delegates to a *subordinate* within the same agency, from cases in which an agency or agency official subdelegates a decision to an *outside party*.<sup>37</sup> So, for example, a statute which says that “the Attorney General” shall make a certain determination would presumptively allow the Attorney General to delegate that decision to her deputy in the Justice Department—unless the statute clearly indicates that the Attorney General must make the decision personally. But that same statute would not allow the Attorney General to delegate that decision to someone outside of the Justice Department, unless the statute expressly authorized such a subdelegation.

Next, the *USTA II* opinion drew a subtle but important distinction between cases in which an agency subdelegates its decision-making authority to an outside party and those in which the agency incorporates the input of outside parties into its decision-making process without transferring any decision-making authority.<sup>38</sup> The opinion stressed that the former is presumptively unlawful without express statutory

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33. Telecommunications Act of 1996, Pub. L. No. 104-104, § 251(d)(2), 1100 Stat. 56, 63 (emphasis added).

34. *USTA II*, 359 F.3d at 564-65.

35. Brief for Respondents at 23-27, *USTA II*, 359 F.3d 554 (No. 00-1012), 2004 WL 121014, at \*23-27.

36. See, e.g., *Fleming v. Mohawk Wrecking & Lumber Co.*, 311 U.S. 111, 121-22 (1947); *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 795-96 (9th Cir. 1996); *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977); *United States v. Matherson*, 367 F. Supp. 779, 782-83 (E.D.N.Y. 1973), *aff’d*, 493 F.2d 1399 (2d Cir. 1974).

37. *USTA II*, 359 F.3d at 565 (“[T]he cases recognize an important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*. The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties.”).

38. *Id.* at 566-68.

authorization.<sup>39</sup> The latter arrangements, on the other hand, might superficially resemble subdelegations of the federal agency's responsibilities, but they are not—at least not as long as the agency retains and exercises its decision-making authority.<sup>40</sup> Drawing on the case law in the circuit courts, the *USTA II* opinion noted three main forms that this sort of ersatz subdelegation might take.<sup>41</sup>

First, an agency with broad permitting authority might rationally take into account the views or actions of another party, especially another jurisdiction with an interest in the matter.<sup>42</sup> Indeed, the agency might make the outside party's assent a precondition for granting a permit.<sup>43</sup> In much the same way that a local zoning board might tell a homeowner that it will only approve a variance from construction rules if the homeowner gets her neighbors' approval, a federal agency with the power, say, to grant right-of-way permits across federal land might announce a policy of granting such permits only if abutting local governments also grant permission. In these cases, the agency has not transferred its decision-making authority; instead, it has reasonably determined that one of the factors that it can and should take into account when exercising its discretionary authority is the view of other parties with a direct and legitimate interest in the decision.<sup>44</sup>

Second, an agency can rely on an outside entity for fact-finding—that is, gathering and providing to the agency information that is relevant to the agency's decision.<sup>45</sup> Such facts might in some cases be critical to, and perhaps dispositive of, the issue before the agency. Crucially, however, the ostensible fact-gathering entity may not be empowered to make discretionary determinations that are vested in the federal agency.<sup>46</sup> The federal agency must retain final decision-making authority.

Third, and along similar lines, a federal agency may rely on outside parties for advice and recommendations.<sup>47</sup> Those recommendations may play an important role in the agency's ultimate decision. However, as the *USTA II* opinion stressed, “[a]n agency may not merely ‘rubber stamp’ decisions made by others under the guise of seeking their ‘advice,’ nor will vague or inadequate assertions of final reviewing authority save an unlawful delegation . . . .”<sup>48</sup>

Thus, the *USTA II* opinion clarifies the doctrine by drawing two basic distinctions. The first is the distinction between subdelegations to

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39. *Id.* at 566.

40. *Id.*

41. *Id.*

42. *Id.* at 567.

43. *See id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 568.

48. *Id.* at 567 (citations omitted).

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subordinates and subdelegations to outside parties. The second is the distinction between true subdelegations, in which an entity other than the one specified in the statute is granted the primary authority to make the decision, and situations in which the agency considers an outside party's views, factual determinations, or advice, but the agency retains decision-making authority and responsibility. A true subdelegation to an outside party, the *USTA II* court held, is unlawful without express statutory authorization.<sup>49</sup>

But *why* should this be the case? Judge Williams's framework helps sort the hodge-podge of cases into boxes—though perhaps not quite as neatly as he suggests, a point to which I will return in a moment—and provides a helpful analytical framework for resolving future disputes. Why are these particular lines the right ones?

