REPLACING AGENCY ADJUDICATION WITH INDEPENDENT ADMINISTRATIVE COURTS

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INTRODUCTION

Modern administrative agencies conflict with a strong separation of powers. Under a strong separation of powers, distinct entities exercise the legislative power, the executive power, and the judicial power. But modern administrative agencies typically exercise all three of these powers to a significant degree, possessing not only executive power, but also delegated legislative and judicial power.

This feature of modern agencies raises serious concerns. The separation of powers is one of the traditional means to constrain government power and deter improper government behavior. This function of the separation of powers is especially important in the area of judicial power, where independent courts are prized even in systems that appear to combine executive and legislative power. Governments that combine powers thus raise serious legitimacy concerns.

Defenders of the administrative state often argue that these legitimacy concerns must be borne because modern government could not function under a strong separation of powers. If government were small, as it was in the more classical-liberal world of the nineteenth century, then a stronger separation of powers might be feasible. But in a world of big government, it is often thought that the costs of a strong separation of powers would be too large. In particular, a strong separation of powers is thought to be inconsistent with the need for expertise and expeditious decision-making. Thus, it might seem that we currently face a choice between legitimate and efficient decision-making.

In this Article, I dispute that we must choose between agencies with combined powers and a strong separation of powers. Instead, I argue that there is an alternative way of structuring government that would allow for both a strong separation of powers and efficient decision-making. In a prior article, I described how this alternative would constrain and reform the delegation of rulemaking power to agencies;[1] here I focus on how the alternative

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[1] Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, *in* THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT 105 (M. Todd Henderson ed., 2018)

could restructure and improve the operation of administrative adjudication. I argue for the use of genuinely independent judges to adjudicate the cases that are now decided by agencies in formal adjudications. Such judges might be either Article III or Article I judges.

In the area of administrative adjudication, it is often assumed that there are only two basic choices: either employ a strong separation of powers that makes use of generalist Article III courts that follow ordinary federal court procedures, or employ a weak separation of powers in which agencies exercise executive, judicial, and legislative powers. But there is an intermediate alternative to these two extremes. A strong separation of powers does not require generalist judges or courts that follow ordinary federal court procedures. I argue that this alternative—the use of genuinely independent courts that have expertise and that use the streamlined procedures of administrative adjudications—would be superior to both extremes. Such courts would serve to promote the limited and effective government of the separation of powers while also furthering the expert and expeditious decision-making of agency adjudication.

More specifically, a system of independent administrative courts would prevent some of the most problematic features of existing agency adjudication. The system would avoid the basic unfairness and bad results of having the prosecutor be the judge in his own case. It would also reduce the opportunity for agencies to take a host of other actions that are currently allowed. For example, by reducing the discretion of agencies, the proposed system would limit their abilities to pursue extreme ideologies not shared by the public or to promote the interests of a political party, of the bureaucracy, or of an influential group. It would also increase the chances that the government makes lawful and proper decisions when implementing public programs. Finally, the system would decrease the political polarization that delegation promotes.

But while a system of independent administrative courts would constrain the excesses of the administrative state, it would not require that regulatory laws be administered by uninformed officials or through expensive and time-consuming procedures. One could employ expert judges and streamlined procedures to allow for knowledgeable and low-cost decision-making.

It is true that this intermediate alternative might not feature as much expertise or be as expeditious as present agency adjudication. Nor would it provide as strong protections as adjudication by generalist Article III judges following ordinary federal court procedures. But the intermediate alternative is, in my view, superior to either of these extremes in the current big-government world.

Since this Article discusses the separation of powers throughout, it is important to be clear about what I mean by this term. I do not refer to the separation of powers that was established by the Constitution's original

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[hereinafter Rappaport, *Classical Liberal*]. This earlier article also discussed independent administrative courts, but this Article significantly expands upon my earlier treatment.

meaning or articulated by constitutional law at a particular time. Instead, I refer to a political ideal or principle that has been prized at various times. In my view, this political ideal of the separation of powers requires that the courts make final decisions in cases as to the facts and the law without granting deference to agencies.[2] But it is not necessary that judges be generalists rather than specialists. After all, specialist judges are still separate and independent. Nor does the separation of powers require that the courts follow a particular set of protective procedures. A range of procedures, some stricter than others, will be consistent with an independent judicial power. I fully acknowledge that the separation of powers, understood as a political ideal, is likely to occasion disagreements about its meaning. But I believe my understanding of the separation of powers is both defensible and attractive.[3]

In analyzing these alternative institutions, I write from the perspective of classical liberalism. While classical liberalism can be defined in various ways, I understand it to be an approach that views individual freedom as the predominant political value.[4] But classical liberalism does not merely protect individual freedom. It also allows government regulation and government benefits when a system of ordered liberty, such as the market, does not adequately govern itself. Thus, under classical liberalism, it is important that the government be limited and that it perform its functions effectively.[5]

The Article proceeds as follows. Part I sets up the problem by describing the advantages and disadvantages of the two basic approaches to federal adjudication of regulatory laws. Under a strict separation of powers approach, which uses courts that are staffed with generalist judges and employs ordinary federal court procedures, the public would be protected against harmful actions undertaken by administrative agencies. In particular, the separation of powers would constrain federal government officials, promote the rule of law, and improve government decision-making. But this system would lack expert decisionmakers and low-cost decision procedures. By contrast, under the existing system of agency adjudication, government decisionmakers are both informed and operate under streamlined procedures. But that system raises concerns about illegitimate decision-making.

Part II describes the alternative of independent administrative courts. These courts would be filled with individuals who have expertise in one of

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[2] It also requires that judges not make naked policy determinations. While classical common-law decision-making that is fairly described as "finding the law" is consistent with a strong separation of powers, modern policy-oriented common law decisions are in some tension with it.

[3] If one did believe that a strong separation of powers required judges to be generalists and that courts follow the existing strict judicial procedures, then my proposal would have to be described as requiring not a strong separation of powers, but something less—perhaps a moderately strong separation of powers. Ultimately, nothing much turns on this semantic question. What is important is that my proposal exhibits a considerably stronger separation of powers than do existing agencies and that my proposal has desirable consequences.

[4] *See generally* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 51–52 (1960); JOSÉ GUILHERME MERQUIOR, O LIBERALISMO: ANTIGUO E MODERNO 21 (1991).

[5] *See* Rappaport, *Classical Liberal*, supra note 1, at 3.

three areas: medicine, science, or economics. The judges, who would be appointed by the President with the advice and consent of the Senate, would not hear cases from a single agency, but would preside over cases in their particular area of expertise from any agency. These courts would not follow ordinary federal court procedures, but instead would largely conform to the streamlined procedures currently used in administrative adjudication.

These administrative courts would be independent from the agencies. Appeals from these courts would be taken only to Article III courts. The administrative courts would also greatly restrict the amount of deference that is granted to agencies. Under this proposal, administrative courts would not confer any deference as to adjudicative facts or legal issues and would be a little less deferential as to policy determinations than at present. This Part also discusses how much deference the circuit courts should afford to administrative court decisions.

I. THREE ALTERNATIVE INSTITUTIONS

A common way to view our present system of administrative adjudication is as a choice between two opposing approaches to structuring adjudication as to federal regulatory laws: adjudication by generalist Article III courts that follow ordinary federal court procedures, or adjudication by administrative agencies that possess combined executive, legislative, and judicial power. Under this view, the justification for adjudication by agencies with combined powers is that a strong separation-of-powers approach to adjudication is not feasible given the current system of big government. But there is a third, intermediate approach to adjudications concerning federal regulatory laws that employs the best features of both arrangements and thus is superior to either extreme.

