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Collateral Damage: When Should the Determinations of Administrative Adjudications Have Collateral Estoppel Effect in Subsequent Adjudications?

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COLLATERAL DAMAGE: WHEN SHOULD THE DETERMINATIONS OF ADMINISTRATIVE ADJUDICATIONS HAVE COLLATERAL ESTOPPEL EFFECT IN SUBSEQUENT ADJUDICATIONS?

*Matthew Faust**

Collateral estoppel is an equitable doctrine under which a court gives issue-preclusive effect to findings of fact or law made in previous proceedings. The U.S. Supreme Court has recently held that under certain circumstances, the determinations of administrative adjudications have collateral estoppel effect in federal court. The Court, however, did not address under which circumstances the determinations of administrative adjudications should have collateral estoppel effect in subsequent administrative adjudications. There has been little clear and consistent reasoning in lower federal courts about when collateral estoppel should apply in administrative adjudications, and administrative agencies vary widely in their application of collateral estoppel when conducting adjudications.

This Note argues that neither the balancing test used to apply collateral estoppel in federal court nor the more formalistic per se rules proposed by some commentators are appropriate when applying collateral estoppel between administrative adjudications. Instead, courts should defer to agencies, granting them wide discretion to recognize or not recognize the collateral estoppel effect of prior administrative adjudications.

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INTRODUCTION

Mohammad Hassan Amrollah-Majdabadi ("Amrollah") was an Iranian pharmacist.[1] After the Iranian Revolution in 1979, he resented the

1. Amrollah v. Napolitano, 710 F.3d 568, 570 (5th Cir. 2013).

repressiveness of the new regime.[2] In addition to participating in antigovernment protests, he began to provide medical supplies and money to an opposition group known as the Mujahadeen-e-Khalq[3] (MeK). The MeK had initially supported the Iranian Revolution of 1979, but had quickly turned against the new government.[4] The Iranian government repeatedly prosecuted Amrollah throughout the 1980s and 90s for his suspected support of the MeK.[5]

In 1998, Amrollah received a subpoena to appear before the Iranian religious authorities.[6] Fearing for his life, he and his family fled Iran for the United States.[7] After illegally entering the United States, Amrollah applied for asylum.[8] The United States Citizenship and Immigration Service (USCIS) immigration judge who heard Amrollah's application decided that, despite Amrollah's involvement with the MeK, his actions had not constituted terrorist activity, and he ruled that Amrollah and his family were eligible for asylum.[9]

Amrollah changed his first name to Tom, and he and his family applied for permanent residency status in the United States.[10] After a long delay, his application for permanent residency was denied.[11] USCIS had reconsidered its earlier determination in the asylum proceeding and decided that Amrollah's involvement with the MeK did, in fact, constitute terrorist activity.[12] Amrollah appealed the agency's decision, and after losing in federal district court, he appealed again to the Fifth Circuit.[13]

Amrollah argued that, because the issue of whether he had engaged in terrorism had been litigated and decided during his asylum hearing, USCIS was collaterally estopped from revisiting the issue in a subsequent adjudication.[14] The Fifth Circuit agreed, reversed the district court, and granted summary judgment for Amrollah.[15] The application was remanded

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2. Brief for Appellant at 9–10, *Amrollah*, 710 F.3d 568 (No. 12-50357).

3. *Amrollah*, 710 F.3d at 570. The MeK, or People's Mujahadeen of Iran, is a controversial Iranian opposition group with a Marxist-Islamist ideology. Jonathan Masters, *Mujahadeen-e-Khalq (MEK)*, COUNCIL ON FOREIGN REL. (July 28, 2014), http://www.cfr.org/iran/mujahadeen-e-khalq-mek/p9158 [https://perma.cc/W7L8-FJYB]. The MeK has been accused of violence against both the Islamic Republic of Iran and the previous Iranian regime under the Shah. *Id.*

4. Masters, *supra* note 3.

5. *Amrollah*, 710 F.3d at 570.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Amrollah applied for permanent residency in 1999 and his application was denied in 2009. *Id.*

12. *Id.* In 2002, the U.S. State Department listed the MeK as a terrorist organization, and in 2003 the MeK fought alongside Saddam Hussein's forces in resisting the United States invasion of Iraq. Masters, *supra* note 3.

13. *Amrollah*, 710 F.3d at 570. Amrollah appealed pursuant to 5 U.S.C. §§ 704, 706. *Id.* Chapter Seven of the Administrative Procedure Act (APA) allows for judicial review of decisions made by administrative agencies. 5 U.S.C. §§ 701–706 (2012).

14. *See Amrollah*, 710 F.3d at 571.

15. *Id.* at 573.

back to USCIS, which had no choice but to grant Amrollah permanent resident status.[16]

In holding that USCIS could not relitigate issues of fact or law already decided in a prior adjudication, the court relied on the common law doctrine of collateral estoppel (sometimes called "issue preclusion").[17] The principle that the determinations of administrative adjudications, as well as court cases, can collaterally estop parties in subsequent proceedings has been developed by the U.S. Supreme Court over the last fifty years.[18] The Court's recent decision in *B & B Hardware, Inc. v. Hargis Industries, Inc.*[19] finally established a test for determining when an administrative determination will have collateral estoppel effect in federal court.[20]

B & B Hardware, however, did not address the question that was raised in *Amrollah v. Napolitano*[21]: What is the collateral estoppel effect of an administrative adjudication on subsequent administrative adjudications? This Note explores the difficulties that agencies and federal courts have encountered when applying collateral estoppel from the findings of one administrative adjudication in another administrative adjudication. Part I summarizes the doctrine of collateral estoppel before describing the analytic framework the Supreme Court has constructed for determining whether agency determinations have collateral estoppel effect in federal court. Part II examines situations in which courts and agencies have had to determine the collateral estoppel effect of a prior agency decision on a subsequent adjudication by the same agency or another agency with overlapping jurisdiction. It examines a range of cases to show that courts have failed to provide clear guidance or resolve the tensions between collateral estoppel and administrative law. Part III discusses possible solutions, including whether the Court's current collateral estoppel framework can be expanded to encompass administrative adjudications and whether courts should adopt a set of per se rules governing when an agency's decision has collateral estoppel effect in subsequent adjudications. Finally, Part IV argues that, given the complexities of agency adjudications and the broad discretion federal agencies enjoy, agencies should be allowed to determine whether to rely on collateral estoppel on a case-by-case basis.

I. DEVELOPMENT OF COLLATERAL ESTOPPEL IN THE ADMINISTRATIVE CONTEXT

In order to understand the problems that arise when applying collateral estoppel in administrative adjudications, it is first necessary to understand the four-factor analysis that federal courts use to decide whether collateral estoppel applies. Then, it is necessary to understand how this basic analysis

16. *Id.*
17. *See id.* at 571–73.
18. *See infra* Part I.B.
19. 135 S. Ct. 1293 (2015).
20. *See infra* Part I.B.3.
21. 710 F.3d 568 (5th Cir. 2013).

has been modified and applied by the Supreme Court when determining the collateral estoppel effect of agency determinations.

Part I.A describes the factors that courts normally consider when applying collateral estoppel, as well as the policy considerations that caused the courts gradually to expand the use of issue preclusion. Part I.B traces the evolution of the Court's reasoning on the collateral estoppel effect of administrative adjudications, starting with *United States v. Utah Construction & Mining Co.*,[22] through *University of Tennessee v. Elliot*[23] and *Astoria Federal Savings & Loan Ass'n v. Solimino*,[24] culminating with the Court's recent decision in *B & B Hardware*, in which the Court attempted to synthesize the reasoning from its earlier cases into a two-step analysis.

A. Collateral Estoppel Effect of Judicial Determinations in Federal Court

Collateral estoppel is an equitable doctrine under which a court gives preclusive effect to findings of fact or law made in previous proceedings.[25] In determining whether to apply collateral estoppel, courts generally rely on a four-factor test: First, is the issue identical to the issue in the previous proceeding? Second, was the issue necessary to the judgment in the previous proceeding? Third, was the issue fully and fairly litigated? And finally, did the party against whom collateral estoppel is being asserted have the opportunity to contest the issue?[26] Courts have broad discretion in deciding how much weight to give each factor in the administrative context.[27] Courts balance the interests of justice against the underlying

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22. 384 U.S. 394 (1966).

23. 478 U.S. 788 (1986).

24. 501 U.S. 104 (1991).

25. *See, e.g.*, Montana v. United States, 440 U.S. 147, 153–54 (1979) (explaining the doctrine of collateral estoppel); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931); United States v. Moser, 266 U.S. 236, 241–42 (1924) (extending collateral estoppel to matters of law when the parties are identical); Cromwell v. Cty. of Sacramento, 94 U.S. 351, 354 (1877) (establishing collateral estoppel). *See generally* Austin Wakeman Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942). Scott relies heavily on *Cromwell*, distinguishing collateral estoppel from the related doctrine of res judicata. *Id.* at 3–4. Res judicata precludes the relitigation of claims, whereas collateral estoppel precludes the relitigation of the individual issues collateral to those claims. *Id.*

26. *See, e.g.*, Kremer v. Chem. Constr. Corp., 456 U.S. 461, 493 (1982) (Blackmun, J., dissenting) (emphasizing that the issue must be identical for collateral estoppel to apply); *Montana*, 440 U.S at 153 (holding that the issue must be identical and have been necessary to prior judgment, and the party against whom estoppel is asserted must have exercised some control over the litigation); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *see also* Brian Levine, Note, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 ANN. SURV. AM. L. 435, 439.

27. *See* Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995); Facchiano v. U.S. Dep't of Labor, 859 F.2d 1163, 1167 (3d Cir. 1988) (noting that collateral estoppel should be applied flexibly in the administrative context).

policy goal of collateral estoppel, which is to provide finality between parties on the disputed issue.[28]

Since the start of the twentieth century, courts have become increasingly willing to allow the use of collateral estoppel.[29] Initially, collateral estoppel only applied when both parties were identical or, at the very least, in privity with one another.[30] In addition to this "mutual" collateral estoppel, courts allowed "non-mutual" collateral estoppel, satisfied only where the party who is to be estopped was privy to the previous proceeding.[31] This liberalization also has extended collateral estoppel effect to "nontraditional" proceedings, such as arbitrations and administrative adjudications.[32]

B. The Collateral Estoppel Effect of Administrative Determinations in Federal Court

The expansion of the application of collateral estoppel gradually came to encompass administrative as well as judicial decisions.[33] Beginning in 1966, the Court developed a line of cases that suggested administrative adjudications could have collateral estoppel effect in subsequent cases in federal court and then defined under which circumstances an agency's decision could have issue preclusive effect.[34]

Part I.B.1 examines the *Utah Construction* decision and the Court's suggestion that administrative decisions could have collateral estoppel effect. Then Part I.B.2 analyzes how the Court began to develop specific guidelines for the application of collateral estoppel in subsequent cases. Lastly, Part I.B.3 discusses the Court's recent decision in *B & B Hardware*, which finally outlined a clear test to determine when administrative agency decisions have collateral estoppel effect in federal court.

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28. *See, e.g.*, *Montana*, 440 U.S. at 153–54 ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."); Scott, *supra* note 25, at 2.

29. *See, e.g.*, Blonder-Tongue Labs. v. Univ. of Ill. Found., 402 U.S. 313, 327 (1971) (noting "mutations in estoppel doctrine" including an "expansion" of the use of collateral estoppel that "enhanc[ed] the capabilities of the courts to deal with some issues swiftly but fairly").

30. *Id.* at 322, 326–27.

31. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327–29 (1979); *Blonder-Tongue*, 402 U.S. at 329.

32. *See, e.g.*, David A. Brown, Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, 73 CORNELL L. REV. 817, 826–28 (1988); Levine, *supra* note 26, at 440–41; *infra* Part I.B.

33. *See* Brown, *supra* note 32, at 817; Eric N. Macey, Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65, 66 (1977).

34. *See infra* Part I.B.1–2.