In what is probably the most important passage in the *USTA II* opinion, Judge Williams explains the background considerations motivating his thinking. The passage in question, which appears in the section on the distinction between subdelegating to subordinates and subdelegating to outside parties, explains and justifies this distinction as follows:

When an agency delegates authority to its subordinate, responsibility—and thus accountability—clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important check on government decision-making. Also, delegation to outside entities increases the risk that these parties will not share the agency's 'national vision and perspective,' and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.<sup>50</sup>

This passage highlights two related normative commitments that subdelegations to outside parties would tend to undermine, both of which are familiar foundational values often invoked in administrative law cases. First, subdelegation to outside parties (but not to subordinates) tends to undermine accountability, because interested parties (such as Members of Congress, firms, and advocacy groups) will not be as certain as to who is responsible for the implementation of the Telecommunications Act. Indeed, the FCC, aware of the controversies over unbundling decisions—with the CLECs lobbying hard for widespread access and the ILECs fighting equally hard for keeping unbundling requirements to an absolute minimum—may be tempted to let some other entity, like the state

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49. *Id.* at 566.

50. *Id.* at 565-66 (citations omitted) (quoting *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.C. Cir. 1999)).

commissions, become the locus for these fights. But, the *USTA II* opinion emphasizes, agencies in this situation cannot pass the buck. Congress, for better or worse, lodged the decision with the federal agency.

Second, the passage quoted above also emphasizes the importance of the federal agency's "national vision and perspective."<sup>51</sup> This may be an allusion to the idea that the federal agency is more likely to apply consistent standards across jurisdictions than are a plethora of state commissions. Consistency might initially seem like an odd value to emphasize here. After all, Judge Williams's *USTA I* opinion emphasized the possibility of substantial variation across markets.<sup>52</sup> Indeed the FCC was responding to this very concern when it decided to subdelegate to state commissions.<sup>53</sup> But what Judge Williams seems to be driving at in *USTA II* is that the FCC needs to come up with a consistent *set of criteria* for making impairment determinations, application of which may produce different results in different markets. By contrast, subdelegation to state commissions may lead to the application of *different criteria* in different markets, thus producing different results. In addition to the consistency interest, the above passage from *USTA II* suggests another factor potentially at play: the idea that the FCC, as a federal agency, is more closely attuned to the purposes and objectives of the Telecommunications Act, and therefore more likely than the state commissions to conduct the impairment analysis with a greater sensitivity to that larger federal statutory scheme.

It is worth pausing to note one central administrative law value that does *not* figure into the *USTA II* opinion's explication of its approach to the subdelegation issue: expertise. This omission is interesting and potentially revealing. Expertise is a common trope in administrative law cases and commentary, and the expertise interest would, in cases like this one, seem to favor much greater tolerance for subdelegation. Indeed, the FCC explained and defended its decision to subdelegate to state agencies primarily on the grounds that the state agencies had much greater familiarity with local market conditions than did the FCC.<sup>54</sup> State agencies would therefore be better positioned to accurately determine whether, in any given market, the CLECs would be impaired without access to a given ILEC network element. This claim may or may not be true, but, tellingly, the *USTA II* opinion doesn't bother to engage with it. Comparative expertise may matter in other areas of administrative law doctrine, but here, Judge Williams's opinion implies, the paramount consideration is that the responsible federal agency makes the decision itself. Perhaps that

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51. *Id.* at 566 (quoting *Stanton*, 54 F. Supp. 2d at 20).

52. 290 F.3d 415, 422-26 (D.C. Cir. 2002).

53. Order at paras. 186-88.

54. Order at paras. 188-90.

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might lead to somewhat less accurate decisions—as the FCC essentially asserted, and the *USTA II* opinion did not deny.<sup>55</sup> But that, the opinion suggests, is less important than ensuring that the agency not try to pass the buck, especially to entities that might not be as sensitive and responsive to the broader purposes of the underlying federal statute.

Although the passage quoted above appears in the context of the distinction between subdelegation to subordinates and subdelegation to outside parties, it also illuminates the reasoning behind the distinction between unlawful subdelegations to outside parties and the other lawful ways in which the agency might consider the input from outside parties in making its decision. As the opinion emphasizes repeatedly in distinguishing these latter cases, the key consideration is whether ultimate decision-making authority—and thus responsibility and accountability—remains with the federal agency to which Congress delegated.<sup>56</sup> Outside parties can provide input—for example, in the form of factual findings or advice—but the federal agency cannot let those parties make the decisions on behalf of the agency, and the federal agency’s review cannot become a mere rubber stamp.

This suggests that the FCC’s scheme might have been lawful if the FCC, instead of subdelegating to state commissions the authority to reverse the FCC’s impairment determination when local market conditions warranted, had instead authorized state commissions to submit a report to the FCC on the impairment question, together with a recommendation on whether to order unbundling of particular network elements. Even if the FCC ultimately accepted most or all of the state commission recommendations, the FCC would have made an explicit decision in all cases—one that parties could challenge if they objected. The problem, the *USTA II* opinion suggests, is that the FCC structured the process in such a way that in many cases, state commissions would make unbundling decisions without the FCC ever directly involved—in Judge Williams’s view, an impermissible abdication of responsibility.