A. *A Comparison Between a Strong Separation of Powers and Existing Agencies*

At one end of the spectrum is an arrangement based on a strong separation of powers with the executive, legislative, and judicial powers all separate from one another.[6] Agencies would make enforcement decisions, while Article III judges would adjudicate the cases without interference. The

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[6] In this paper, I focus upon the separation between executive and judicial power. But the combining of legislative power with these powers is also an issue. In the adjudicative context, the exercise of policymaking by an agency should be deemed legislative power. Similarly, one might treat *Chevron* and *Auer* deference to the agency as the delegation of legislative power (although it can also be thought of as the delegation of judicial power). While my administrative courts proposal does address this delegation of legislative power, *see infra* Section I.B.1, my analysis focuses on the separation of judicial power and executive power.

decisions of these judges would be reviewed only by other Article III judges, not by the agency. And the judges would adjudicate without deference to the agencies as to fact or law.[7]

At the other end of the spectrum is the existing regime with its significant delegation of decision-making to administrative agencies. Not only do agencies make enforcement decisions, but they also possess significant judicial and legislative power. The agency has substantial discretion as to findings of fact, interpretations of law, and policymaking. Formal adjudications are typically held initially before an administrative law judge ("ALJ"), with the private party opposed by the agency's enforcement personnel.[8] To be sure, the ALJs enjoy certain protections. They cannot be fired except for cause as determined by the independent Merit Systems Protection Board, an independent agency.[9] And they cannot be supervised by anyone involved in enforcement or investigative matters.[10] But these protections, while important, are nonetheless of limited significance here because the agency almost always enjoys the ability to appeal an ALJ decision against the agency to itself—that is, either to the head of the agency or to higher officials within the agency.[11] Thus, the agency almost always has the final decision as to the adjudication.[12]

Moreover, even in cases when the agency does not choose to review the ALJ's decision, there are serious causes for concern about the ALJ's impartiality. First, ALJs are limited to deciding cases from within their own agencies. Thus, they are likely to exhibit the narrow focus or tunnel vision that is so often characteristic of administrative agencies. Second, ALJ decisions will normally be reviewed by higher agency officials.[13] If ALJs exhibit the normal human preference to not be reversed, they will be tempted to anticipate what the agency officials will do rather than decide the case based entirely on their own judgment. Thus, even if the agency chooses not to review an ALJ's decision, that decision may still reflect agency preferences. Finally, ALJs are

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7 In addition, neither agencies nor judges would make binding policy decisions. In an earlier paper, I propose that agency rulemaking should be subject to a congressional approval procedure, such as in the REINS Act. *See* Rappaport, *Classical Liberalism*, *supra* note 1, at 5. I argue that the most important policy decisions should be made either by Congress or by agency rulemaking that is approved by Congress. For my discussion of this issue below, see *infra* Section II.B.2.

8 *See* 5 U.S.C. § 554 (2012). Formal adjudication can also occur between two private parties. *E.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 835–38 (1986).

9 5 U.S.C. § 7521(a)–(b).

10 *Id.* § 554(d)(2).

11 *Id.* § 557(b).

12 The one possible exception to the authority of the agencies is the ability to reverse findings concerning testimony where demeanor evidence is important. Courts are especially interested in ALJ findings concerning such testimony. *See, e.g.*, Local 702, Int'l Bhd. of Elec. Workers v. NLRB, 215 F.3d 11, 15 (D.C. Cir. 2000).

13 *See supra* Section I.A.

currently chosen by the agency itself.[14] In the past, the agency had the power to select from the top three selections identified by the Office of Personnel Management.[15] At present, the agency appears to have broad discretion to select persons for the job.[16] In both cases, the agency can select from the available pool the person who it believes most shares its views.

It is true that the agency's adjudicatory decision is subject to judicial review. But judicial review of the agency's decision gives the agency significant deference. Factual findings by the agency are reviewed under the deferential substantial-evidence standard.[17] Findings of law by the agency also typically enjoy significant deference. In formal adjudications, agencies generally receive *Chevron* deference for interpretations of statutes they administer.[18] They also generally receive *Auer* deference for interpretations of their legislative regulations during formal adjudications.[19] And, if the agency does not receive *Chevron* or *Auer* deference, it often enjoys *Skidmore* deference.[20] Ignoring the differences between these types of deference, in general the agency's legal interpretations will be upheld so long as they are not unreasonable.

Finally, agencies also enjoy significant deference as to their policy decisions. When an agency's statute provides it discretion to make a decision based on policy considerations, the agency enjoys policymaking discretion. Such discretion is normally reviewed under hard look review.[21] While this review requires the agency to explain the reasoning it used to make its policy decision, the agency's explanations are reviewed under a deferential standard.[22] Overall, then, although agencies are subject to judicial review, they enjoy significant ability to make decisions as they choose.

In sum, a strong separation of powers differs substantially from the existing combined powers approach. Under the existing approach, agencies enjoy significant discretion to bring enforcement actions before the agency, to adjudicate violations of the law, and to set policy in the adjudication. This stands in sharp contrast to a strong separation-of-powers regime under which

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14 5 U.S.C. § 3105 (2012).

15 *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 804–05 (2013).

16 After the recent Supreme Court decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), holding ALJs to be Officers of the United States, the Trump Administration issued an executive order changing the appointment system to allow the agencies to select ALJs under procedures similar to those used for selecting agency attorneys. Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

17 *E.g.*, United States v. Eurodif S. A., 555 U.S. 305, 316 n.6 (2009).

18 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

19 *See* Auer v. Robbins, 519 U.S. 452, 461 (1997); *see also* Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (retaining but narrowing *Auer* deference).

20 *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

21 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43–44 (1983); Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 180 (John F. Duffy & Michael Herz eds., 2005).

22 *See* Bressman, *supra* note 21, at 178–79.

agencies would bring enforcement actions, but independent Article III judges would adjudicate (and only Congress would legislate policy).

B. *The Benefits of Strong Separation of Powers*

1. Limiting Government, the Rule of Law, and Improving Government Incentives

These two approaches—a strong separation of powers and the existing combined-powers approach—each have different benefits and drawbacks. This subsection discusses the benefits of a strong separation of powers, while Section I.B.2 discusses the benefits of the existing administrative law approach.

The benefits of the separation of powers, from a classical liberal perspective, can be divided into three main components: (1) constraining the government; (2) promoting the rule of law; and (3) improving the incentives of government officials to perform their jobs properly.

While each of these benefits is important, the key insight underlying the separation of powers is that the government cannot be trusted to have full discretion to pursue the public interest. If it could, it would make sense simply to have a single individual or entity with unlimited authority make all of the decisions as to enacting and implementing programs. But unilateral power has not turned out to be a desirable way to enact and implement programs, especially from a classical liberal perspective. Limitations, such as elections and checks and balances, are required. One of the most important limitations is the separation of powers.

The first benefit of the separation of powers is to limit government. Under the separation of powers, three separate entities, rather than one, must agree before a person is found to have violated the law. The legislature must enact a law; the executive must determine that the law has been violated and the violation should be prosecuted; and the judiciary must decide that the law has been violated. This requirement of three entities agreeing imposes a constraint on the government.

This constraint is reinforced because each of the entities is subject to different forces. The lawmakers—Congress and the President (through presentment)—are elected, with each branch serving different terms and elected from districts of differing sizes. The executive is staffed by agencies, all of which are controlled by officials subject to advice and consent, some of which are answerable to the President and some of which are not.[23] And the judiciary is staffed by judges who are selected by the President with the advice and consent of the Senate, granted life tenure, and generally insulated

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[23] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013).

from politics. Thus, the separation of powers checks a government that would otherwise have the discretion to behave in a problematic manner.