1. The *Utah Construction* Decision

The Court first suggested that administrative decisions could have collateral estoppel effect in federal court in *Utah Construction*.[35] The case was a dispute between the Atomic Energy Commission (AEC) and a private contractor in which the contractor claimed breach of contract.[36] Under the contract, an administrative panel adjudicated disputes between the parties regarding how the contract would be performed.[37] When Utah Construction asked for additional time and money to complete the project due to changed conditions and incomplete government specifications,[38] the AEC's Advisory Board of Contract Appeals ("the Board") denied the company's claim after an administrative hearing.[39] The Board drew its authority from the Wunderlich Act,[40] which authorized the resolution of government contract disputes in administrative proceedings.[41] In denying Utah Construction's claims, the Board made the factual determination that changed conditions were not the cause of the delays and that, in any event, Utah Construction had not borne the cost of the delays.[42]

Utah Construction responded by filing suit in the Court of Claims.[43] The Court of Claims determined that the Board had exceeded its authority under the contract, as it was authorized only to resolve minor disputes, not settle actions for breach of contract.[44] The Court of Claims granted trial de novo on Utah Construction's claims.[45] The Government appealed the decision to the Supreme Court.[46] The Court reversed the grant of a trial de novo, holding that, while the Board could not settle a breach of contract claim, the Court of Claims had to respect the Board's factual findings.[47]

Justice White, writing for the Court, said in dicta that, while the Court's decision was fully justified by the contractual terms as modified by the relevant statute, it was also "harmonious with [the] general principles of collateral estoppel."[48] Justice White noted that the Board was acting in its judicial capacity, the parties had had a fair opportunity to litigate the issue, and the determination of the issue had been necessary to the Board's

35. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421–22 (1966).
36. *Id.* at 400–01.
37. *Id.* at 396–99.
38. *Id.* at 400–01.
39. *Id.*
40. 41 U.S.C. § 7107 (2012).
41. *Utah Constr.*, 384 U.S. at 418–19.
42. *Id.* at 400.
43. The U.S. Court of Claims is a federal court established under Article I of the Constitution. *See* 28 U.S.C. § 171(a) (2012). It has jurisdiction over claims against the United States stemming from, among other things, breaches of contract. *See id.* § 1491(a)(1).
44. *Utah Constr.*, 384 U.S. at 401.
45. *Id.*
46. *Id.*
47. *Id.* at 420.
48. *Id.* at 421.

judgment.[49] Thus, the common law prerequisites for applying collateral estoppel were satisfied by the Board's decision.[50]

Although the *Utah Construction* opinion indicated the Court's sympathy for the claim that administrative decisions could be given collateral estoppel effect, it stopped short of stating that collateral estoppel could have served as an independent basis for the Court's decision.[51] Many commentators, and some lower courts, concluded from *Utah Construction* that administrative adjudications could have collateral estoppel effect in federal court.[52] The extent to which this applied, and exactly which agencies' rulings were entitled to collateral estoppel effect, remained uncertain.[53]

2. Evolution of the Administrative Collateral Estoppel in Federal Courts

If the extent to which agency determinations had preclusive effect in federal courts was uncertain, the extent to which the administrative decisions of one agency bound another was even less certain.[54] Whereas applying collateral estoppel from agency decisions in federal court required the comparison of one agency's procedures and functions to those of the court,[55] this analysis was further complicated when it required that one agency be compared to another agency. For instance, if agencies had different mandates and areas of expertise, was collateral estoppel appropriate?[56] How should courts treat the myriad of procedurally diverse adjudications administrative agencies conduct?[57]

The Court began to provide clarification in *University of Tennessee v. Elliot*. In that case, the Court had to determine the preclusive effect of a

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49. *Id.* at 422.

50. *See supra* note 26 and accompanying text.

51. *Utah Constr.*, 384 U.S. at 421 ("[T]he decision here rests upon the agreement of the parties as modified by the Wunderlich Act . . . .").

52. *See, e.g.*, Safir v. Gibson, 432 F.2d 137, 143–44 (2d Cir. 1970) (noting that an administrative ruling would have a preclusive effect on an issue before the court); Brown, *supra* note 32, at 826–27 ("In light of the modern expansion in administrative adjudicatory authority . . . courts have recognized that the extension of collateral estoppel to agency determinations can advance the goals behind the doctrine without increasing the risk of unfairness to the precluded litigants."); Case Comment, *Administrative Collateral Estoppel: The Case of the Subpoenas*, 87 YALE L.J. 1247, 1251 (1978) [hereinafter *Subpoenas*] ("Supreme Court decisions now establish that the collateral estoppel principle is available to litigants in the burgeoning field of administrative adjudication.").

53. *See* Brown, *supra* note 32, at 819.

54. *See* Kramer v. Jenkins, 803 F.2d 896, 901 (7th Cir. 1986); FTC v. Texaco, Inc., 555 F.2d 862, 894 (D.C. Cir. 1977) (Leventhal, J., concurring) (questioning whether the FTC's decisions could be given preclusive effect against another agency). *But see Subpoenas*, *supra* note 52, at 1252 ("Taken together with the Court's decision in *Sunshine* [*Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)], *Utah Construction* binds one agency to the administrative adjudications of another.").

55. *See* Brown, *supra* note 32, at 818–19.

56. *Compare* Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 299 (7th Cir. 1979) (dismissing argument that the FTC was estopped from bringing an enforcement action because of a prior Post Office decision), *with Kramer*, 803 F.2d at 901 (suggesting that the Constitution may require agencies to recognize one another's decisions).

57. *See infra* Part III.A.1–2.

state agency proceeding on issues in a federal discrimination suit.[58] The Court began its analysis by examining the provisions of Title VII[59] under which the federal claims had been brought.[60] Title VII required the Equal Employment Opportunity Commission (EEOC) to give "substantial weight"[61] to state or local authorities' determinations. The Court concluded that, had the complaint been filed with the EEOC and not in federal court, the EEOC would have had to consider the state agency's position but not give it preclusive effect.[62] Holding that what did not bind a federal agency could not bind a federal court, the Court rejected the university's invocation of collateral estoppel based on the state agency adjudication.[63]

Though the Court confirmed that agency determinations were entitled to collateral estoppel effect in federal court when the agency acted in a "judicial capacity,"[64] the decision was, like *Utah Construction*, based on narrow statutory grounds that were not widely applicable in other contexts.[65] Furthermore, the involvement of federalism issues complicated the Court's analysis of collateral estoppel.[66]

The Court returned to the issue of collateral estoppel in *Astoria*. *Astoria* involved an age discrimination complaint that originally had been filed with the EEOC, but was referred to a New York state agency under a work sharing agreement.[67] The state agency denied Angelo Solimino's claim, and he subsequently filed a complaint in federal court.[68] The federal district court granted the defendant's summary judgment motion, citing the collateral estoppel effect of the state agency's determinations of fact and law.[69] The Second Circuit reversed the district court on the grounds that collateral estoppel was not appropriate in the circumstances of the case.[70]

The Supreme Court affirmed the Second Circuit's reversal, holding that there was a presumption that administrative agencies' determinations were entitled to collateral estoppel effect when they acted in a "judicial

58. Univ. of Tenn. v. Elliot, 478 U.S. 788, 794 (1986).

59. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

60. *Elliot*, 478 U.S. at 795.

61. *See* 42 U.S.C. § 2000e-5b (2012).

62. *Elliot*, 478 U.S. at 795–96.

63. *Id.* at 796.

64. *Id.* at 797.

65. *Id.* at 795 (noting that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court").

66. *See id.* at 794. The Court held that it was bound to give the state agency decisions the same effect in federal court as they had in state court. *Id.* at 799.

67. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 106 (1991).

68. *Id.* at 106–07.

69. *Id.* at 107. The district court granted summary judgment in favor of Astoria Federal Savings and Loan rather than dismissing Solimino's claims, making the case one of the application of collateral estoppel rather than res judicata. Solimino v. Astoria Fed. Sav. & Loan Ass'n, 715 F. Supp. 42, 46–47 (E.D.N.Y. 1989). The district court credited the state agency's findings of fact and law rather than its final decision on the claim. *Id.* at 47; *see, e.g.*, Scott, *supra* note 25, at 2–3 (distinguishing res judicata from collateral estoppel).

70. *Astoria*, 501 U.S. at 107.

capacity."[71] However, this was a "lenient presumption"[72] that could be overcome by an explicit or implied indication that Congress had not intended an agency's determinations to have collateral estoppel effect.[73] In *Astoria*, the Age Discrimination in Employment Act[74] (ADEA), which was the basis of Solimino's claim, required the filing of a claim with the state agency before filing in federal court.[75] The Court reasoned that, if collateral estoppel were applied, it would effectively make it impossible to pursue ADEA claims in federal court.[76] As Congress had clearly contemplated the availability of federal remedies in the ADEA, the Court concluded that the state agency's decision could not have collateral estoppel effect.[77]

Despite not granting collateral estoppel effect to the agency determination, *Astoria*'s reasoning actually strengthened the case for the courts to find that administrative adjudications had collateral estoppel effect.[78] Before *Astoria*, courts could still plausibly claim that according an agency determination collateral estoppel effect was entirely within a court's discretion.[79] After *Astoria*, however, the lower courts had to recognize the presumption that agencies were authorized to make adjudicative determinations with collateral estoppel effect.[80] The reasoning of the case also differed from *Utah Construction* in that it did not rest its analysis on the equitable factors of common law that Justice White cited as making collateral estoppel appropriate in the administrative context,[81] but instead relied on legislative intent and statutory structure.[82] Petitioners could now argue that, not only could the courts give collateral estoppel effect to administrative determinations, but that they were required to by statute.[83]

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71. *Id.* at 108.
72. *Id.* at 112.
73. *Id.* at 108.
74. 29 U.S.C. § 621 (2012).
75. *Astoria*, 501 U.S. at 110–11.
76. *Id.* at 110.
77. *Id.* at 112–13.
78. *See, e.g.*, B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1303–05 (2015) (citing *Astoria* as endorsing collateral estoppel from administrative adjudications).
79. *See id.* at 1310 (Thomas, J., dissenting) ("The Court today applies a presumption that when Congress enacts statutes authorizing administrative agencies to resolve disputes in an adjudicatory setting, it intends those agency decisions to have preclusive effect in Article III courts. That presumption was first announced in poorly supported dictum in a 1991 decision of this Court . . . .").
80. *See, e.g.*, Tice v. Bristol-Myers Squibb Co., 325 F. App'x 114, 117 (3d Cir. 2009) (affirming the collateral estoppel effect of an agency decision); Duvall v. Att'y Gen., 436 F.3d 382, 387 (3d Cir. 2006) (citing *Astoria* for the proposition that "Congress may be presumed, when enacting a statute granting to an agency adjudicatory authority, to mandate adherence to the doctrine of collateral estoppel"). *But see B & B Hardware*, 135 S. Ct. at 1311 (Thomas, J., dissenting) (arguing that *Astoria*'s presumption in favor of collateral estoppel was mere dicta).
81. *See supra* Part I.B.1.
82. *See B & B Hardware*, 135 S. Ct. at 1303.
83. *See id.*

3. *B & B Hardware*'s Two-Step Analysis

These different collateral estoppel analyses were united by the Supreme Court in *B & B Hardware*. In *B & B Hardware*, Hargis Industries had attempted to register a trademark with the Trademark Trial and Appeal Board (TTAB), but was successfully opposed by B & B Hardware, which already was using a similar trademark.[84] While the case was in front of the TTAB, B & B Hardware filed a trademark infringement claim against Hargis in federal court.[85] After the TTAB decision in favor of B & B Hardware, B & B Hardware claimed that Hargis was estopped from launching a collateral attack on the TTAB decision in federal court.[86] The district court rejected the assertion of collateral estoppel, and the case was eventually appealed to the Supreme Court.[87]

Justice Alito, writing for the Court, applied a two-step process to determine whether collateral estoppel prevented Hargis from bringing the suit.[88] First, citing *Astoria*, Justice Alito determined that there was nothing in the statutory scheme that could overcome the presumption that the TTAB was acting in its judicial capacity and that its determinations were entitled to have collateral estoppel effect in subsequent proceedings.[89] Second, the Court applied the common law collateral estoppel factors, citing the Restatement (Second) of Judgments.[90] The Court held that Hargis—the party against whom estoppel was asserted—had had a fair chance to litigate the issue before the TTAB,[91] the issue before the TTAB was essentially the same issue that arose in the subsequent suit,[92] and the issue was explicitly decided in the TTAB decision.[93] The Court, therefore, determined that the TTAB decision was entitled to collateral estoppel effect in the subsequent litigation.[94]

The line of cases from *Utah Construction* through *B & B Hardware* created a template for deciding when an administrative adjudication should be accorded collateral estoppel effect in federal court. *Utah Construction* suggested that the common law collateral estoppel analysis could be applied to administrative decisions.[95] *Elliot* and *Astoria* established that, when Congress has authorized an agency to adjudicate, its determinations have a presumptively preclusive effect in federal court.[96] Finally, *B & B*

84. *Id.* at 1299.
85. *Id.* at 1302.
86. *Id.*
87. *Id.*
88. *Id.* at 1305–07.
89. *Id.* at 1303.
90. *Id.* at 1306 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982)).
91. *Id.* at 1309.
92. *Id.* at 1306–07.
93. *Id.* at 1307.
94. *Id.* at 1310.
95. *See supra* notes 48–53 and accompanying text.
96. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991); Univ. of Tenn. v. Elliot, 478 U.S. 788, 797 (1986); *supra* Part I.B.2.