### III. Reflections

As noted at the outset, Judge Williams’s *USTA II* opinion is significant for two related reasons. First, it was (and may still be) the most comprehensive effort to articulate a coherent synthesis of the doctrine, one that articulates a few basic principles and categories that can account for the existing precedents and provide guidance for future cases. Second, the opinion articulates—succinctly but clearly—a substantive rationale that can serve as the touchstone for evaluating cases in this and related areas: the idea that the federal agency to which Congress has assigned decision-

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55. *Id.*

56. *USTA II*, 359 F.3d at 565-68.

making authority must not pass the buck to other actors. The agency can consult with other entities, get their input, deputize them to gather facts, and take their views into account, but ultimately if Congress has instructed the federal agency to make a certain kind of determination or rule, the agency itself must do so—even if some other actor might conceivably have more expertise or better information.

Notwithstanding its virtues, Judge Williams’s *USTA II* opinion is vulnerable to important criticisms. For one thing, the proffered framework may not account for all the prior case law quite as neatly as the opinion claims. For example, *USTA II* discusses and attempts to distinguish *Tabor v. Joint Board for Enrollment of Actuaries*,<sup>57</sup> which upheld the decision of a federal certification board to allow an actuary to receive certification to administer certain pension plans if that individual *either* passed an exam administered by the federal board *or* obtained membership in one of the private actuarial societies by passing an exam administered by those societies. *Tabor* dismissed—briefly and in a footnote—an argument that this arrangement constituted an unlawful subdelegation of the Board’s certification responsibilities to these private societies.<sup>58</sup> The *Tabor* court’s rationale was that although members of these associations could “short-cut the regular certification process,” this was not actually a subdelegation of the board’s responsibility because the overall process was “superintended by the Board in every respect.”<sup>59</sup> The *USTA II* opinion distinguished *Tabor* as something of a hybrid of two of the court’s permissible categories: The Board was perhaps treating admission into the actuarial society as a reasonable (but not necessary) precondition for certification, or perhaps (more aptly, in my view) as essentially a form of fact-finding, where passage of the society’s exam is evidence, reasonably treated by the Board as sufficient, that the individual in question is a technically competent actuary.<sup>60</sup>

Another possible distinction, though not one stressed by the *USTA II* opinion, is that subtle differences in the statutory language may give the Board greater room to allow outside parties to participate in the certification process than the FCC has under the Telecommunications Act. The Telecommunications Act, as noted earlier, states: “*In determining what network elements shall be made available [on an unbundled basis], the Commission shall consider [a number of factors, including impairment.]*”<sup>61</sup> By contrast, the relevant statutory provision in *Tabor* provided that the Board “shall, by regulations, establish reasonable

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57. 566 F.2d 705 (D.C. Cir. 1977).

58. *Id.* at 705 n.5.

59. *Id.*

60. See *USTA II*, 359 F.3d at 567 (citing *Tabor*, 566 F.2d at 708 n.5).

61. Telecommunications Act of 1996, Pub. L. No. 104-104, § 251(d)(2), 1100 Stat. 56, 63 (emphasis added).

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standards and qualifications for performing [the relevant] actuarial services.”<sup>62</sup> Arguably the former language requires the agency itself to make a particular kind of determination, taking into account specific factors, whereas the latter statutory language gives the agency more latitude to establish qualifications requirements—which could include membership in a private society. Still, *Tabor* is at the very least a problematic case for the doctrinal scheme that Judge Williams lays out in *USTA II* insofar as it does seem to confer decision-making authority on an outside party. And, insofar as the *Tabor* court found that this scheme was “superintended by the Board in every respect,”<sup>63</sup> despite the absence of any direct Board participation in designing or directly reviewing the societies’ exams, one might argue that the FCC exercised just as much “superintendence” over the state commissions’ impairment determinations.<sup>64</sup>

Another potentially problematic case for the *USTA II* framework for identifying impermissible subdelegations is the Supreme Court’s decision in *Batterton v. Francis*,<sup>65</sup> which upheld a Department of Health, Education, and Welfare (HEW) regulation that permitted state commissions to make certain eligibility determinations for an unemployment insurance program. The relevant statutory provision stated that the meaning of “unemployment,” for purposes of this program, is to be “determined in accordance with standards prescribed by the Secretary [of HEW].” The Secretary’s regulation gave states the option to exclude from the definition of “unemployed” (and thus from eligibility for the program) fathers whose unemployment results from participation in a labor dispute or from conduct that “would result in disqualification for unemployment compensation under the State’s employment compensation law.” The Court rejected the argument that this arrangement constituted an impermissible (sub)delegation of the Secretary’s responsibility to define “unemployment.”<sup>66</sup> The *USTA II* opinion does not mention *Batterton*, probably because none of the litigants mentioned or cited it, so it’s not entirely clear whether or how Judge Williams’s doctrinal framework can account for that case. One possibility is that *Batterton* fits into the first of the three categories of ersatz subdelegation, where an agency takes another interested party’s views into account when making a determination. The *Batterton* Court uses language suggesting something

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62. 29 U.S.C. § 1242(a).