In the context of administrative adjudication, enforcement and adjudication are to a substantial extent subject to control by the same people. The agency decides whether to prosecute a person, and then the agency adjudicates whether that person violated the law. Thus, the agency is a judge in its own case. To a significant extent, one entity, rather than two entities, can decide on the matter. Thus, there is less of a check on the government than would exist if one entity brought the enforcement action and a separate entity adjudicated it.[24]

A second benefit of the separation of powers is that it promotes the rule of law. The "rule of law" refers to a situation in which the law is knowable by the public, which in turn significantly constrains the actions of the executive branch.[25] Under a strong separation of powers, the agency has substantial discretion to bring enforcement actions, but the laws that are applied in the adjudication are determined by independent courts. And those judicial determinations are based on statutory interpretation methods that provide guidance as to how the provisions will be interpreted.[26]

When the agency exercises both executive power and judicial power, it can deprive people of knowledge of the law and avoid significant constraints on its actions. For example, an agency might bring an enforcement action against an individual based on a statute or regulation while possessing significant authority in a formal adjudication to determine the meaning of the statute under *Chevron* or the meaning of the regulation under *Auer*. Moreover, agencies can adopt rulings based on policy decisions that they make in the formal adjudication.[27] In addition, the agency has substantial authority to take an action against a party that was not on notice as to the applicable rule. While there is a limit on such retroactive actions where they would work a manifest injustice, that limit is likely to apply only in exceptional cases.[28] In fact, courts have held that "[r]etroactivity is the norm in agency adjudications no less than in judicial adjudications."[29] Thus, under existing administrative adjudication, the public often cannot safely rely on the existing rules.

A third benefit of the separation of powers is that it can improve the incentives of government entities. By contrast, when powers are combined in a single entity, the incentives to act impartially and effectively may be undermined. This is especially true when combining enforcement and

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24 As discussed above, it is true that the agency is required to follow certain procedures, and its action is subject to judicial review. But these limitations, due in part to significant deference to the agency, still allow the agency substantial discretion to make decisions on its own.

25 *See* HAYEK, *supra* note 4, at 205–19; Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 14–17 (1997).

26 By contrast, under *Chevron*, the agency is generally allowed to select on policy grounds the statutory interpretation that it deems to be reasonable (subject perhaps to hard-look review).

27 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 510–12, 517–18 (2009).

28 *See, e.g.*, Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109–10 (D.C. Cir. 2001).

29 AT&T v. FCC, 454 F.3d 329, 332 (D.C. Cir. 2006).

judicial powers. First, the impartiality of the judge is undermined when the judge also controls the enforcement decision. If one has decided to prosecute an individual, then it is hard to impartially adjudicate his case. People who bring enforcement actions often have made up their minds about the case and are usually strongly motivated to win. The attitude of the judge and the prosecutor should be quite different. But if the prosecutor must act as the judge, his impartiality will often be compromised.

Additionally, combining these powers can also undermine the enforcement decision. When the enforcement decision is made by an entity separate from the adjudicator, the enforcement officials must decide whether they are likely to persuade that independent adjudicator of the facts and the law. They will bring the action only if they are likely to succeed. By contrast, if the enforcement officials know that the agency will make the decision, they are not forced to consider whether an impartial decisionmaker will agree with them. Instead, they already know that the agency is likely to do so.

This third benefit of the separation of powers is especially important. If one is concerned that the government not merely be constrained, but that it do a good job of implementing its program, the separation of powers is essential. It is not merely about restraint, but also about ensuring that the government has the right incentives.

While not traditionally offered as a benefit of the separation of powers, an additional feature of the separation of powers is particularly important in our day: the separation of powers reduces the extent of political polarization and political divisiveness. If rules and policies need to be enacted by the Congress, as they do under the strong separation of powers, then they are likely to involve significant compromises between the political parties due to the frequency of divided government. Such compromises are likely to move the law towards the preferences of the median voter and the political center.

By contrast, under a system of delegation, policies are determined largely by the President's preferences. But presidential preferences are likely to be located near the median voter of his party, a significant distance from the median voter of the country. As a result, a presidential election will involve a choice between quite different policy outcomes. When people have a great deal to gain or lose from elections, political divisions become much more strident and bitter.

These divisions would be greatly reduced without delegation. If a presidential election did not have such a significant influence on regulatory policy—if policy were enacted as part of the tricameral lawmaking process, which is often characterized by divided government—then our political differences would be less severe and rancorous.

2. Improper Motivations of Government Agencies

While the previous section noted the possibility that the agency has improper motivations, it is helpful to discuss more specifically what those

improper motivations might be. Under the combined powers model, administrative agencies have significant discretion to take action without being significantly checked by other entities. The agency thus has ample opportunity to act on its improper motivations.

The analysis of agencies, especially through public choice, reveals four potential biases that the agencies might exhibit.[30] First, the agency may seek to promote an extreme ideological view of the public interest that is not shared by the public generally. Agencies are filled with people who are devoting their lives to the cause of the agency and therefore are likely to value it more highly than do most people. In addition, the fact that agency personnel spend their time working in one specific area may lead them to view that area as more important than does the general public.

Such extreme ideological views are likely to be problematic. One problem is that such views will not be supported by the people in a democracy. While classical liberalism is not primarily about democracy, imposing an alien view on people makes it likely that they will neither respect nor accept the policies supported by that view. Another problem is that extreme ideological views have not passed through any test for determining whether they are likely to be desirable.[31]

A second problem is that the agency may seek to promote the interests of a political party. An agency will generally be controlled by officials who were appointed in part based on their loyalty to the President's political party. Thus, if the President's political party cares deeply about a particular issue, based on ideology or its electoral prospects, the agency may be motivated to promote the party's view, even if the facts, law, or policy do not really support such action. For example, the Obama Administration would have been unlikely to make an agency decision that would undermine the Affordable Care Act. Similarly, the Trump Administration would have been extremely reluctant to take an action that did not impose a travel ban.

Third, the agency may seek to promote its bureaucratic interests. The agency may interpret a law, establish a policy, or find facts to promote its own interests, such as expanding its authority under a statute or by concluding that it need not comply with a restriction.

Finally, the agency may seek to aid a powerful special interest. Such organized interests may be able to influence the administrative agency to take actions that it favors. Thus, the agency may be influenced to interpret laws, make policy, or find facts to benefit a special interest.

A strong separation of powers would limit an agency's ability to pursue these improper motivations. While the agency could make enforcement decisions, the separation of powers would prevent it from also making findings

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30 For a general discussion of public choice theory, see generally, DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

31 Such views have not passed through a test based on the market, custom, consensus, or even elections (except in a very indirect sense). Although agencies do employ experts who have more knowledge of the facts, that does not necessarily support their ideology, which may be based on values as well.

of facts, policy, or law. At present, agencies are given discretion to give content to the law and to make policy, but the tripartite lawmaking process of Congress and the President is unlikely to pass laws that promote an extreme ideology, a single political party, or bureaucratic interests. And while Congress is susceptible to special interests, it is harder for the special interests to control the content of the law because of the President's role in the tripartite lawmaking process.

It is true that shifting power from agencies to judges creates the possibility that judges would behave in an improper manner. But judges are not especially susceptible to this problem and so the shift in decision-making towards them should not increase its incidence. Since judges are insulated from politics, special interests are less able to influence them. Nor are judges as likely as agencies are to pursue an extreme ideology or the interests of a political party or the bureaucracy. Judges are generalists and are thus unlikely to share the extreme ideologies or tunnel vision of the agencies. Concerning bureaucratic interests, judges, who are in another branch, are unlikely to be motivated to protect such interests. Judges are also less prone to pursue political party interests. Judges may be members of another political party and may therefore operate as a check on an agency's pursuit of party interests. And even if the judges are members of the same political party as the President, they may have views that differ from the existing leadership of the party. Judges usually serve for long periods, and it is common to see judges of a party have an allegiance to the earlier concerns of the party rather than to its present-day enthusiasms.