Hardware consolidated these principles into a two-step analysis: First, the agency must be acting in its "judicial capacity,"[97] and there can be nothing in its statutory scheme that states or implies that Congress did not intend its determinations to have issue-preclusive effect.[98] Second, the application of collateral estoppel has to be equitable under a common law analysis.[99] Though certainly not immune from criticism,[100] this framework provides reasonably clear criteria under which courts can decide when to apply collateral estoppel from administrative adjudications in federal court.

II. COLLATERAL ESTOPPEL AMONG ADMINISTRATIVE AGENCIES

The architecture of the modern administrative state often requires agencies to conduct parallel, recurring, or overlapping adjudications,[101] meaning that the same party can be subject to proceedings concerning the same set of facts more than once. This raises the risk of inconsistent agency determinations, creates the possibility of repetitive or vexatious litigation, and promotes the general inefficiency of conducting multiple fact findings on the same issue.[102] These are the same basic concerns that have driven the adoption of collateral estoppel by the courts.[103]

B & B Hardware creates a template for courts to apply collateral estoppel from an administrative adjudication to a federal court proceeding, but it does not address how to apply collateral estoppel from one agency decision to another.[104] Applying collateral estoppel across or within agencies increases the complexity of the common law collateral estoppel analysis and raises a host of concerns that are absent from the comparatively straightforward process of applying agency decisions in court.[105] Part II.A examines the conflicting guidance courts have given when determining the collateral estoppel effect of agencies' prior adjudications. Part II.B analyzes the myriad ways that agencies themselves have applied collateral estoppel in their adjudications.

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97. *See B & B Hardware*, 135 S. Ct. at 1303 (citing *Elliot*, 478 U.S. at 797).

98. *See id.* (citing *Astoria*, 501 U.S. at 108).

99. *See id.* at 1306–10 (analyzing the TTAB's decision under the common law standard for applying collateral estoppel).

100. *See, e.g.*, Brown, *supra* note 32, at 819, 851 (asserting the need for stricter, more formal requirements).

101. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134–35 (2012) (discussing the increased overlap of jurisdiction between agencies); Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 711 (2013) (analyzing the overlapping jurisdictions of newly created financial regulatory agencies).

102. *See* Freeman & Rossi, *supra* note 101, at 1145–46 (enumerating the potential conflicts and inefficiencies of concurrent agency jurisdiction).

103. *See, e.g.*, Montana v. United States, 440 U.S. 147, 153–54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.").

104. *See B & B Hardware*, 135 S. Ct. at 1303. The Court's decision only addressed situations "where a single issue is before a court and an administrative agency." *Id.*

105. *See supra* notes 54–57 and accompanying text.

A. Application of Collateral Estoppel by the Courts

This section examines two questions that regularly arise when parties assert that administrative adjudications have collateral estoppel effect in subsequent administrative adjudications. First, what collateral estoppel effect should an agency give to its own prior adjudications on the same issue? Second, what collateral estoppel effect should an agency give the determinations of other agencies? Part II.A.1 examines the conflicting guidance courts have given when determining the collateral estoppel effect of an agency's own prior adjudications. Part II.A.2 discusses the lack of a clear standard for courts to use when applying collateral estoppel between different agencies' adjudications.

1. Concurrent and Recurring Adjudications by the Same Agency

The first situation that requires the courts to determine the degree to which an agency should or can recognize the collateral estoppel effects of its own decisions occurs when a single event triggers more than one adjudication by the same agency.[106] The adjudications can occur simultaneously or successively, either by chance or by design, as part of a multi-step process.[107]

While this situation arises in a variety of administrative agencies,[108] it commonly occurs in the context of immigration status decisions made by USCIS (formerly the Immigration and Naturalization Service (INS)).[109] This is partly due to the sheer number of determinations that USCIS is asked to make[110] and partly due to the parallel and repetitive filings required by the regulatory scheme.[111] For instance, a prospective immigrant may have to apply for an entry visa, a work permit, and a green card.[112] The requests to obtain these documents can be filed simultaneously or successively, and the order in which determinations are made on each request depends largelyon processing times rather than any prerequisite that

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106. *See, e.g.*, Amrollah v. Napolitano, 710 F.3d 568, 570–71 (2013) (noting that illegal entry into the United States required asylum hearings and permanent residency decisions for Amrollah, his wife, and his children).

107. *See, e.g.*, *id.* at 571 (granting of asylum was a precondition for a hearing on permanent residency status); Adjustment of Status to That of Person Admitted for Permanent Residence, 8 C.F.R. § 1245.1(a) (2015) (allowing adjustment of status to be filed before visa has been granted, so the two determinations may be made simultaneously or successively).

108. *See, e.g.*, Office of Workers' Comp. Programs v. Saulsberry, 887 F.2d 667, 668 (6th Cir. 1989) (examining an assertion of collateral estoppel within the Department of Labor); Michigan v. Thomas, 805 F.2d 176, 185 (6th Cir. 1986) (examining an assertion of collateral estoppel within the Environmental Protection Agency).

109. *See infra* note 115 (providing examples of immigration cases involving multiple adjudications).

110. USCIS receives approximately six million petitions every year. *Immigration and Citizenship Data*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/tools/reports-studies/immigration-forms-data (last visited Apr. 29, 2016) [https://perma.cc/78Y7-FXET].

111. In this Note, "regulatory scheme" refers to the decisional procedures and standards created by the agency. This is distinct from the "statutory scheme," which refers to the procedures required by Congress.

112. *See generally* Immigration Regulations, 8 C.F.R. §§ 1101–1299 (2015).

one must be obtained before another.[113] Once obtained, these documents must regularly be renewed.[114] Many of these decisions require the consideration of the same facts and legal issues, leading parties to assert collateral estoppel.[115]

The second situation in which agencies are asked to apply the collateral estoppel effect of an agency decision in that agency's subsequent adjudications is when a regulatory agency, such as the Securities and Exchange Commission (SEC) or Environmental Protection Agency (EPA), revisits its decision concerning the permissibility of an activity. For instance, the SEC may reexamine the same type of financial transaction[116] or the EPA may regulate the same industrial activity repeatedly.[117]

If, for whatever reason, the agency refuses to recognize collateral estoppel from the prior adjudication, the parties may ask that the agency's collateral estoppel decision be reviewed in federal court.[118] Some of the usual collateral estoppel considerations are moot in intra-agency collateral estoppel, so courts use a modified test.[119] In deciding whether to enforce collateral estoppel in intra-agency decisions, courts consider whether the issue was fully litigated,[120] whether the issue is identical in both

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113. A person who is physically in the United States may file for adjustment of status before their visa has been approved. Adjustment of Status to That of Person Admitted for Permanent Residence, 8 C.F.R. § 1245.1(a) (2015).

114. *See, e.g.*, Conditional Basis of Lawful Permanent Residence Status, 8 C.F.R. § 1216 (2015).

115. *See, e.g.*, *In re* Petitioner [Identifying Information Redacted], 2015 WL 4385367, at *9 (USCIS June 23, 2015) (dismissing the petitioner's collateral estoppel argument based on an earlier determination in a multistep immigration proceeding); *see also* Mugomoke v. Hazuda, No. 13-cv-00984-KJM-KJN, 2014 WL 4472743, at *6 (E.D. Cal. Sep. 11, 2014) (analyzing an assertion of collateral estoppel from prior decisions in multistage asylum process).

116. *See, e.g.*, SEC v. First Jersey Sec., 101 F.3d 1450, 1463–64 (2d Cir. 1996) (allowing the SEC to reexamine the legality of a type of transaction that it had previously allowed).

117. *See, e.g.*, Michigan v. Thomas, 805 F.2d 176, 185 (6th Cir. 1986) (allowing the EPA to impose higher emissions standards than it had previously required).

118. *See supra* note 13. Agency decisions are also reviewable on constitutional due process grounds. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

119. *See supra* note 26 and accompanying text (explaining collateral estoppel factors). Agencies must state the reasons for their judgments and are in privity with themselves and other government agencies, so these two factors are not generally disputed. *See* 5 U.S.C. § 557(c) (2012) (requiring agencies subject to the APA to state the reasons for their conclusions); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402–03 (1940) (holding that government officers are in privity with one another for collateral estoppel purposes); United States v. Willard Tablet Co., 141 F.2d 141, 143 (7th Cir. 1944) (holding federal agencies are in privity with one another).

120. *See* Duvall v. Att'y Gen., 436 F.3d 382, 391 (3d Cir. 2006) ("[Collateral estoppel] will not preclude relitigation of the issue when there is a substantial difference in the procedures employed by the prior and current tribunals."); City of Pompano Beach v. Fed. Aviation Admin., 774 F.2d 1529, 1538 n.10 (11th Cir. 1985) (noting that the "agency proceeding . . . does not meet the test that the parties were afforded a full opportunity to litigate"); *Mugomoke*, 2014 WL 4472743, at *8–9 (holding that an asylum interview was not a proceeding that could form the basis of collateral estoppel).

proceedings,[121] and whether a change of fact or law occurred between the proceedings that would justify a different outcome.[122]

Courts have considered both the depth and purpose of proceedings in determining their collateral estoppel value.[123] For instance, a determination made in an initial asylum interview does not have preclusive effect on subsequent immigration proceedings seeking permanent residency.[124] Due to the vast variety of formal and informal agency adjudications, an emphasis on this factor may weigh against the application of collateral estoppel.[125] By contrast, when courts consider the collateral estoppel effect of an agency's own determination, they are likely to determine that the underlying issues are identical.[126] Agency adjudications, as creatures of statute, have limited subject matter jurisdictions, and the same legal or factual determination that is dispositive in one agency adjudication is often dispositive in subsequent adjudications.[127]

If the issue is identical and was previously litigated, courts then consider whether a change of fact or law has occurred that is sufficient to defeat collateral estoppel.[128] Generally speaking, the courts give regulatory agencies deference in claiming a change in circumstance is sufficient to defeat collateral estoppel.[129] This is unremarkable, given that it is a well-established principle of administrative law that agencies may regulate and announce new regulations using any method at their disposal, including adjudications.[130] In *SEC v. Chenery Corp.*,[131] the Court held that an administrative agency could craft a regulation through adjudication, even in the absence of a legislative change or formal rulemaking.[132] An agency

121. *See* Amrollah v. Napolitano, 710 F.3d 568, 572 (5th Cir. 2013).

122. *See id.*; *see also Duvall*, 436 F.3d at 391 (holding that collateral estoppel is not applicable when there is "a material intervening change in governing law or the burden of persuasion"); *Thomas*, 805 F.2d at 185 ("At no time should an agency be estopped from using its increased expertise.").

123. *See supra* notes 120–21 and accompanying text.

124. *See Mugomoke*, 2014 WL 4472743, at *6–7.

125. *See id.*

126. *See Amrollah*, 710 F.3d at 571–72; Office of Workers' Comp. v. Saulsberry, 887 F.2d 667, 667–68 (6th Cir. 1989); Dvareckas v. Sec'y of Health & Human Serv., 804 F.2d 770, 771 (1st Cir. 1986).

127. *See* cases cited *supra* note 126.

128. *See, e.g.*, *Amrollah*, 710 F.3d at 572 (noting that collateral estoppel is only appropriate if the relevant legal standard is unchanged); Bath Iron Works Corp. v. Office of Workers' Comp. Programs, 125 F.3d 18, 21–23 (1st Cir. 1997) (noting that a difference in burden of proof or decisional law could defeat the application of collateral estoppel); Michigan v. Thomas, 805 F.2d 178, 184–85 (6th Cir. 1986) (holding that increased agency expertise and information could defeat collateral estoppel).

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

130. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

131. 322 U.S. 194 (1947).