63. 566 F.2d at 705 n.5.

64. See Order at para. 425 (asserting that the FCC would establish “criteria for impairment . . . to be applied by the state commissions”); *id.* at para. 426 (declaring that the FCC “will provide guidance to and exercise oversight of state commissions as they make [impairment] determinations”).

65. 432 U.S. 416 (1977).

66. 432 U.S. at 430-32.

along these lines, noting that courts “should not lightly infer a congressional intention to preclude the Secretary from recognizing legitimate local policies in determining [program] eligibility.”<sup>67</sup>

Another possible distinction, similar to the suggestion above regarding *Tabor*, is that the statutory language is importantly different, even though the difference is subtle. The Telecommunications Act, again, seems to direct the FCC to determine whether a CLEC will be impaired without unbundled access to a certain ILEC network element. In contrast, the relevant statutory language in *Batterton* states not that the HEW Secretary shall determine the meaning of unemployment, but rather that the meaning of unemployment is to be “determined in accordance with standards prescribed by the Secretary,” and this latter phrasing arguably gives the agency more leeway to establish standards that incorporate the decisions of outside parties. The *Batterton* opinion contains language suggesting something like this distinction, noting that the statute read “unemployment (as determined in accordance with standards prescribed by the Secretary)[.]” instead of “unemployment (as defined by the Secretary)”, and that this former formulation “gives the Secretary sufficient flexibility to recognize some local options in determining [program] eligibility.”<sup>68</sup> Still, such attentiveness to subtle distinctions in statutory language is largely absent from Judge Williams’s *USTA II* opinion, and one might reasonably question whether, if such fine linguistic distinctions can make such a difference to the outcome, the categorical framework advanced in *USTA II* will provide as clear and consistent guidance as one might have supposed.

Even putting to one side the question of whether the *USTA II* framework can accommodate all the prior case law in this area, that framework does entail some challenging line-drawing problems, especially with respect to Judge Williams’s distinction between true subdelegations and his three categories of ersatz subdelegation. At what point does an agency’s reliance on an outside party fact-finding transform into an illegitimate subdelegation to the outside party? It is all well and good to say that an agency may seek an outside party’s advice or recommendations so long as the agency is not a “rubber stamp”—but how is that determination to be made? The *USTA II* framework is open to the criticism that it leaves agencies and other interested parties uncertain as to when, how, and to what extent federal agencies may involve outside parties in their decisions.

Another line of criticism, noted above, is that the *USTA II* approach does not place much weight on considerations of comparative expertise and competence—despite the fact that such considerations are often front and center in much of administrative law. Though the FCC has expertise

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67. *Id.* at 431-32.

68. *Id.* at 430.

## When and Why Agencies Must Decide for Themselves

in telecommunications matters generally, it arguably did not have much expertise in the local market conditions that the D.C. Circuit held in *USTA I* had to be taken into account when making impairment determinations. The state regulatory commissions, the FCC insisted in its order,<sup>69</sup> are better positioned to make such determinations. But the *USTA II* court seemed to give no weight to that argument when assessing the subdelegation issue. A critic might plausibly argue that forcing federal agencies to make these sorts of determinations themselves, rather than delegating them to outside entities with comparatively greater competence, puts a greater burden on federal agencies and could well reduce the overall accuracy and quality of their decisions.

Perhaps that is so, but in defense of Judge Williams's approach in *USTA II*, this price may be worth paying in order to put the brakes on what could otherwise be an excessive agency proclivity to outsource responsibilities—not only to state governments, as in *USTA II* itself, but to private parties. For Judge Williams, the core value of requiring the agencies in which Congress has vested authority to take responsibility for making the hard choices trumps whatever policy benefits might be associated with devolution of federal power to state and private actors. Such devolution can and does occur sometimes—but only when Congress specifically authorizes it.

The fact that Judge Williams's *USTA II* opinion embraced that order of priorities highlights an important and sometimes neglected aspect of Judge Williams's approach to administrative law. He has often been characterized as a libertarian-oriented, pro-free-market skeptic of government regulation. That is fair and, in the main, accurate. But his *USTA II* opinion demonstrates a separate and perhaps more fundamental commitment to the principle that good governance requires federal agencies to discharge their responsibilities themselves, rather than deputizing other actors to do their work for them.

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69. Order at paras. 188-90.