C. *The Benefits of Existing Agencies*

Although a strong separation of powers produces significant benefits by improving agency incentives and limiting agency wrongdoing, it also has costs. The two principal costs of a strong separation of powers are normally thought to be lack of expertise and higher decision-making costs. The combined powers of the agencies are generally defended based on their greater expertise and their lower decision-making costs.

1. Expertise

Agencies are generally thought to be specialists in their area and therefore to have greater expertise than do generalist judges.[32] Thus, a strong separation of powers might be thought to lead to less accurate and knowledgeable decision-making.

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[32] *See* Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 739–40 (2013).

The degree to which agencies have superior expertise turns on the type of expertise at issue. We can distinguish between two types of expertise: legal and nonlegal.[33] Nonlegal expertise involves knowledge of the nonlegal subject matter of an agency, such as knowledge of the facts and science governing the area, the policies considered to be relevant, and whether different rules support those policies. Legal expertise, by contrast, involves knowledge of the law that governs the agency's subject-matter area, as well as of the law generally.

Nonlegal expertise is most obviously relevant to the agency when it engages in rulemaking. In deciding what regulations to adopt, the agency will consider both the policies that should be pursued and the best methods to pursue those policies.[34] But nonlegal expertise is also relevant to adjudication. Agencies are permitted to engage in policymaking when they formulate rules of decision in adjudications. Such policymaking will involve not merely the best policies to pursue but also legislative facts about how the world operates. This policymaking will occur when there has been a delegation of policymaking authority to the agency. It may also occur when the agency chooses an interpretation of the statute under Step Two of *Chevron*.[35] Finally, agencies will employ their nonlegal expertise when finding adjudicative facts.

The agency will have much more nonlegal expertise than generalist judges, who are not as likely to be knowledgeable of the policies or facts at issue in a specific area. By contrast, agency staff will know the facts as well as the relevant policy issues. These people will spend much more time studying and working with these matters than will generalist judges.

The relative expertise of the agency and the courts is more evenly matched when it comes to legal expertise. There are two different types of legal expertise: knowledge of statutes and regulations in a particular area and knowledge of the law in general. Agency lawyers will certainly be superior as to the first type of legal expertise, since they spend their time focused on the agency's statute and regulations. Thus, they will know more about the overall statutory and regulatory scheme, its history, and how it has been interpreted in the past.

But the agency lawyers will be inferior as to the second type of legal expertise—knowledge and skills about the law in general. This general knowledge of the law matters because general concepts in the law like intent

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33 *See* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991).

34 *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–90 (2004).

35 Bressman, *supra* note 21, at 180–81 (noting the connection between Step Two of *Chevron* and policymaking review by the courts).

or causation appear in a variety of contexts.[36] Generalist judges will be in a much better position than agency lawyers to ensure that these concepts in an agency's statute are interpreted to cohere with the law generally. Another even more important aspect of a general knowledge of the law is statutory interpretation. Generalist judges are likely better at applying statutory interpretation principles to a variety of areas than agency lawyers. Generalist federal judges are engaged in the task of interpreting a broad range of statutes, while agency lawyers work with only one, or a few, statutes.[37]

In fact, the special focus on a particular statute by agency lawyers may lead to the atrophying of their general skills as lawyers.[38] By working daily with a statute that one knows intimately (including its judicial precedents), one may be less able to understand and predict how general principles of statutory interpretation would apply in unclear cases. This effect is reinforced by the fact that an agency enjoys *Chevron* (and *Auer*) deference, and therefore its decisions in close cases will not be scrutinized by the courts. The tunnel vision of the agency also affects its lawyers.

Overall, then, whether the agency is superior as to legal expertise depends on how important one believes the expertise as to particular statutes is compared to expertise as to the law generally. It is quite plausible that the agency's lawyers are no more expert than generalist courts as to legal expertise. In contrast, the agency will be strongly superior as to nonlegal expertise.

2. Lower Decision-Making Costs

A second benefit of agencies is thought to be lower decision-making costs. Agencies can generally act more quickly and at lower cost than the traditional government branches.[39] As to legislative powers, Congress must overcome the obstacles of bicameralism and presentment, as well as passing through the cumbersome process of the committee system and legislative rules such as the filibuster. Moreover, a legislative house is able to work on only a few matters at any given time. By contrast, an agency's exercise of legislative power, either through rulemaking or agency adjudication, can occur more quickly and at lower cost. Agencies as a whole can work on many

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36 *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1161–62 (1990).

37 Some might think that the nonlegal expertise of the agency will be a significant advantage when interpreting the agency's organic statute. While some people who view statutory interpretation of unclear provisions as policy driven may accept this argument, I do not. In my view, statutory interpretation involves the legal task of discerning the original meaning of a federal statute, not the investigating what would be good policy. The nonlegal expertise of the agency is thus largely irrelevant to the properly understood task of interpreting a statute.

38 *See* Revesz, *supra* note 36 at 1164.

39 *See* Bruff, *supra* note 33, at 356. ("A traditional justification for creating agencies has been to obtain speedy and informal adjudication.").

different rules and adjudications at the same time. And they can reach agreement more quickly than can the tricameral legislative process.

In the area of adjudication—the primary focus of this Article— agencies are thought to act with lower decision-making costs than ordinary Article III judges. Perhaps the principal reason for this is that formal adjudication employs more streamlined procedures than do ordinary Article III courts. For example, the Administrative Procedure Act ("APA") does not require cross-examination or hearsay rules.[40] In addition, agencies impose significant limits on discovery.[41]

But another reason why agency adjudication may have lower decision-making costs is specialization. Agency adjudications involve a much narrower range of issues for each adjudicator—as to factual, legal, and policy issues. So if agency adjudicators are deciding cases only about a single statute, then they will develop knowledge of that statute. As a result, they will be able to resolve the issues under that statute more quickly and easily than a generalist judge could.

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These costs of a strong separation of powers are quite significant. While a strong separation of powers would protect against government wrongdoing and would improve government incentives, it would also produce a much less efficient system. First, the reduced expertise of generalist judges in this system would be significant. It would arguably produce less accurate decisions as to facts and perhaps as to law. Second, the system would be unable to expeditiously and cheaply decide the large number of cases produced by the administrative state. One would need to hire many new district judges—presumably considerably more than the existing number of ALJs. And the costs of these adjudications for the government and private parties might be significantly greater.

Thus, it seems that the choice between a system of strong separation of powers that employs generalist judges and ordinary federal court procedures or the existing system of administrative adjudications is an unhappy one. There can be a system with less risk of government wrongdoing, but it would be less accurate and would impose significant decision-making costs on the parties. It is not immediately obvious whether that system is preferable to the existing system of administrative adjudication.

Happily, though, there is a third choice—one that could combine much of the expertise and low decision-making costs of the existing agency system with a lower risk of government wrongdoing in a strong separation of powers.

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[40] *See* 5 U.S.C. §§ 556(c)(3), 556(d); JEFFREY B. LITWAK, A GUIDE TO FEDERAL AGENCY ADJUDICATION 57, 92, 101–02 (2d ed. 2012).

[41] *See* LITWAK, *supra* note 40, at 57–58.