132. *Id.* at 202–03.

could approve of a certain practice in one adjudication and withdraw that approval in a subsequent adjudication.[133]

Reconciling this agency discretion with the application of collateral estoppel has caused courts some trouble. For instance, compare *Amrollah v. Napolitano* with *Michigan v. Thomas*.[134] In *Amrollah*, a petitioner who had previously been granted asylum was denied permanent residency.[135] In granting the petitioner's request for asylum, USCIS determined that he had not supported terrorism.[136] Between his grant of asylum and his application for residency, however, the 9/11 attacks occurred, and USCIS expanded its definition of "supporting terrorism." This, along with the shift in public policy toward increased security, was the basis of the denial of Amrollah's permanent resident status.[137] The Fifth Circuit reversed USCIS, noting that the underlying facts were the same and the legal standard for "supporting terrorism" had not changed sufficiently to justify the reversal of the asylum decision.[138]

In *Thomas*, the EPA refused to approve Michigan's proposed emissions rules, despite previously approving almost identical ones proposed by other states.[139] Like USCIS in *Amrollah*, on appeal to the circuit court, the EPA argued that a change in the scope of a definition justified its decision.[140] The Sixth Circuit held that the EPA was not collaterally estopped from holding Michigan to higher emissions standards.[141] Thus, in the absence of a Supreme Court determination, courts have been unable to provide clear guidance on when an agency is collaterally estopped by its previous decision.[142]

2. Overlapping Jurisdiction Between Agencies

Courts also have confronted collateral estoppel issues when parties in an agency adjudication seek to enforce collateral estoppel based on the adjudication of another agency.[143] These situations occur primarily when

133. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). Agencies may change their rules to adapt to changing circumstances and promulgate these changes through administrative adjudications. *See id.*

134. 805 F.2d 176 (6th Cir. 1986).

135. Amrollah v. Napolitano, 710 F.3d 568, 569 (5th Cir. 2013).

136. *Id.* at 570.

137. *Id.* at 571–72.

138. *Id.* at 573. *See generally supra* INTRODUCTION (recounting the case in detail and noting the dramatic geopolitical changes that occurred between Amrollah's asylum request and his permanent residency petition).

139. *Thomas*, 805 F.2d at 185.

140. *Id.*

141. *Id.*

142. This conflict is symptomatic of a larger tension between collateral estoppel and administrative law, which will be discussed *infra* Part IV.A.2.

143. *See* Crowley v. United States, 398 F.3d 1329, 1342 (Fed. Cir. 2004) (Dyk, J., concurring); Kramer v. Jenkins, 803 F.2d 896, 901 (7th Cir. 1986); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 299 (7th Cir. 1979); FTC v. Texaco, Inc., 555 F.2d 862, 894 (D.C. Cir. 1977).

agencies have overlapping jurisdiction.[144] Interagency collateral estoppel is more complex, as it occurs across a wider variety of situations.[145] It also has the potential to present a problem if one or both adjudicating agencies claim their determination is entitled to *Chevron* deference.[146]

Though the facts of the disputes about the application of interagency collateral estoppel vary much more widely, the legal arguments that the agencies present to courts tend to be recurring. As in intra-agency applications of collateral estoppel, courts consider the nature of the proceedings in which the issue was determined and whether the issue to be determined is the same in both adjudications.[147] Similarly, courts also consider whether changes in known facts or law are sufficient to defeat collateral estoppel.[148] However, when deciding to apply collateral estoppel across agencies, courts also are attentive to the differences in purpose and expertise of the agencies involved.[149]

For instance, in *Porter & Dietsch, Inc., v. FTC*,[150] Porter & Dietsch argued that an adverse decision by the Federal Trade Commission (FTC) was estoppped by an earlier Postal Service decision that held the marketing for Porter & Dietsch's product did not contain fraudulent claims.[151] The Seventh Circuit, however, disagreed.[152] The court noted numerous factors that militated against the application of collateral estoppel, finding that the FTC should not be prevented from using its increased subject matter expertise and that new information available to the FTC made the application of collateral estoppel inappropriate.[153]

In *Kramer v. Jenkins*,[154] the court allowed the Parole Commission to rely on an Internal Revenue Service (IRS) deficiency determination in denying a

144. *See Crowley*, 398 F.3d at 1342 (Dyk, J., concurring); *Kramer*, 803 F.2d at 901; *Porter & Dietsch, Inc.*, 605 F.2d at 299; *Texaco, Inc.*, 555 F.2d at 894. The cases deal with the overlapping jurisdictions of the Merit Systems Protection Board, the IRS, and the FTC, respectively. *See generally* Freeman & Rossi, *supra* note 101; Gersen, *supra* note 101.

145. It does, however, affect some agencies more than others. In particular, the FTC is often a party to these disputes, though under widely varying circumstances. *See* Gersen, *supra* note 101, at 707, 709 n.91.

146. *See infra* notes 180–85 and accompanying text.

147. *See, e.g.*, Bath Iron Works Corp. v. Office of Workers' Comp. Programs, 125 F.3d 18, 21–23 (1st Cir. 1997) (noting that a difference in burden of proof or decisional law could defeat the application of collateral estoppel); Kairys v. INS, 981 F.2d 937, 939–40 (7th Cir. 1992) (discussing the proceedings to which the INS could accord collateral estoppel effect).

148. *See Kramer*, 803 F.2d at 902 (expressing dissatisfaction that the IRS determination being given collateral estoppel effect might be factually incorrect).

149. *See Porter & Dietsch, Inc*., 605 F.2d at 300 (allowing the FTC to relitigate an issue on public policy grounds); *Texaco, Inc.*, 555 F.2d at 893–94 (Levethal, J., concurring) (discussing limitations on collateral estoppel based on the type and purpose of the agency proceeding).

150. 605 F.2d 294 (7th Cir. 1979).

151. *Id.* at 299.

152. *Id.*

153. *Id.* at 300 ("[I]t deals with a body of knowledge . . . that is constantly increasing. The government is not precluded from subsequently relitigating . . . under these circumstances.").

154. 803 F.2d 896 (7th Cir. 1986).

prisoner parole.[155] Arnold Kramer was convicted of failing to file income tax returns and sentenced to four years in prison.[156] When he applied for parole, the Parole Commission relied on an IRS letter stating the amount of tax Kramer owed to determine that the seriousness of Kramer's crime required him to serve at least thirty-six months of his sentence.[157] Kramer appealed the decision, arguing that the Parole Commission had acted unconstitutionally by failing to give him an opportunity to challenge the IRS's determination of his liability.[158]

Judge Easterbrook, writing for the majority, disagreed.[159] He went further, stating that not only was the Parole Commission permitted to rely on the IRS's determination, but that it was probably required to defer to the IRS's expertise on the matter.[160] Though the court relied on the same consideration of agency expertise as in *Porter & Dietsch*, this time the circuit court seemed to arrive at the opposite conclusion by not only permitting the use of collateral estoppel, but also implying that its use might be mandatory.[161]

These decisions could be reconciled on the theory that the courts in each case simply were deferring to the agency to decide what effect the agency must give the determinations of another agency.[162] Judge Easterbrook's dicta at the end of *Kramer*, however, appears to indicate that he believes that agencies may be required to apply collateral estoppel from other agency determinations.[163] Furthermore, in *Kairys v. Immigration Naturalization Services*,[164] the Seventh Circuit noted that agency discretion in deciding when to apply collateral estoppel was limited, but declined to define those limits.[165]

Other courts also have struggled to produce a clear standard for applying collateral estoppel across agencies. In *FTC v. Texaco, Inc.*,[166] the D.C. Circuit rejected Texaco's assertion of collateral estoppel based on a Federal Power Commission (FPC) decision.[167] Though it followed the pattern of

155. *Id.* at 901.
156. *Id.* at 897.
157. *Id.* at 898.
158. *Id.*
159. *Id.* at 902.
160. *See id.* at 901 ("Once one agency of the government makes a finding, the Constitution does not require that the finding be subject to collateral attack in another agency. Quite the contrary, principles of administrative preclusion may bind agencies.").
161. *See id.*
162. In both of these cases the courts ultimately end up endorsing the agency's view on whether collateral estoppel should apply. *See generally* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding courts should give special weight and deference to well-reasoned agency judgments).
163. *See Kramer*, 803 F.2d at 902. *But see id.* at 903 (expressing concern over the use of collateral estoppel stemming from an IRS determination that a court might overturn on review).
164. 981 F.2d 937 (7th Cir. 1992).
165. *See id.* at 940 (noting the agency adjudicative body did not possess "a free-swinging, uncanalized discretion").
166. 555 F.2d 862 (D.C. Cir. 1977).
167. *Id.* at 885.

courts deferring to the agency position on collateral estoppel, the panel's judges could not agree on why the FPC decision did not bind the FTC.[168] Arguably, the FPC had more subject matter expertise than the FTC, and in the opinion it is unclear whether the court relied more on procedural posture or substantive administrative law.[169]

Additionally, even when an agency acts within its subject matter expertise, courts sometimes decline to show deference to the agency's position on collateral estoppel. In *Bath Iron Works Corp. v. Office of Workers' Compensation Programs*,[170] the First Circuit required the Department of Labor (DOL) to give collateral estoppel effect to a state agency's workers' compensation determination.[171] Even though the court admitted federalism did not strictly require the application of collateral estoppel, as it might have in *Elliot*,[172] the court held that "a federal agency is normally bound to respect findings by another agency acting within its competence."[173] The court then conducted the common law multi-factor collateral estoppel analysis and concluded that the DOL had erred and that collateral estoppel did apply.[174] The court also rejected the idea that new information about the claimant's medical condition defeated collateral estoppel, noting that even a decision that was clearly wrong in light of new information could be protected by collateral estoppel.[175]

Thus, an examination of multiple cases across the circuits presents no clear rule about when collateral estoppel applies across administrative proceedings.[176] Another aspect of the issue that courts have not addressed is what effect *Chevron* deference has on the application of collateral estoppel across agencies.[177]

In *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*,[178] the Supreme Court held that courts should defer to an agency's interpretation of an ambiguous statute as long as the agency's interpretation is permissible.[179] When jurisdictions overlap, however, agencies sometimes propose conflicting interpretations of the same ambiguous statute, each

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168. *See Subpoenas*, *supra* note 52, at 1247–48.

169. *See Texaco, Inc.*, 555 F.2d at 880–81 (declining to consider the merits of a collateral estoppel defense because it was improper at that stage).

170. 125 F.3d 18 (1st Cir. 1997).

171. *Id.* at 22–23.

172. *Id.* at 21. In *Elliot*, the state agency's decision had the issue-preclusive effect a state court would give it. *See* Univ. of Tenn. v. Elliot, 478 U.S. 788, 798–99 (1986).

173. *Bath Iron Works*, 125 F.3d at 21.

174. *Id.* at 22.

175. *Id.* at 22–23.

176. *See id.* at 22 (analyzing a claim using the common law collateral estoppel factors); Kramer v. Jenkins, 803 F.2d 896, 902 (7th Cir. 1986) (comparing agency expertise and decision-making procedures); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 299–300 (7th Cir. 1979) (considering agency expertise); FTC v. Texaco, Inc., 555 F.2d 862, 874 (D.C. Cir. 1977) (comparing the nature of the agency proceedings).

177. *See* Freeman & Rossi, *supra* note 101, at 1203–06 (speculating on the effect overlapping agency jurisdictions will have on *Chevron* deference).

178. 467 U.S. 837 (1984).

179. *See id.* at 843.

arguing their interpretation deserves *Chevron* deference.[180] Collateral estoppel applies to matters of fact and law,[181] and agency adjudicative determinations may contain statutory interpretation.[182] This means that, if a court gives collateral estoppel effect to one agency's statutory interpretation, it could preclude another agency from interpreting the ambiguous statute with the deference that it would usually enjoy under *Chevron*.[183] The increasing number of agency adjudicative bodies and the proliferation of statutes, which are administered by multiple regulatory bodies with concurrent jurisdiction,[184] increase the chances that the application of collateral estoppel across different agencies will require courts to address agencies' conflicting statutory interpretations.[185]

B. The Ways in Which Agencies Currently Apply Collateral Estoppel

The lack of consensus among the courts as to when collateral estoppel applies in administrative adjudications has not stopped agencies from developing their own methods of determining when collateral estoppel should apply.[186] There are three types of rules agencies employ. The first rule mirrors the common law collateral estoppel analysis and is generally applied by administrative law judges (ALJs) when considering the effect of prior adjudications by their own or another agency.[187] The second type of rule is one of interagency deference and is applied when agencies defer to the subject matter expertise of another agency that has previously adjudicated an issue.[188] The third type of rule is a rigid, per se rule used by an agency to determine what effect to give its own prior determinations.[189] Whichever rule they choose, however, agencies differ from courts by maintaining a much greater degree of discretion when deciding to allow or deny a previous administrative adjudication collateral estoppel effect.[190]

The first way agencies apply collateral estoppel in their adjudications resembles the operations of the courts. Agencies that have ALJs or various levels of appellate review often employ the common law test to determine when to apply collateral estoppel from their own or another agency's prior adjudication.[191] The Merits System Protection Board (MSPB), which

180. *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 148–50 (1991) (resolving a dispute in which an administrative adjudication's interpretation of the statute conflicted with the Secretary of Labor's prior interpretation).

181. *See supra* note 25 and accompanying text.

182. *See supra* notes 126–30 and accompanying text.

183. *See, e.g.*, *Martin*, 499 U.S. at 148–50.

184. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

185. *See* Gersen, *supra* note 101, at 691–92.

186. *See infra* notes 191–201 and accompanying text.

187. *See infra* notes 191–95 and accompanying text.

188. *See infra* notes 196–98 and accompanying text.

189. *See infra* notes 200–01 and accompanying text.

190. *See infra* notes 205–11 and accompanying text.

191. For examples of agency decisions by ALJs and appeal boards, see *infra* notes 192–95.

reviews the decisions made by federal agencies to dismiss employees, regularly decides cases on the basis of collateral estoppel.[192] In doing so, it explicitly invokes the same four-factor test used by the federal courts.[193] It applies collateral estoppel both from its own decisions and the decisions of other federal agencies.[194] Other agencies, as varied as the Nuclear Regulatory Commission and the Commodity Futures Trading Commission, have found it appropriate to apply collateral estoppel on similar grounds.[195]

The second way agencies apply collateral estoppel in their adjudications is less common and occurs when agencies defer to the expertise of another agency to decide a specific issue.[196] Agencies can choose to rely on the prior adjudications of other agencies when the subject matter presented is complex or outside their scope of expertise.[197] The actions of the Parole Commission in *Kramer* fit this model.[198]

The last way agencies apply collateral estoppel in their adjudications is through per se rules governing which proceedings are entitled to collateral estoppel effect.[199] The SEC, for instance, considers that pleas in criminal cases have collateral estoppel effect.[200] By contrast, USCIS has rules that say that the granting of certain types of petitions do not have collateral estoppel effect on subsequent adjudications.[201]

192. *See, e.g.*, Lee v. U.S. Postal Service, AT-0752-12-0618-B-1, 2014 WL 5326062 (M.S.P.B. Aug. 13, 2015); Greer v. U.S. Air Force, DA-0752-15-0324-I-1, 2015 WL 4877902 (M.S.P.B. Aug. 8, 2015); Baseden v. Navy, DC-3443-15-0743-I-1, 2015 WL 4712165, (M.S.P.B. Jul. 31, 2015); Payer v. Dep't of the Army, 19 M.S.P.R. 534, 536–38 (M.S.P.B. 1984).

193. *See, e.g.*, *Lee*, 2014 WL 5326062 ("[C]ollateral estoppel, or issue preclusion, is appropriate when (1) an issue is identical to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party precluded was fully represented in the prior action." (citation omitted)).

194. *See id.* (holding jurisdictional determination in previous appeal collaterally estopped appellant in subsequent appeal); *Payer*, 19 M.S.P.R. at 537 (applying collateral estoppel from a previous Department of the Army pay increase determination).

195. *See, e.g.*, Harter v. Iowa Grain Co., CFTC No. 98-R095, 1999 WL 325337, at *35 (May 20, 1999) (reversing the ALJ for failing to apply collateral estoppel); *In re* Tex. Utils. Generating Co., 18 N.R.C. 36, 37–38 (1983) (holding DOL decision had a collateral estoppel effect).

196. *See, e.g.*, *In re* Hanover House, Postal Service Nos. 2/143 & 2/149 (1975) (relying in part on findings of fact made by the FTC to determine whether information contained in mailing was false).

197. *See, e.g.*, Kramer v. Jenkins, 803 F.2d 896, 899 (7th Cir. 1986) (quoting a passage showing that the Parole Commission relied on IRS findings).

198. *See id.*

199. Per se rules do not invoke a balancing test, but simply specify situations in which collateral estoppel applies. *See generally* Brown, *supra* note 32 (explaining the concept of per se rules for collateral estoppel).

200. *See, e.g.*, *In re* Michael Lapp, Exchange Act Release No. 591, 72 SEC Docket 97, 98–99 (Mar. 29, 2000) (granting criminal plea collateral estoppel effect). *But see* SEC v. Monarch Funding Corp., 192 F.3d 295, 306–07 (2d. Cir. 1999) (preventing the SEC from giving sentencing hearings collateral estoppel effect).

201. *See* Denials, Appeals, and Precedent Decisions, 8 C.F.R. § 103.3(c) (2012); *In re* [Identifying Information Redacted], 2012 WL 8526897, at *5 (USCIS Dec. 7, 2012) (denying collateral estoppel effect to the grant of a petition for a family member).

Whichever reasoning they use, agencies generally invoke collateral estoppel when they are faced with repeated proceedings against private parties and when relitigating the issue is unnecessary because a record on which the agency can make a decision has been developed in a prior adjudication.[202] This parallels the concerns of courts when they apply collateral estoppel to promote judicial economy and finality between parties.[203] Courts reserve broad discretion in deciding whether to apply collateral estoppel.[204] Agencies, however, claim the power to abrogate collateral estoppel altogether when it no longer serves the agencies' policy purposes.[205]

Agencies are careful to maintain that collateral estoppel may not apply in their adjudications even if previous practice would indicate otherwise.[206] This reflects a principle of administrative law, which requires that an agency maintain flexibility in decision making.[207] The decisions of the courts in *Porter & Dietsch*, *Thomas*, and *Duvall v. Attorney General*[208] endorse this line of reasoning by relying on the agency's interest in improving its expertise, developing its regulations, and achieving Congress's policy goals.[209] In all of these cases, the common law analysis probably would have weighed in favor of applying collateral estoppel.[210] The courts reviewing the agency decisions in these cases recognized that considerations of administrative law required that agencies be given more leeway and not be so rigidly bound by past decisions.[211]

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202. *See, e.g.*, Lee v. U.S. Postal Service, AT-0752-12-0618-B-1, 2014 WL 5326062 (M.S.P.B. Aug. 13, 2015) (applying collateral estoppel to prevent the matter from being litigated for a third time); *In re* Tex. Utils. Generating Co., 18 N.R.C. 36, 37–38 (1983) (holding the previously conducted DOL fact finding process was sufficient to have collateral estoppel effect).

203. *See supra* note 103.

204. *See supra* note 27.

205. *See, e.g.*, *supra* note 201; RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (AM. LAW INST. 1982) (noting as an exception to the general rule that agencies may relitigate issues when invocation of collateral estoppel is inconsistent with legislative policy).

206. For instance, the MSPB decisions recognizing collateral estoppel carry a heading disclaiming their precedential value. *See Lee*, 2014 WL 5326062. USCIS also specifically denies that its use of collateral estoppel in unpublished decisions can support its use in other cases. *See In re* Petitioner [Identifying Information Redacted], 2015 WL 4385367, at *9 (USCIS June 23, 2015) (noting that "unpublished decisions are not . . . binding").

207. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) ("[T]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.").

208. 436 F.3d 382 (3d Cir. 2006).

209. *See* Duvall v. Att'y Gen., 436 F.3d 382, 390–91 (3d Cir. 2006); Michigan v. Thomas, 805 F.2d 178, 179–80 (6th Cir. 1986); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 299–300 (7th Cir. 1979).

210. For instance, in *Duvall*, USCIS was allowed to relitigate an issue after government error resulted in an outcome that was clearly erroneous (the USCIS attorney at the initial deportation hearing failed to present evidence showing Duvall, a Jamaican national, was an alien). *Duvall*, 436 F.3d at 383–84, 391. In *United States v. Moser*, the Court held that collateral estoppel prevented the government from relitigating after an unappealed legal error led to a clearly erroneous outcome. 266 U.S. 236, 241–42 (1924).

211. *See supra* note 209.

III. THREE MODELS FOR APPLYING COLLATERAL ESTOPPEL IN ADMINISTRATIVE ADJUDICATIONS

Part III explores three analytic frameworks for determining when administrative adjudications have collateral estoppel effect on subsequent adjudications. Part III.A examines the Court's reasoning in *B & B Hardware* and discusses the applicability of this analysis in administrative adjudications. This view flows from the generally held assumption among commentators that whatever has the power to bind a federal court can bind a federal agency.[212] Therefore, any agency decision that would have collateral estoppel effect in federal court under the *B & B Hardware* analysis would also collaterally estop parties in subsequent administrative adjudications.[213]

Part III.B considers a second approach, which rejects the case-by-case analysis in favor of per se rules. These rules would explicitly determine when an agency adjudication would have collateral estoppel effect in subsequent agency adjudications.[214] Commentators who are dissatisfied by the uncertainty in the application of collateral estoppel created by courts' reliance on multifactor tests often have advocated this view.[215]

Part III.C discusses the third approach, which is to allow each agency to decide which adjudicative determinations it will recognize as giving rise to collateral estoppel. This approach relies on current administrative and regulatory mechanisms to ensure that agency decisions are fair. It also relies on interagency cooperation mechanisms to ensure that agency findings are consistent with one another, with courts intervening only as referees of last resort in case of an intractable disagreement between agencies.[216]

A. The B & B Hardware *Approach*

This approach creates one standard for the application of collateral estoppel in federal proceedings. It applies the two-step *B & B Hardware* analysis to determine the collateral estoppel effect of administrative determinations in subsequent administrative adjudications. Part III.A.1 describes the framework, and Part III.A.2 discusses its benefits and drawbacks.

1. *B & B Hardware* Applied to Administrative Adjudications

After the *Utah Construction* Court suggested that administrative adjudications could have collateral estoppel effect in court, courts and commentators assumed that this also meant that administrative adjudications could have collateral estoppel effect in other administrative

212. *See infra* notes 217–23 and accompanying text.
213. *See infra* notes 224–31 and accompanying text.
214. *See infra* notes 274–77 and accompanying text.
215. *See infra* notes 262–73 and accompanying text.
216. *See infra* Part III.C.

adjudications.[217] *Administrative Collateral Estoppel: The Case of the Subpoenas* was one of the early academic considerations of how courts should apply collateral estoppel in the administrative context.[218] It examined the wide divergence of concurring and dissenting opinions expressed by the D.C. Circuit in *Texaco* and dealt with the issue of whether *Utah Construction* authorized the use of collateral estoppel in administrative adjudications summarily, determining that it did by implication.[219] Subsequent academic works, including the Restatement (Second) of Judgments, also contained this assumption.[220]

The Court endorsed this view indirectly in *Astoria* by holding that, when an administrative determination is not binding on a federal agency, it cannot be binding on a federal court.[221] This seemed to imply a congruity between an administrative agency's adjudicatory power to bind courts and its power to bind other agencies.[222] If this implied congruity is extended, *B & B Hardware* can be used to govern the use of collateral estoppel in administrative adjudications.[223]

Under *B & B Hardware*, courts and agencies would use a two-step analysis. They would first determine whether an agency's adjudicative determinations were entitled to collateral estoppel effect by examining the statutory scheme.[224] Then courts would determine if collateral estoppel was appropriate in the specific situation using a common law analysis.[225] The First Circuit's reasoning in *Bath Iron Works* neatly conforms to this template.[226] In that case, the court first examined the statutory scheme and discussed whether decisions made under the Longshoreman's Act had to be made de novo.[227] After the court determined that the Maine Workers' Compensation Commission had the power to make issue-preclusive determinations, it applied a common law collateral estoppel analysis.[228]

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217. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (AM. LAW INST. 1982) (implying collateral estoppel between administrative adjudications is the default rule by stating the exceptions).

218. *See Subpoenas*, *supra* note 52, at 1247.

219. *See id.* at 1248–49.

220. *See supra* note 217.

221. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 110 (1991) ("What does not preclude a federal agency cannot preclude a federal court . . . .").

222. *See id.*

223. *See* Ronald Mann, *Opinion Analysis: Justices Unsettled in Trademark Preclusion Dispute*, SCOTUSBLOG (Mar. 25, 2015, 10:38 AM), http://www.scotusblog.com/2015/03/opinion-analysis-justices-unsettled-in-trademark-preclusion-dispute/ (noting that the case can be used as a "compendium" of modern preclusion rules with wide applicability) [https://perma.cc/2E8M-C6CS].

224. *See* B & B Hardware, Inc. v. Hargis Indus., Inc. 135 S. Ct. 1293, 1303–04 (2015).

225. *See supra* Part I.B.3.

226. *See* Bath Iron Works Corp. v. Office of Workers' Comp. Programs, 125 F.3d 18, 20–23 (1st Cir. 1997).

227. *See id.* at 21.