D. *An Intermediate Alternative: Article III Administrative Courts*

Instead of choosing between biased administrative agencies and a strong but inefficient separation of powers, I propose an intermediate approach: using independent but expert administrative courts and eliminating most agency deference. This intermediate approach would be superior to both of these extremes under the large government that currently exists because it would be possible to maintain much of the expertise and lower decision-making costs that the existing agency adjudication process provides while providing for much of the constraint and improved incentives of a strong separation of powers.[42] In particular, one could design independent administrative courts that have expertise and use streamlined procedures. As a result, agencies would be subject to the constraints and improved incentives of a strong separation of powers with much of the expertise and low decision-making costs of existing agency adjudication. In short, the best of both worlds.[43]

It should be acknowledged that independent administrative courts might, to a limited extent, both reduce the degree of expertise and increase the decision-making costs of agency adjudications under the existing system. But these relatively small disadvantages of administrative courts would have to be balanced against what I regard as significant improvements in the constraints on and impartiality of administrative adjudication under a strong separation of powers.

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[42] As noted previously, my argument assumes the existing size of government. If, as classical liberals generally favor, the size of the government were much smaller, it might be desirable to have a strong separation of powers with generalist judges and ordinary court procedures. By contrast, if the government were much larger than it is, it might be desirable to use less separation of powers than my intermediate proposal recommends.

[43] Some people may disagree with my claim that this arrangement will be superior to the existing system (while others may disagree that it is superior to a strong separation of powers with generalist judges and ordinary court procedures). One reason is that people may not desire merely the existing level of administrative action, but rather an even larger and more active administrative state. For these people, that the administrative courts could serve the existing level of government would be insufficient. A similar reason is that some people believe that the existing agency arrangement, despite its combining of separate powers, is still too burdensome and limiting. Many advocates of active regulation argue that there now is an ossification of regulation. Thomas O. McGarity, *Some Thoughts on "DeOssifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992). Those critics will not be satisfied with independent administrative courts that function in a way roughly comparable to the present system.

Yet others may disagree with my claim because they place a lower value on constraining government, or they believe that agencies are not subject to the problems of bias I have identified. As a result, they may not view the goals of constraint and impartiality as having much value. And therefore, they may not want to sacrifice much, if anything, to promote them.

I do not have space here to address these criticisms. They are largely criticisms of the classical liberal premises upon which the article is written. But it is important to note that I do not claim that my approach will appeal to those who have different views on how government agencies operate or how important government regulation is to a free and prosperous country.

II. A DESCRIPTION OF THE INDEPENDENT ADMINISTRATIVE COURTS

A. *The Organization of the Independent Administrative Courts*

At present, administrative agencies—through ALJs and higher agency officials—adjudicate cases subject to judicial review that accords them significant deference. Thus, the agency can, to a significant extent, both prosecute and adjudicate the same cases. And because the adjudicator can also make policy decisions, the agency can exercise executive, legislative, and judicial power at the same time.

Under an administrative court regime, agencies would make enforcement decisions, but the adjudication would be heard by independent courts. The decisions of these courts would not be reviewed by the agency, but only by Article III federal courts. And the agencies would receive either no or reduced deference for their findings. While these administrative courts would have the independence associated with a strong separation of powers, they could be designed to have both expertise and lower decision-making costs.

1. Expertise

To promote expertise, the administrative courts should be staffed with judges having one of three types of expertise: medical, scientific, or economic. The administrative judges should be divided into three groups, each of which has expert knowledge in one of these areas. The persons appointed to these positions should have a background in these nonlegal areas. For example, persons in the medical area might have developed medical knowledge either through additional education, such as a master's degree, or through career experience.

The judges in each group would not hear cases from only a single agency. Instead, they would be assigned cases involving their expertise from any of the agencies. For example, the administrative judge with medical expertise could hear cases involving medical issues from the Occupational Safety and Health Administration, the Environmental Protection Agency, or various other agencies.

In this way, the judges would avoid a narrow focus on a single agency's output. Instead, they would adopt a broader perspective. Moreover, since the judges would not be subject to appellate review by the agency, they would not attempt to tailor their decisions to the agency's views to avoid reversal.

While these judges would have expert knowledge as to nonlegal matters, they would also develop legal expertise. Some of the judges might have knowledge on specific legal matters from their prior years as a lawyer. But even if they did not have this knowledge, the administrative judges in a particular specialty group would regularly hear cases concerning certain statutes and regulations. For example, the medical judges would repeatedly hear

cases involving statutory provisions relevant to medical issues. Over time, then, these medical administrative judges would develop legal expertise on a range of statutory and regulatory provisions.

At present, there are approximately 175 ALJs[44] (apart from those that hear cases involving Social Security or Medicare, who should be treated under a different system).[45] This fact suggests that the number of administrative judges would be of a similar size.[46] While this is a large number of judges, it does not seem unduly large. By comparison, there are 663 authorized district court judges.[47] The administrative judges would follow applicable circuit court precedent, as existing district court judges now do.

These administrative judges should be treated as principal officers of the United States to be appointed by the President with the advice and consent of the Senate. Thus, the judges would no longer be selected by the agencies, which now can use their appointment power to select persons whom they view as favorable to their interests or ideology.[48] Moreover, the President's selection would be subject to the significant check of senatorial consent.[49]

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44 *Administrative Law Judges*, OPM.GOV, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited, Apr. 19, 2019).

45 The most important reason why Social Security and Medicare should be treated under a different system is that the large number of judges under these programs, based on workload, would overwhelm the three-specialty system proposed in the text. If Social Security were included, judges with medical knowledge would be spending most of their time with social security disability cases, which would prevent them from developing expertise in other areas.

46 It is hard to know how many of these administrative judges would fall into each of the three specialty groups.

47 *Authorized Judgeships*, USCOURTS.GOV, http://www.uscourts.gov/sites/default/files/allauth.pdf (last visited Apr. 19, 2019).

48 Appointment by the President with the advice and consent of the Senate might also address political bias. There is some evidence that the bureaucracy, especially as to domestic programs, has a strong political bias toward the Democratic Party. *See* Johnathan Swan, *Government Workers Shun Trump, Give Big Money to Clinton*, THE HILL (Oct. 25, 2016), https://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign. If that is true, then transferring appointment authority from the agencies to the President with the advice and consent of the Senate could reduce the extent of that bias.

49 As noted above, ALJs until recently were appointed under a procedure whereby the agency selected a person from the three candidates identified by the OPM. *See* Barnett, *supra* note 15, at 804–05. This system was controversial, but one who regards it as a desirable appointment mechanism might also be able to devise a way of promoting the mechanism without requiring it. Congress might provide that OPM should continue to rate candidates and should identify the top three rated persons. The President then could choose from these three people. Although Congress probably could not require the President to select a nominee from a short list, the Senate could adopt the position that nominations of people other than from the list of three names would be presumed inadequate unless clearly shown to be highly qualified.

2. Decision-Making Costs.

The administrative courts could also be designed to lower decision-making costs. There is no reason why the administrative courts, even if they have Article III status, could not employ many of the same streamlined procedures currently employed by administrative adjudication under ALJs. Moreover, the expertise (legal and nonlegal) of these administrative judges would also allow cases to be decided more quickly.

The administrative courts would have other features that would lower decision-making costs. The administrative courts would eliminate the multiple levels of appeals within an agency. Most agencies allow for an appeal from the ALJ to higher officials in the agency, but under the administrative-courts proposal, an appeal from an ALJ would go to the Circuit Courts of Appeals. In addition, agencies would not need to go into federal courts for enforcement purposes. For example, agency subpoenas often require the agency to go to a federal court for enforcement.[50] By contrast, the administrative court could enforce the subpoenas on its own.

3. Article I or Article III?

Although I have argued for genuinely independent administrative courts, an important follow-up question is what type of courts should be employed. There are two reasonable alternatives here.