228. *See id.* After a brief discussion of the complexities involved in determining whether a state administrative agency decision could have collateral estoppel effect in a federal agency's adjudication, the court noted the appellee was seeking to "defend the result on narrower and more conventional grounds," that is, attempting to defeat collateral estoppel by

Agency application of collateral estoppel is sometimes similar to the *B & B Hardware* two-step analysis.[229] Agencies often consider the statutory and regulatory scheme when deciding which adjudicative decisions give rise to collateral estoppel.[230] Agencies, and especially their administrative appeals boards, also regularly apply common law collateral estoppel factors.[231]

Finally, application of the *B & B Hardware* analysis could help courts resolve interagency conflicts involving statutory interpretation under *Chevron*. The first step of the *B & B Hardware* analysis requires the court (or adjudicative body) to consider the statutory scheme.[232] When there is a *Chevron* conflict, courts similarly look to the statutory scheme to try to determine which agency deserves greater deference.[233] When an agency interprets a statute of general applicability, such as the Administrative Procedure Act (APA), courts do not grant *Chevron* deference.[234] Courts also deny agencies *Chevron* deference when they interpret statutes that are primarily the domain of another agency.[235]

Applying these concepts to the *B & B Hardware* analysis, courts could decline to accord collateral estoppel to agency findings that rely on interpretations of general statutes, as such statutes fail to demonstrate congressional intent to invest the agency with the presumption of adjudicative authority.[236] Similarly, when both agencies are invested with adjudicative authority, the court could engage in an analysis to determine which agency is primarily responsible for conducting adjudications under the statute.[237] If neither of these analyses clearly favored one agency over the other, courts could continue with the common law portion of the *B & B Hardware* analysis.[238] If the agency decisions met the common law

arguing that the decisional law was different in the two proceedings. *Id.*; *see also supra* notes 171–75 and accompanying text.

229. *See supra* Part II.B (examining the ways in which agencies apply collateral estoppel).

230. *See In re* Petitioner [Identifying Information Redacted], 2015 WL 4385367, at *9 (USCIS June 23, 2015) (rejecting a collateral estoppel argument due to the multistep nature of immigration proceedings); *see also* Mugomoke v. Hazuda, No. 13-cv-00984-KJM-KJN, 2014 WL 4472743, at *6 (E.D. Cal. Sep. 11, 2014) (endorsing USCIS's position).

231. *See, e.g.*, *supra* note 192 and accompanying text.

232. *See supra* Part I.B.

233. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151–55 (considering the structure of the statutory scheme).

234. *See* Prof'l Reactor Operator Soc'y v. Nuclear Regulatory Comm'n, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (holding there is no *Chevron* deference when an agency interprets the APA).

235. *See* Gonzales v. Oregon, 546 U.S. 243, 267–69 (2006) (denying *Chevron* deference to the Attorney General when the FDA was primarily authorized to administer the statute); Gersen, *supra* note 101, at 714–15; Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 206–07; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 893 (2001).

236. *See supra* notes 72–77 and accompanying text (listing case law requiring legislative authority for agency adjudications to have collateral estoppel effect).

237. *See* Gersen, *supra* note 101, at 714–15.

238. *See supra* Part I.B.3 (explaining the steps of the *B & B Hardware* analysis).

standard for the application of collateral estoppel, the court would settle the conflict in favor of the agency who adjudicated first.[239]

2. Benefits and Drawbacks of the *B & B Hardware* Analysis

The *B & B Hardware* approach could increase the predictability with which collateral estoppel is applied while still allowing the courts the flexibility of an equitable balancing test.[240] Given the growth of the administrative state and proliferation of different types of administrative proceedings, a common complaint is that parties are often unsure how vigorously to contest adverse administrative determinations.[241] The consequences of the actual administrative decision may be minor but could have major legal consequences if given collateral estoppel effect.[242] The failure of courts to develop consistent lines of reasoning risks making the application of collateral estoppel appear arbitrary.[243] The application of the *B & B Hardware* rule, with its clear analytic steps, could go a long way to curing this defect.[244]

There are two possible drawbacks to using *B & B Hardware* to make collateral estoppel determinations in administrative adjudications. The first is that, as a rule designed to be used in courts, it fails to take into account the variety of procedures in which agencies make their decisions.[245] Administrative determinations made in less formal proceedings that are not procedurally rigorous enough to be given collateral estoppel effect in federal court would also not be given collateral estoppel effect in other similarly informal adjudications.[246] A formal test like *B & B Hardware* could place limits on agencies' ability to rely on each other's expertise.[247] This means that *B & B Hardware* could be underinclusive.[248] It could also be overinclusive, by forcing agencies to recognize the collateral estoppel

239. This method of settling interagency disputes could have the salutary effect of incentivizing agencies to act promptly to issue and clarify rules.

240. *But see* Levine, *supra* note 26, at 449–50 (arguing that collateral estoppel balancing tests are inherently unpredictable).

241. *See id.* at 435–36.

242. *See infra* Part III.B.1.

243. *See* Levine, *supra* note 26, at 449–50 (arguing that an unpredictable rule is worse than no rule).

244. *See id.* at 453–54 (noting the possibility of improving the application of collateral estoppel with a detailed balancing test).

245. *See, e.g.*, *Subpoenas*, *supra* note 52, at 1260 (noting that agencies have reclassified proceedings as being "adjudicative" or "nonadjudicative" in order to defeat the use of collateral estoppel).

246. *See supra* notes 220–23 and accompanying text (supporting the assumption of congruity between federal court and agency use of collateral estoppel).

247. *See, e.g.*, Kramer v. Jenkins, 803 F.2d 896, 901 (7th Cir. 1986) (rejecting formal requirements on collateral estoppel where one agency relies on another's expertise).

248. That is, it could be used to deny collateral estoppel effect to determinations that policy considerations suggest should be given collateral estoppel effect. Courts sometimes use this analysis to examine procedural due process claims. *See, e.g.*, Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 448 (1989) (explaining the concepts of overinclusion and underinclusion and their common uses in legal reasoning).

effect of prior procedurally sufficient adjudications, which would deprive agencies of the discretion to alter their positions and relitigate in the interests of public policy.[249]

Another objection is that structure of the dispute in *B & B Hardware* is different from the structure of the disputes in other administrative collateral estoppel cases.[250] *B & B Hardware* is a case between two private parties,[251] as is *Astoria*.[252] *Utah Construction* and *Elliot* have governmental bodies as one of the parties, but in neither case are the governmental bodies the adjudicative agencies whose decisions are in question.[253] The Court's reasoning in *B & B Hardware* is focused on the rights and expectations of the private parties and their need for finality on issues.[254]

However, in every case in which the courts are asked to compel or prevent an agency's application of collateral estoppel, the adjudicatory body is a party to the litigation.[255] Often times both parties are repeat players who are bound by statute or regulatory scheme to revisit the same issues periodically, whether or not collateral estoppel is applied.[256] This means that much of the Court's reasoning in *B & B Hardware* may not be relevant to the application of collateral estoppel in administrative adjudications.[257]

B. Per Se Rules Governing the Use of Collateral Estoppel

An alternative to *B & B Hardware*, or indeed any balancing test or multifactor analysis, is a per se rule. This section considers the proposals of

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249. *See* Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 299–300 (7th Cir. 1979) (holding public policy goals can override collateral estoppel); Isaac N. Groner & Herman Sternstein, *Res Judicata in Federal Administrative Law*, 39 IOWA L. REV. 300, 312 (1954) (arguing that the Food and Drug Administration should not be collaterally estopped by prior agency adjudications).

250. *See* B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1316–17 (2015) (Thomas, J., dissenting) (distinguishing public and private rights when applying collateral estoppel from an administrative adjudication); *Subpoenas*, *supra* note 52, at 1258–59, 1262 (distinguishing the interests of private parties as opposed to agencies in the application of collateral estoppel).

251. *B & B Hardware*, 135 S. Ct. at 1299.

252. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 106 (1991).

253. In *United States v. Utah Construction & Mining Co.*, the contracting agency was the Atomic Energy Commission, and the adjudicating agency was the Advisory Board of Contract Appeals. 384 U.S. 394, 400 (1966). In *University of Tennessee v. Elliot*, the University of Tennessee was sued in federal court. 478 U.S. 788, 794 (1986).

254. *B & B Hardware*, 135 S. Ct. at 1302–03.

255. *See supra* Part II.A. When a petitioner asks for judicial review of an agency's use or denial of collateral estoppel in an adjudication, the agency (or one of its officials) appears as an adverse party to defend its decision. *See generally* Administrative Procedure Act, 5 U.S.C §§ 701–706 (2012).

256. *See, e.g.*, Duvall v. Att'y Gen., 436 F.3d 382, 384–85 (3d Cir. 2006) (noting an alien had appeared in multiple immigration proceedings over fifteen years); Michigan v. Thomas, 805 F.2d 176, 179–80 (6th Cir. 1986) (reading the statutory provision to require periodic reformulation of the rule); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 299–300 (7th Cir. 1979) (considering at least three prior administrative adjudications that had been conducted about the marketing of the same type of product).

257. *See, e.g.*, *B & B Hardware*, 135 S. Ct. at 1316–17 (Thomas, J., dissenting) (arguing that the Court's reasoning should only apply to the public rights of private parties).

commentators who have argued that the application of collateral estoppel in administrative adjudications should be governed by per se rules. Part III.B.1 considers whether, in the administrative context, collateral estoppel's equitable balancing test should be replaced with a set of objective requirements designed to curb agency and judicial discretion and make the collateral estoppel effect of administrative adjudications more predictable.[258] Part III.B.2 considers potential benefits and limitations of this approach while examining a more flexible way to apply per se rules.

1. Adoption of Formal Per Se Rules for Collateral Estoppel

In a note entitled *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, David Brown argues that the increased application of collateral estoppel from administrative adjudications increases the risk of unfairness and inefficiency in subsequent administrative and judicial proceedings.[259] This risk primarily stems from the uncertainty surrounding the factors that courts consider when deciding to give an agency determination collateral estoppel effect.[260] Brown proposes to cure this defect by creating a formal checklist that an administrative adjudication must meet in order for its determinations to have collateral estoppel effect.[261]

Brown first discusses the increased application of collateral estoppel in administrative adjudications in the wake of *Utah Construction* and its progeny.[262] He then examines the factors that could make collateral estoppel appropriate as found by the Court in *Utah Construction*.[263] Brown argues that the requirements that the agency act in its judicial capacity and that adjudication give the parties a full and fair opportunity to litigate have been subject to a wide range of interpretations.[264]

Brown contends this uncertainty has two adverse effects.[265] First, it creates litigation inefficiencies in both administrative adjudications and federal courts.[266] Parties are unsure which administrative adjudications will have collateral estoppel effect and so have an incentive to litigate vigorously in otherwise low stakes administrative proceedings in order to protect themselves from an adverse decision that could be consequential in a future dispute.[267] Additionally, because parties cannot be certain whether an administrative adjudication will have collateral estoppel effect, the losing

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258. *See* Brown, *supra* note 32, at 818.
259. *Id*.
260. *Id.* at 819.
261. *Id.*
262. *Id.* at 827–28.
263. *Id.* Brown identifies four factors: the agency must have jurisdiction, be acting in a judicial capacity, properly resolve the issue, and give the parties a fair chance to litigate. *Id.*
264. *Id.* at 830–31.
265. *Id.* at 819.
266. *Id.*
267. *Id.* at 838–39.

party has an incentive to try to relitigate the issue in court, if only to find out whether it is estopped from doing so.[268]

The second concern Brown raises is unfairness.[269] He argues that the procedural variety of agency adjudicatory procedures, and the fact that regulatory agencies often act as parties rather than neutral arbitrators,[270] creates the risk that parties could be unfairly deprived of their chance to truly contest the issue.[271] Administrative adjudications have their own rules, which often limit the amount of evidence parties can present, the manner in which they can present it, and their ability to be represented by counsel.[272] Giving collateral estoppel effect to such a proceeding effectively would nullify the greater rights, protections, and opportunity to litigate that might be provided by a court or subsequent adjudicatory body.[273]

Brown proposes to minimize these problems through a seven-point checklist that administrative adjudications would have to meet for their determinations to be entitled to collateral estoppel effect.[274] These include the right to counsel and to cross-examine witnesses.[275] Essentially, under Brown's proposal, only court-like proceedings would be accorded collateral estoppel effect.[276] This would ensure both uniformity and fairness across all administrative proceedings.[277]

2. The Benefits and Limitations of Per Se Rules

Per se rules would ensure both uniformity and fairness across all administrative proceedings.[278] Litigants would know if any given adjudication has collateral estoppel effect and be able to adjust their behavior accordingly, eliminating the inefficiency of overlitigation and the unfairness of underlitigation.[279] However, Brown's specific proposals were designed with courts in mind, and only secondary consideration was given to collateral estoppel between administrative adjudications.[280] As with the *B & B Hardware* approach, Brown's proposals are not tailored to specific administrative adjudications and carry the risk of being underinclusive.[281] The procedural formality they require for a decision to have collateral estoppel effect would also be burdensome on agency decision making.[282]

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268. *Id.* at 839.
269. *Id.* at 842.
270. *Id.*
271. *Id.* at 842–43.
272. *Id.* at 844–45.
273. *See id.* at 845.
274. *Id.* at 848.
275. *Id.*
276. *Id.* at 851.
277. *See id.*
278. *See id.*
279. *See id.* at 838–39.
280. *See id.* at 848–49.
281. *See supra* notes 248–49 and accompanying text (discussing underinclusiveness).
282. *See* Brown, *supra* note 32, at 850–51 (noting that per se rules may decrease efficiency).

A more narrowly tailored version of the per se rules seeks to solve these problems.[283] In a note entitled *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, Brian Levine concurs with Brown about the cost of uncertainty inherent in the balancing test approach to collateral estoppel in administrative adjudications.[284] However, Levine dismisses the possibility of developing a single, comprehensive per se rule like the one proposed by Brown.[285] He believes that, given the variety on administrative and other proceedings, a comprehensive proposal for per se prohibitions is virtually impossible.[286] Levine instead argues that, in litigation where the benefits of predictability are high and the burden on courts of allowing relitigation of the issues is low, courts should develop per se rules limiting the collateral estoppel effect of previous administrative adjudications.[287] For instance, Levine argues in favor of a per se rule that administrative adjudications in unemployment claims do not give rise to collateral estoppel.[288]

Levine's per se rules have the benefit of providing increased predictability while still allowing agencies some flexibility.[289] Some agencies already have per se rules similar to the type he proposes.[290] However, a potential drawback of these narrowly tailored prohibitions is the complexity of the system they would create.[291] Levine's approach also combines a balancing test with per se rules, and it is unclear whether this would really create more certainty.[292]

C. Reasons for Giving Agencies the Discretion to Decide Which Administrative Adjudications Will Have Collateral Estoppel Effect

The application of collateral estoppel is usually classified as an area of procedural, rather than substantive, law.[293] Agencies have the discretion to choose which procedures they use, subject only to the requirements of the APA and their authorizing statute.[294] Therefore, it would be consistent with administrative law for courts to defer to agency determinations about when administrative adjudications should be accorded collateral estoppel effect within and across agencies.[295]

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283. *See generally* Levine, *supra* note 26.
284. *Id.* at 439–40.
285. *Id.* at 449.
286. *Id.* ("It would be impossible to evaluate every conceivable situation to which a per se prohibition may be appropriate . . . .").
287. *Id.* at 463–66.
288. *Id.* at 465.
289. *Id.* at 463–66.
290. *See supra* Part II.B.
291. *See* Levine, *supra* note 26, at 453–54.
292. *See id.*
293. *See, e.g.*, *id.* at 435 (labeling collateral estoppel as "an esoteric procedural doctrine").
294. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 523–24 (1978).
295. *See* Kairys v. INS, 981 F.2d 937, 939–40 (7th Cir. 1992) (holding that "the main task of the reviewing court is to make sure that the tribunal actually exercised its discretion").

There are, however, two major issues raised by allowing agencies the discretion to decide if and when to apply collateral estoppel. The first is the concern that this will lead to uncertainty and unfairness among the parties that have to appear in administrative adjudications.[296] The second is that allowing agencies the discretion to decide the extent to which they will apply collateral estoppel will lead to unresolved conflicts between agencies.[297]

Regarding the first concern, different agencies applying different rules, with the discretion to change those rules, will exacerbate the unpredictable nature of collateral estoppel.[298] However, agencies exercise their discretion to apply collateral estoppel most often by either applying the common law standard or formulating per se rules.[299] If the agency employs the common law balancing test, which is similar to the one used by courts,[300] the application of collateral estoppel is no more unpredictable than in court.[301] If they apply per se rules,[302] collateral estoppel is more predictable in the agency setting than in court.[303] Arguably, this makes collateral estoppel applied by agency discretion more predictable than that applied by courts.[304]

When agencies do change the rules by which they apply collateral estoppel, they cannot act unconstrainedly.[305] At a minimum, federal agency actions are reviewable for violations of due process under the U.S. Constitution and to ensure they are not "arbitrary," "capricious," or otherwise irrational under the APA.[306] In *Kramer*, for instance, the court reviewed the Parole Commission's use of collateral estoppel to ensure it met due process requirements.[307] Agencies also are subject to other

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296. *See, e.g.*, Brown, *supra* note 32, at 848 (arguing, inter alia, that only agency decisions subject to judicial review should be given collateral estoppel effect). See *supra* Part III.B.1 for a full discussion of these concerns.

297. *See generally* Freeman & Rossi, *supra* note 101.

298. *See* Levine, *supra* note 26, at 449–53.

299. *See supra* Part II.B.

300. *See supra* notes 192–95 and accompanying text (listing examples of agencies applying the common law balancing test).

301. *See supra* notes 192–95 and accompanying text.

302. *See supra* notes 200–01 and accompanying text (listing examples of agencies applying per se rules).

303. *See* Levine, *supra* note 26, at 436 (arguing that per se rules improve predictability).

304. *See id.* at 453 (arguing that the application of collateral estoppel is so unpredictable that any additional per se rule would simplify it).

305. An agency could not, for instance, give collateral estoppel effect to the findings of a court that had no jurisdiction. *See* Kairys v. INS, 981 F.2d 937, 939–40 (7th Cir. 1992).

306. *See* 5 U.S.C. § 706 (2012) ("The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.").

307. *See* Kramer v. Jenkins, 803 F.3d 896, 898 (7th Cir. 1986).

requirements that limit their discretion to apply collateral estoppel.[308] The Sarbanes-Oxely Act,[309] for instance, requires that administrative decisions made pursuant to it be given collateral estoppel effect.[310] Similarly, certain Title VII[311] issues adjudicated by the EEOC are binding in other agencies' adjudications.[312]

Agencies themselves also have an interest in acting in a rational and predictable manner.[313] Agencies are subject to political control and oversight.[314] An agency that acts in unpredictable ways or causes large amounts of uncertainty will draw criticism and find its actions curbed.[315] Even absent any other legal restraints, agencies tend to use their discretion to apply collateral estoppel in a predictable and equitable manner.[316]

The other major concern is that agencies that share regulatory space will choose not to honor collateral estoppel from one another's adjudications and cause parties to be subject to conflicting and inconsistent rulings.[317] In practice, agencies have little incentive to, and rarely do, work directly against one another in this way.[318] When they do disagree, there are safeguards in place to resolve the disputes.[319]

Executive agencies[320] operating in a shared regulatory space are subject to presidential control through the Office of Information and Regulatory Affairs[321] (OIRA). They do not have the discretion to embark on diametrically opposed courses of action that could result in conflicting

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308. *See Kairys*, 981 F.2d at 939–40 (holding that there are limits to agency discretion to apply collateral estoppel).

309. Pub. L. No. 107–204, 116 Stat. 745 (2002).

310. *See* Tice v. Bristol-Myers Squibb Co., 325 F. App'x 114, 121 (holding administrative determinations in claims brought under the Sarbanes-Oxley Act are not subject to collateral attack).

311. 42 U.S.C. § 2000e-5b (2012).

312. *See id.* § 2000e-16.

313. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of [an agency] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements . . . .").

314. *See* Freeman & Rossi, *supra* note 101, at 1173–74 (explaining tools that are available to Congress and the President to control agencies).

315. *See, e.g.*, Motor Vehicles Mfg. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 34–43 (1983) (holding that after multiple sudden policy reversals, an agency policy was arbitrary and capricious).

316. Even critics of collateral estoppel admit that there are relatively few cases challenging its application by agencies. *See* Levine, *supra* note 26, at 450 (noting a lack of case law in this area).

317. *See* Freeman & Rossi, *supra* note 101, at 1146–48; Levine, *supra* note 26, at 460–61.

318. *See* Freeman & Rossi, *supra* note 101, at 1155–56 (noting a recent increase in the use of interagency coordination tools).

319. *See* Jody Freeman & Jim Rossi, *Improving Interagency Coordination in Shared Regulatory Space*, 38 ADMIN. & REG. L. NEWS 11, 12–13 (listing various interagency coordination mechanisms).

320. An executive agency is one whose head serves at the pleasure of the President. *See id.* at 13; Gersen, *supra* note 101, at 704.

321. *See* Freeman & Rossi, *supra* note 101, at 1178–79.

adjudicative decisions.[322] Independent agencies with concurrent jurisdictions often use interagency bodies to coordinate adjudicatory enforcement efforts.[323] All agencies are incentivized to cooperate and honor one another's adjudications, if only to increase the deference such proceedings are accorded by the courts.[324]

Agencies with overlapping jurisdiction generally honor each other's adjudicative findings or arrange that only one agency conduct administrative adjudications, while the other, for instance, engages in formal rulemaking.[325] If all of these mechanisms fail, courts still can apply a primacy analysis to determine which agencies' decisions are entitled to collateral estoppel effect.[326] Therefore, granting agencies the discretion to decide when collateral estoppel applies in administrative adjudications is likely to produce decisions that are at least as consistent and predictable as those reached by the courts.

IV. CHOOSING A WAY TO APPLY COLLATERAL ESTOPPEL IN ADMINISTRATIVE ADJUDICATIONS

The *B & B Hardware* approach, the per se rules approach, and the agency discretion approach of applying collateral estoppel each bring their own set of problems and concerns.[327] Ultimately, however, this Note argues that courts should defer to agency discretion in applying collateral estoppel in administrative adjudications. Part IV.A discusses the difficulties of applying the *B & B Hardware* analysis, including underinclusiveness, overinclusiveness, and the incongruity of its underlying reasoning with the purposes and goals of administrative adjudications. Part IV.B demonstrates why neither broad nor narrow per se rules can create a workable system for applying collateral estoppel in administrative adjudications. Finally, Part IV.C argues that courts should defer to agencies when applying collateral estoppel in administrative adjudications.

A. Problems with the B & B Hardware *Analysis*

This section discusses why the problems that arise from using the *B & B Hardware* analysis in administrative adjudications make it an inappropriate standard for the application of collateral estoppel. Part IV.A.1 explains that the *B & B Hardware* analysis is both underinclusive and overinclusive, excluding cases where collateral estoppel should probably apply while still

322. *Id. See generally* Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sep. 30, 1993) ("Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.").

323. *See* Freeman & Rossi, *supra* note 101, at 1165–70 (describing joint policy and rulemaking procedures among independent agencies); *see also* Gersen, *supra* note 101, at 696.

324. *See* Freeman & Rossi, *supra* note 101, at 1204–06 ("Yet even if courts apply existing standards of review, other things being equal, we expect strong agency coordination to produce decisions that will tend to attract greater judicial deference.").

325. *See, e.g.*, *id.* at 1150.

326. *See id.* at 1150 n.69.

327. *See supra* Part III.A.2, B.2, C.

applying collateral estoppel so broadly that it could impede basic administrative and regulatory functions in agency adjudications. Part IV.A.2 examines the underlying problem, which is a tension between the policy reasons behind collateral estoppel and the structure of most regulatory schemes.

1. Underinclusiveness and Overinclusiveness

A serious problem with using the *B & B Hardware* analysis in the administrative context is that its first step makes it underinclusive. The requirement that the administrative body that made the initial determination be authorized by statute to make binding adjudications is justified when applying collateral estoppel in a judicial proceeding.[328] However, it risks becoming needlessly burdensome in less formal administrative proceedings.[329]

This issue is probably best illustrated in *Kramer*. The Seventh Circuit allowed the Parole Commission to base its findings on the amount Kramer owed the government, contained in a letter from the IRS estimating his tax deficiency.[330] This letter almost certainly would have failed to be accorded collateral estoppel effect under *B & B Hardware*, because the statutory scheme requires that the IRS finding be subject to collateral and direct attack in federal tax court.[331] *B & B Hardware*, if applied to this case, would have required the Parole Commission to allow Kramer to relitigate his tax debt before the board and the board to render its own decision.[332] Results like this are inefficient not only because they require a duplication of effort but also because they prevent agencies from relying on the specialized knowledge and expertise of other agencies.[333]

In order to avoid this problem when applying collateral estoppel, most agencies (and some courts) do not consider the absolute authority invested in the body that made the initial determination.[334] Instead, they consider the relative similarity between the first proceeding and the subsequent proceeding in which collateral estoppel is asserted.[335] In other words, it

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328. *See supra* notes 72–77 and accompanying text.

329. *See supra* Part III.A.2.

330. Kramer v. Jenkins, 803 F.2d 896, 901 (7th Cir. 1986).

331. *Id.* at 902. In *Astoria*, the Court found that, because Congress intended the agency finding to be subject to collateral attack in EEOC proceedings, it could not be given collateral estoppel effect in any federal forum. *See supra* notes 72–77 and accompanying text.