First, the administrative courts might be structured as Article III courts. Such courts would be protected by the good-behavior provisions of the Constitution.[51] As a result, the judges would have life tenure and would be removable only by impeachment. In addition, the Constitution would prevent Congress from allowing the agencies to review or reverse administrative courts' decisions.[52] It has long been held that Article III judges cannot be reversed by executive branch agencies.[53]

Second, the administrative courts might be structured as Article I courts. The judges of such courts would serve a long but limited term, such as fifteen years.[54] They would be removable only for cause. And their decisions would be appealed to Article III courts rather than to administrative agencies.[55]

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50 LITWAK, *supra* note 40, at 62.

51 U.S. CONST. art. III, § 1.

52 *See generally* Hayburn's Case, 2 U.S. (2 Dall.) 409, 409–11 (1792).

53 *See id.*

54 For example, the judges of the United States Tax Court and the United States Court of Federal Claims, both Article I courts, serve for fifteen year terms and can be removed only for cause. *See* 26 U.S.C. § 7443(e)–(f); 28 U.S.C. §§ 172(a), 176(a).

55 *See* 26 U.S.C. § 7443(e)–(f); 28 U.S.C. §§ 172(a), 176(a).

There are reasonable arguments in favor of each of these alternatives. One advantage of Article III courts is that their independence is constitutionally assured. Another advantage is that they quiet any claims that the administrative courts do not conform to the Constitution's original meaning. While the original meaning in this area is not clear, strong arguments have been made that at least some issues decided by the administrative courts would require resolution by Article III courts.[56]

Article I courts also have advantages. The main advantage of using Article I courts is that it confers genuine independence to the judges without employing the arguably excessively strong independence protections enjoyed by Article III judges. A fifteen-year term, with the possibility of renewal, may provide the judges with an incentive to efficiently perform their functions. And it will be less constitutionally problematic to employ supervisory mechanisms to promote judicial efficiency for Article I judges.

Different observers will have differing views about which of these alternatives is superior. But in my view either option would be far superior to the existing system of administrative adjudication.

B. *Deference as to Different Issues*

A strong separation of powers system would have independent judges decide all traditional judicial matters. To transform the existing system of administrative adjudication to one of a strong separation of powers would require two changes: First, it would be necessary to replace agency adjudicators with independent judges who make the final decisions as to these adjudications. But it would also require eliminating all or most deference to agency decisions concerning traditional judicial matters, such as finding the facts and interpreting the law.

While deference can be substantially reduced, I do not think it is possible to beneficially eliminate all such deference. In some cases, assigning the decision to the court without deference would be problematic either because it would not accord with the judicial role or because the judiciary would be worse at the task than the agency, even taking into account that the agency would have worse incentives.

Thus, deference should be allowed when the benefits of such deference exceed the costs. The main cost of deference in this context is that it reduces the impartiality and constraint features of the separation of powers. *Thus, for deference to be justified, there must be benefits from deference, and those benefits must outweigh the reduction in benefits from departures from the separation of powers.*

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[56] Caleb Nelson, *Adjudication in The Political Branches*, 107 COLUM. L. REV. 559, 563, 573–74 (2007).

Perhaps the most obvious benefit of deference comes from the agency's superior expertise. One might conclude that the expertise of the agency makes it more likely that it will reach the correct answer than would the court. There are, of course, other reasons for deference. One reason is that the decision would require the courts to exercise a nonjudicial power, such as policymaking. In that case, one might conclude that it is better for the executive to make the decision than the courts.[57] Another reason is that allocating this type of decision to the courts would be too time-consuming for the judiciary.

This Article argues that agencies should not be granted deference as to adjudicative facts or legal questions. I have also argued that agencies should not have the power to make policy findings in adjudications.[58] But if one believes that agencies should have that power, then their policy determinations should be reviewed by administrative courts under a stricter version of hard-look review. In general, it is a matter of judgment as to whether the different types of deference are beneficial. While I believe that the judgments made here are reasonable, others may disagree.

1. Adjudicative Facts

Adjudicative facts are the facts that involve the parties to a lawsuit. For example, a question might arise as to what safety equipment a firm provided to an employee.[59] The administrative court should make findings of adjudicative facts without deferring to the agency.[60] Several reasons support this recommendation. While expertise may be helpful in making these findings, the adjudicative court will have some expertise. Moreover, the information relevant to the adjudication will be based on both testimony and documents supplied to and reviewed by the administrative court. Thus, the court will be in a good position to make these findings, especially to the extent that they are based on demeanor evidence.

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57 Of course, under a strong separation of powers, the legislature would make that policy decision rather than the executive.

58 *See* Rappaport, *Classical Liberal*, *supra* note 1, at 6.

59 Such adjudicative facts are to be distinguished from legislative facts, which are generally understood as more general facts that involve how groups in the population behaved in the past or might behave in the future. *See* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 140–49 (3d ed. 1994) (distinguishing between adjudicative and legislative facts). For example, a question might arise as to how many workers in the United States were injured in the past ten years who were equipped with a particular type of safety equipment. Legislative facts are mainly relevant to policy findings. *See supra* Section I.C.1.

60 That is, the review should be de novo or plenary.

2. Policy Findings

In an earlier paper on applying the separation of powers to agencies, I argued that policymaking should not be permitted in adjudication.[61] Instead, policymaking should occur only through rulemaking that is limited by a congressional review procedure like the proposed REINS Act.[62]

I recognize, however, that many people may believe this position is too restrictive. As a result, I offer a more moderate proposal that would restrict, but not prohibit, agency policymaking in adjudications. Under this restriction, multimembered agencies, such as commissions, should be permitted to make policy, but only with a supermajority of the commission (such as a 4/5 vote of commissioners rather than a simple majority vote). Single-headed agencies could make policy in an adjudication only with the approval of an outside entity, such as the Office of Management and Budget.

If one chooses to restrict, but not prohibit policymaking, it would be necessary to have a standard of review for policy decisions. Under existing doctrine, such policy findings are reviewed under hard-look review,[63] which contains two principal components. First, the courts inquire whether the agency considered and answered the substantial questions that might be raised about its policy.[64] Second, the courts ask whether the answers to these questions that the agency provided (as well as the support it marshaled for its policy) were sufficient.[65] This latter component confers significant deference to the agency to reach conclusions that differ from what the court would have regarded as the best answer.

Since administrative courts have more expertise than do ordinary circuit courts, one might argue that the administrative courts should engage in a more searching review of agency policymaking. They would be in a better position to engage in both hard-look components. First, they would be better equipped to determine what are the substantial questions that the agency should have answered. Familiarity with an area allows someone to better appreciate what are the strong arguments that should have been raised. Second, the administrative judges would be in a better position to determine whether the agency's response was adequate, since they are more knowledgeable about the facts and policy arguments in the area.

In these circumstances, one might argue that the administrative court should be less deferential to the agency as to these matters. The court should

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61 *See* Rappaport, *Classical Liberal*, *supra* note 1, at 6.

62 The proposed REINS Act (Regulations from the Executive in Need of Scrutiny Act) would require that major regulations receive the approval of Congress and the President before they can take effect. On the REINS Act, see Jonathan H. Adler, *Placing "Reins" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 4 (2013).

63 *See* Bressman, *supra* note 21, at 178–79.

64 *Id.* at 187–88, 191–92.

65 *Id.* at 178–79.

not be reluctant to conclude that the agency failed to address a substantial question, if the court believes the question was important.[66] Moreover, the court should show less deference as to whether the agency's response was adequate, because the agency has expertise in the area. Thus, overall, one might argue that hard-look review, at least as to formal adjudication, should be stronger than hard-look review at present.

Since policymaking is problematic for judges, this decrease in deference for agency policymaking should not eliminate deference altogether. The ultimate policy decision would still be made by the agency. But such policymaking should be approved only if the agency responded to the significant questions and only if it provided reasonable answers to the questions raised about its policy.

3. Law

a. *Expertise*

Agency interpretations of law involve a significant portion of agency activities in formal adjudications. These interpretations can occur in a variety of circumstances. Under existing law, the interpretations that receive deference are of statutes that the agency administers (*Chevron* deference)[67] and of legislative regulations that the agency has issued (*Auer* deference).[68] Under both *Chevron* and *Auer* deference, the agency's interpretation will be approved so long as it is reasonable or permissible.[69]

There is a very strong argument for providing no deference to administrative agencies. Under a strong separation of powers, the interpretation of statutes is a judicial activity. The idea goes back to *Marbury v. Madison*[70] that it is the duty of the judiciary to say what the law is.[71] Moreover, allowing an agency significant discretion as to legal interpretations provides it with a significant area where it can take action at its own discretion.

There are, however, many arguments for deference to agency interpretations of law. One argument on which *Chevron* deference is now based is that Congress delegated such authority over interpretive decisions to the

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66 I do not argue that courts presently confer deference as to what is a substantial question. But courts sometimes appear reluctant to conclude that a question is substantial. Administrative courts should not be reluctant to do so.

67 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

68 Auer v. Robbins, 519 U.S. 452, 458–60 (1997).

69 While I do not discuss it here, I also propose eliminating *Skidmore* deference. *See* Rappaport, Classical Liberal *supra* note 1, at 28–29. (arguing that *Skidmore* is a government privilege because knowledgeable agencies are shown such deference, but equally knowledgeable private parties are not).

70 5 U.S. (1 Cranch) 137 (1803).

71 *Id.* at 177.

agencies.[72] But there are two problems with this argument. First, there is a powerful argument that Congress did no such thing and in fact under the APA did not intend to delegate interpretive authority.[73] Second, even if Congress did delegate such authority to the agencies, that would not answer the objection. The separation of powers constrains Congress, and therefore Congress does not have authority to depart from it.

Another argument in favor of deference to agencies is that agencies have more legal expertise than do the administrative courts.[74] But even if agencies did have more expertise, that expertise would need to be balanced against the separation of powers advantages that independent judicial interpreters provide. Yet, there are strong reasons to believe that administrative courts would not have less legal expertise than agencies.

As was the case with generalist judges, the legal expertise of administrative judges is likely to be inferior to agency lawyers in one way and superior in another way. Since administrative judges will hear cases from a range of agencies in their specialty area, they are likely to have less knowledge of an agency's particular statutes and regulations than the agency's lawyers, whose primary concerns are those statutes and regulations. At the same time, though, the administrative judges are likely to have superior knowledge of the law in general, because they will be exposed to a broader range of statutes than will the agency lawyers. Overall, then, the legal expertise of administrative judges is likely to be comparable to that of agency lawyers. While some observers may regard one or the other as having superior expertise, any such superiority is likely to be small.

But even if one believes that administrative judges are inferior to agencies in legal expertise, one should still not defer to agencies on legal questions. The strong–separation of powers reasons for eliminating agency deference would outweigh any advantage as to legal expertise that agencies enjoy. Deference to agencies on legal interpretation confers a very large degree of discretion to agencies to act as they choose. That discretion can lead to serious abuses and makes it difficult to police agencies. Thus, even if agencies did have superior legal expertise, one should not confer deference to agencies on legal interpretation.

b. *Too Many Cases*

One serious objection to eliminating deference for agency legal interpretations is that doing so would lead to a significant increase in federal court

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72 United States v. Mead Corp., 533 U.S. 218, 229 (2001).

73 Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 986–90 (2017); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995–96 (1992).

74 Bruhl, *supra* note 32, at 739.

cases that the Supreme Court would have to decide.[75] Under a standard that provides deference to agencies' legal interpretations, one would predict that agencies would win more cases. Thus, the circuit courts would decide for the agency and would be in agreement with each other. By contrast, without such deference, there would be fewer cases where the agency would win. Instead, the cases would be more split between the agency and the regulated party. As a result, there would likely be a greater number of circuit splits.

It is hard to know how many additional cases would result from the elimination of deference. It could be a small or large number. But in either case there are desirable reforms that would address these additional splits between the circuits.

This increase in additional cases might be addressed in a number of different ways. The best solution would be for the Supreme Court simply to take more cases. The Court's docket is already at historic lows.[76] It could easily hear ten to twenty more administrative law cases a year. Given the importance of administrative agencies to governance in the United States, such an increase would be entirely appropriate.

Another possibility would be for the Supreme Court to allow some splits between the circuits as to agency actions. This alternative might be chosen if one did not believe the Supreme Court should take more cases or if the Court did take more cases but did not have the capacity to resolve all of the additional circuit splits.

To be sure, unresolved circuit splits would conflict with the idea that agency decisions should be uniform throughout the United States. But it is not clear how important this principle is. It might be argued that, in a large pluralistic nation, having different results in different parts of the country, at least for a certain period, is not a problem. Moreover, if uniformity were deemed important for a certain class of cases, the Solicitor General could identify those cases to the Court, or Congress could legislate a different standard of review for them.

A third possibility is to reduce the number of cases in which agencies receive no deference. One could provide that agencies do not enjoy deference on pure questions of law but do enjoy deference on mixed questions of law and fact. This arrangement, which may have been the dominant approach prior to *Chevron*,[77] would work a balance between checking agencies and reducing the burden on the Supreme Court. The most significant cases, involving the meaning of statutes, would still be decided by the courts. But the

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75 Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105, 1121–22 (1987).

76 *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012).

77 *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 9 (2013).

relatively less important cases, involving the application of a statute to particular facts, would get agency deference.[78]

One last possibility for addressing the additional cases involves a more significant change, but one that might be deemed desirable not merely as a means of resolving the additional cases, but also as a means of improving the expertise of the courts. Congress might establish a new national administrative court of appeals.[79] The court might be composed of seven circuit court judges, appointed by the President with the advice and consent of the Senate from the existing federal circuit court judges. The judges might serve for seven-year terms, with one new member appointed each year. The court would hear cases when there were splits between the circuits on the interpretation of regulatory statutes and agency regulations. Since service on the court would probably not be a full-time job, the judges could continue to hear cases in their separate circuits, although they should be excluded from hearing administrative law cases. The Supreme Court would continue to hear cases on certiorari from the national court of appeals.

Under this reform, the courts could resolve all splits between the circuits quickly—in fact, more quickly than at present. And those splits would be resolved by judges who are generalists but who also have administrative law expertise.

My preferred solution to the additional number of circuit splits would be for the Supreme Court to hear twenty more cases per year. But other observers may disagree, especially if they believe that there would be a great increase in the number of circuit splits. At the least, this section shows that there are various possible solutions to the problem.[80]

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78 Of course, this alternative would have the disadvantage of retaining deference in a significant class of cases.

79 Such as the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295 (2012).

80 While most agencies employ the combined powers model, there are a few agency structures that use more of a separation. Although none of these structures employ the independent administrative courts that I recommend, they do use one or more features of the separation of powers that the combined powers agencies do not. Thus, one might expect that they would exhibit some of the benefits that I claim for the separation of powers.

Based on my review of two of these agencies, I believe that these agencies may generate benefits associated with the separation of powers. But these benefits are quite limited, because the structure of these agencies and the environment in which they function greatly reduce the extent to which they actually separate powers.

One such agency structure is that of the Occupational Safety and Health Administration (OSHA) and the Occupational Safety and Health Review Commission (OSHRC). OSHA, an agency within the Department of Labor, sets and enforces workplace health and safety standards. Challenges to its enforcement actions, however, are adjudicated by OSHRC, an independent three-member agency. *See* George Robert Johnson, Jr., *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences,* 39 ADMIN. L. REV. 315, 315, 343 (1987).

While the independence of OSHRC is an important check on OSHA, the extent of the check is limited by the fact that OSHA enjoys such extensive powers including enforcement, rulemaking, policymaking, and deference to its legal interpretation under *Chevron*, *Auer*, and *Skidmore*. *See* Martin v.

C. *Appellate Review of the Administrative Courts*

The decisions of the administrative courts will be reviewed by the generalist circuit courts of appeals. Since the administrative courts have some expertise, an expertise argument exists for providing the administrative courts with deference. Although there are expertise arguments for deference for both the agencies and the administrative courts, there is a significant difference between the two. In the case of the agencies, the superior expertise of the agencies must be balanced against the reduction in separation-of-powers benefits from conferring deference on the agencies. By contrast, the superior expertise of the administrative courts need not be balanced against any reduction in separation-of-powers benefits if both the administrative courts and the circuit courts are within the judicial branch. Since there is no transfer of power away from the judiciary, there is no violation of the separation of

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OSHRC, 499 U.S. 144, 151–53 (1991). OSHRC is merely given the power to adjudicate the facts. Thus, the only bias that OSHRC protects against is that OSHA might use its factfinding authority to impose liability on a particular defendant. Moreover, it is not clear to what extent OSHRC's personnel will have different views than OSHA's, because the Commissioners serve staggered six-year terms, with some not completing their full term. DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW: TEXT AND CASES 355 (2010). Thus, OSHA and OSHRC will often be controlled by members of the same political party.

A second agency structure that departs from the pure combined powers model is that of the National Labor Relations Board (NLRB) and the General Counsel of the NLRB. But here, once again, the extent of the separation is limited, and therefore, so too is its effect. The NLRB enjoys the bulk of the power, including authority as to factfinding, rulemaking, and policymaking, as well receiving *Chevron* and *Auer* deference. *See* Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 374, 378 (1998); Kindred Nursing Ctrs. E., LLC v. NLRB, 727 F.3d 552, 565 (6th Cir. 2013). The General Counsel merely has power over enforcement of unfair labor practices. While the General Counsel can bring such cases, the Board can decide against the General Counsel. *See* Michael Ellement, *Labor Law in 3(d): Reexamining the General Counsel of the NLRB as an Independent Prosecutor of Labor Violations*, 29 A.B.A. J. LAB. & EMP. L. 477, 492 (2014). Thus, the General Counsel's most significant authority occurs when he decides not to bring an enforcement action.

But even this authority turns out to be quite limited, because the General Counsel has rarely, if ever in recent years, chosen to disagree with the Board. *Id.* at 490–92. It is not clear why the General Counsel does not disagree with the Board. After all, the General Counsel, who serves a four-year term, is sometimes from one party when the Board is controlled by the other party. One possibility is that the General Counsel and Board have worked out arrangements for their mutual benefit that decrease their disagreements and therefore the check that they impose on one another. Under the statute, the Board has the authority to hire regional directors and attorneys to represent itself in the courts of appeals, but those directors and attorneys would awkwardly be supervised by the General Counsel. Instead, the Board delegates to the General Counsel its representation in the courts of appeals, and in turn the General Counsel acquiesces to the Board's position. *Id.* at 494–96. The General Counsel secures more responsibility by enhancing its duties, but the Board secures the General Counsel's agreement as to its positions. The ability to make such implicit deals is furthered by the fact that both the Board and the General Counsel are involved in labor relations. If there were the broad administrative courts that I recommend, it would be much harder for specific agencies to work out such implicit deals.

powers. If other things are equal, and of course they may not be, there should be less deference conferred on the agency than on the administrative court.[81]

Here I discuss the standard of review for each of the three types of decisions. First, the administrative court has greater expertise on adjudicative facts and is in a position to observe the testimony and to review the exhibits. Thus, it should receive significant deference. The two obvious possibilities are the clearly-erroneous standard (which governs circuit court review of district court findings of fact)[82] and substantial-evidence standard (which governs circuit court review of agency findings of fact).[83] Since the district courts have no more expertise than do the circuit courts, but the administrative courts have more expertise than do the circuit courts, this suggests that substantial evidence (the more deferential standard) should govern circuit court review of the administrative courts.

Second, the administrative courts will have more expertise as to key aspects of hard-look review. As indicated above, if one allows agencies to engage in policymaking as part of administrative adjudication, there is a strong argument that the expertise of administrative courts, as compared to generalist courts, justifies a less deferential version of hard-look review. In particular, the expertise of the administrative judges would allow them to determine whether a significant issue had not been discussed and whether the agency's response to the significant question was adequate. This would also suggest that circuit courts should confer some deference on administrative courts. The amount of deference is unclear, but a modest amount of deference would be appropriate.

Finally, there is the question of whether circuit courts should defer to administrative courts on legal questions. The analysis here is similar to whether the administrative courts should defer to the agencies. Legal expertise can be divided into two categories: expertise about a particular statute, and expertise about the law in general, including statutory interpretation methods. The circuit courts are more generalist courts than the administrative courts. Thus, the circuit courts are likely to display more legal expertise about the law in general but less expertise about particular statutes. Overall, then, whether the circuit courts have more expertise than administrative courts turns on how one evaluates these two types of expertise.

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81 It is not entirely clear, however, that both types of the independent administrative courts should be deemed to be within the judicial branch. Certainly the Article III versions of those courts are within the judicial branch, but there is likely to be some disagreement as to the Article I courts. Some people may view the Article I courts as executive agencies; others may view them as essentially judicial. *Compare* Freytag v. Comm'r, 501 U.S. 868, 890–92 (1991) (viewing Tax Court as a court of law for Appointments Clause purposes), *with id.* at 901 (Scalia, J., concurring in part and concurring in the judgment) (viewing Tax Court as an executive branch agency). If they are treated as part of the executive branch, then deference to those courts will involve a reduction in separation of powers benefits. This section analyzes the administrative courts on the assumption that they are judicial. Thus, my recommendations for the scope of review may be changed if the Article I courts are deemed to be executive.

82 *See* FED. R. CIV. P. 52(a)(6).

83 *See, e.g.*, United States v. Eurodif S. A., 555 U.S. 305, 316 n.6 (2009).

In this situation, it might seem unclear whether administrative courts should receive deference on legal issues from the circuit courts. And one might even argue that the absence of any reduction in separation-of-powers benefits should allow one to conclude that administrative courts receive deference. Yet, there are two strong reasons why administrative courts should not receive deference. First, the circuit courts are filled with some of the smartest and most accomplished judges in the country. Thus, they are likely to be more talented than the administrative judges. Second, the circuit courts sit in panels of three, which allows the panels to consult and debate the legal issues. This is a superior process for reaching accurate results. These two reasons lead to a conclusion that administrative judges should not receive deference from the circuit judges on legal issues.

CONCLUSION

This Article argues that a system of independent administrative courts would be superior to the existing combined powers model of administrative agencies. Given the large government of the modern world, it would not be desirable to establish a strong separation of powers approach that would employ generalist federal judges and ordinary federal court procedures. But instead of simply accepting the combined-powers model, I argue for an intermediate approach—one that largely employs a strong separation of powers, but also uses expert administrative judges that follow streamlined procedures.

This system of expert administrative courts would eliminate the problems involved with agencies' combining enforcement and adjudication. Agencies would have less ability to take actions based on a host of improper motivations that they now can pursue. But this system of administrative courts would not produce uninformed adjudication or expensive procedures. Instead, it would allow for expert and expeditious adjudication.