332. *See supra* notes 72–77 and accompanying text (denying collateral estoppel effect to proceedings that are automatically reviewed).

333. *See Kramer*, 803 F.3d at 902 (“A decision by the IRS concerning the validity of such a claim is more likely to be correct than is a decision by the Parole Commission on the same subject.”).

334. *See supra* notes 97–98 (discussing the adjudicative authority prong of *B & B Hardware*).

335. *See, e.g.*, *Kramer*, 803 F.3d at 901 (considering the IRS’s decision-making procedures); Mugomoke v. Hazuda, No. 13-cv-00984-KJM-KJN, 2014 WL 4472743, at *6 (E.D. Cal. Sep. 11, 2014) (holding that an asylum interview was not procedurally equivalent to subsequent proceedings, and therefore its findings did not have collateral estoppel effect).

should not be necessary for an administrative adjudication to be able to bind a court for it to bind another administrative adjudication. It should be enough to determine that the two proceedings have a similar level of procedural formality and authority.[336]

The *B & B Hardware* analysis is also overinclusive, as applied to agencies' own past decisions. The common law analysis, which is the second step of the *B & B Hardware* approach, could effectively prevent agencies from promulgating rules through adjudication.[337] As the Court recognized in *B & B Hardware*, the application of collateral estoppel does not require that the issues presented be formally identical, but rather substantially similar, especially when the parties themselves are identical.[338] Furthermore, even clear legal and factual errors, if not appealed, usually are not subject to collateral attack.[339]

The common law version of collateral estoppel in *B & B Hardware* endorses the outcome of *Amrollah* rather than *Duvall* or *Thomas*.[340] This outcome creates a conflict with the broader principle of administrative law enunciated in *Chenery*,[341] as it would enable a party to prevent an agency from modifying a previously enunciated rule by invoking collateral estoppel.[342] By effectively limiting the ways in which agencies can regulate, the robust collateral estoppel doctrine espoused in *B & B Hardware* not only would conflict with nearly seventy years of precedent, but also could significantly raise the cost and difficulty of regulating for administrative agencies, such as the SEC and the National Labor Relations Board, which use adjudicatory regulation to supplement their rulemaking.[343]

2. The Incompatible Policy Goals of Collateral Estoppel and Administrative Law

The problems of underinclusiveness and overinclusiveness inherent in the *B & B Hardware* analysis reflect a deeper tension between the policy concerns that have led courts to favor collateral estoppel and those that

336. *See, e.g.*, Bath Iron Works Corp. v. Office of Workers' Comp. Programs, 125 F.3d 18, 22–23 (1st Cir. 1997) (holding it sufficient that both agency proceedings provided equivalent litigation opportunities).

337. *See supra* note 249 and accompanying text.

338. *See* B & B Hardware, Inc. v. Hargis Indus., Inc. 135 S. Ct. 1293, 1306–07 (2015) (finding that minor variations in the issue did not defeat collateral estoppel); *Bath Iron Works*, 125 F.3d at 22–23 (holding that differences in burdens of proof did not defeat collateral estoppel when both parties had the opportunity to litigate).

339. *See, e.g.*, United States v. Moser, 266 U.S. 236, 241–42 (1924); *Bath Iron Works*, 125 F.3d at 23.

340. *See supra* notes 122, 130–42 and accompanying text.

341. *See supra* notes 130–33 and accompanying text (explaining the *Chenery* rule).

342. *See, e.g.*, *supra* notes 135–38 and accompanying text (describing how USCIS was estopped from expanding the definition of "supporting terrorism").

343. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947); Michigan v. Thomas, 805 F.2d 178, 179–80 (6th Cir. 1986).

underpin much of administrative law.[344] The difference in the structure of the disputes highlights the difference in policy considerations when applying collateral estoppel in court as opposed to an administrative adjudication.[345]

In disputes between private parties, such as *B & B Hardware* and the line of cases that preceded it, a limited number of issues are implicated, and those same issues are unlikely to recur between the parties once settled.[346] Judicial economy and basic fairness are best served by ensuring that, once the parties have contested an issue in an appropriate forum, regardless of the exact nature of that forum, the losing party cannot waste time and money relitigating the issue.[347] This need for finality is the underlying policy consideration that justifies all applications of collateral estoppel, including the use of collateral estoppel from administrative adjudications in federal court.[348]

This underlying logic is not applicable when attempting to justify the application of collateral estoppel between administrative adjudications. The adjudicatory body, as a party to the litigation,[349] is interested not just in "winning" or achieving "repose," but also in constructing a workable regulatory scheme in accordance with legislative intent.[350] In many cases, this end is best served by preventing finality and allowing the relitigation of issues.[351]

Cases in which the collateral estoppel from an administrative adjudication is applied in court are structurally different from cases in which collateral estoppel is applied between administrative adjudications.[352] As a result, the fundamental policy considerations involved are different. The *B & B Hardware* analysis, with its robust common law version of collateral estoppel,[353] simply is not appropriate in an administrative context.

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344. *See* Groner & Sternstein, *supra* note 249, at 312; *see also* Churchill Tabernacle v. FCC, 160 F.2d 244, 246 (D.C. Cir. 1947) (allowing inconsistent Federal Communications Commission determinations after finding that common law collateral estoppel considerations did not apply).

345. *See supra* notes 249–57 and accompanying text.

346. *See supra* note 250 (emphasizing the difference between public and private interest in finality).

347. *See* Montana v. United States, 440 U.S. 147, 153–54 (1979).

348. *See* B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1302–03 (2015).

349. *See supra* notes 255–56 and accompanying text (describing the procedural posture of judicial review of administrative collateral estoppel).

350. *See* Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 300 (7th Cir. 1979) (holding that public policy concerns override the usual collateral estoppel considerations); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (AM. LAW INST. 1982).

351. *See, e.g.*, *Porter & Dietsch*, 605 F.2d at 300; Groner & Sternstein, *supra* note 249, at 312.

352. *See supra* Part III.A.2.

353. *See supra* Part I.B.3 (describing *B & B Hardware*'s endorsement of the common law collateral estoppel doctrine).

B. Problems with Per Se Rules for Administrative Collateral Estoppel

This section discusses how per se rules for collateral estoppel often can complicate, rather than simplify, the problems inherent in the balancing tests. Part IV.B.1 argues that broad, formalistic rules, such as those proposed by Brown, would limit agency discretion in ways that are inconsistent with the current legal landscape and frustrate the purposes of administrative law. Part IV.B.2 points out that narrow, ad hoc rules, such as those proposed by Levine, are in many ways worse and would actually increase uncertainty in administrative adjudications.

1. Problems with Broad Per Se Rules

Broad, generally applicable prohibitions that rely on a formal set of rules, such as the ones proposed by Brown, are not appropriate when applying collateral estoppel across agencies. Any set of formalistic determinations would also be both overinclusive and underinclusive[354]: the sheer variety of agency proceedings defies the imposition of any objective standard, and any comparison of two administrative adjudications would involve a balancing test rather than a formal checklist.[355]

Furthermore, the judicial imposition of a generally applicable formal rule would be an anomaly in administrative law because, within their statutory frameworks, agencies are given the discretion to determine their own decision-making procedures.[356] The Supreme Court has consistently pushed back against lower courts that have attempted to impose formal requirements on agency procedures.[357] A judicially created formal requirement that dictated the extent to which agencies could rely on prior administrative adjudications would violate the spirit, if not the letter, of the Court's jurisprudence.[358]

2. Problems with Narrow Per Se Rules

Narrowly tailored per se prohibitions, such as those proposed by Levine,[359] are even more problematic. They would serve to complicate, rather than clarify, the application of collateral estoppel among agencies and only address when collateral estoppel would be prohibited rather than providing guidance as to when it would be allowed.

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354. *See supra* Part IV.A.1.

355. For this reason, when evaluating the constitutionality of agency procedures, courts compare the value of the interest at stake to the safeguards in place rather than using any formal checklist. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

356. *See supra* notes 294–95 and accompanying text.

357. The most recent example is *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), in which the Court unanimously reversed the D.C. Circuit for attempting to require formal procedures when agencies change their interpretation of a regulation. *See id.* at 1206.

358. *See id.* at 1207 ("Time and again, we have reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'" (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009))).

359. *See supra* Part III.B.2.

Levine himself acknowledges that his proposed analysis to determine when per se prohibitions on collateral estoppel are appropriate adds another balancing test to the ones courts already must consider when applying collateral estoppel.[360] Furthermore, a per se prohibition would have to address to which types of administrative adjudications it applied, or it would risk being underinclusive.[361] Given the sheer variety of administrative adjudications in which collateral estoppel can be invoked, even a single per se rule would be complex.[362] This, combined with the fact that courts and agencies would certainly disagree about which per se prohibitions applied to which adjudications, would create a complex and unworkable system.[363]

Finally, even after the adoption of per se prohibitions, there still would be administrative adjudications where the application of per se prohibitions would not be appropriate.[364] In these cases, courts and agencies still would have defaulted to the common law balancing test to apply collateral estoppel.[365] Thus, per se prohibitions would add layers of complexity and uncertainty to administrative collateral estoppel determinations by adding a new balancing test without actually replacing the current collateral estoppel balancing tests.

C. Courts Should Defer to Agencies When Reviewing the Application of Collateral Estoppel

Courts already defer to agencies when they interpret statutes and engage in rulemaking.[366] As long as they act within the boundaries and for the purposes established by the legislature, agencies have wide discretion.[367] This section argues that judicial constraints on agencies applying collateral estoppel are unnecessary and inconsistent with the larger body of administrative law. It concludes that courts should defer to agency decisions when deciding whether a prior administrative adjudication has collateral estoppel effect on a present one.

Agencies are already subject to a number of constraints, both legal and political.[368] These prevent agencies from acting in ways that are arbitrary or grossly inconsistent.[369] An agency decision to apply collateral estoppel from one adjudication to another adjudication is already bound by these

360. Levine, *supra* note 26, at 453.

361. *See supra* Part IV.A.1. A per se rule would have to say something like "adjudication *A* has collateral estoppel effect on Adjudication *B*, but not on Adjudication *C*" in order to avoid the underinclusiveness problem.

362. *See* Levine, *supra* note 26, at 449; *Subpoenas*, *supra* note 52, at 1259–61.

363. Levine himself acknowledges that his system would increase the frequency of inconsistent judgments. *See* Levine, *supra* note 26, at 460–63.

364. *See id.* at 462–63.

365. *See id.*

366. *See supra* Part III.A.1 (discussing *Chevron* deference).

367. *See supra* notes 294–95 and accompanying text (describing the limits on agency discretion).

368. *See supra* Part III.C.

369. *See supra* Part III.C.

constraints.[370] Additional constraints, such as the equitable balancing test contained in *B & B Hardware* or the judicially imposed per se rules advocated by some commentators, are largely unnecessary.[371] They add additional layers of analysis that complicate an already complex area of the law, creating rather than solving anomalies and uncertainties.[372]

Furthermore, agencies are created by the legislature, as are the limits of their discretion.[373] Agencies' power to make decisions that have collateral estoppel effect flows from the discretion granted to them by Congress.[374] The Supreme Court has consistently pushed back on courts' attempts to limit agency discretion with judicially created or enforced limitations.[375] Where an agency has the power to adjudicate, therefore, it should have the discretion to apply collateral estoppel as it sees fit, subject only to legislative constraints.[376]

Attempts to limit this discretion are inconsistent with other doctrines and policies of administrative law.[377] For instance, requiring agencies to recognize the collateral estoppel effect of their own prior adjudications is inconsistent with agencies' ability to interpret statutes and make rules through administrative adjudications.[378] Constraining an agency to abide by the past determinations of it or another agency is against the policy of allowing agencies to have evolving standards that reflect growing expertise and changing conditions.[379] On the other hand, preventing agencies from relying on the findings of prior adjudications could lead to unnecessary and wasteful litigation.[380]

Courts should therefore defer to agencies when reviewing their use of collateral estoppel. This approach lacks the doctrinal neatness of per se rules and the intuitive appeal of the extension of the *B & B Hardware* analysis.[381] It is, however, the best way to ensure a flexible and equitable application of collateral estoppel in administrative adjudications and the only approach that is consistent with the broader principles of administrative law.

CONCLUSION

Collateral estoppel is an equitable common law doctrine that courts use to enforce repose between private parties once an issue has been litigated. The Supreme Court has expanded its use in federal court, granting collateral estoppel effect to determinations of fact and law made in administrative

370. *See supra* note 164 and accompanying text.
371. *See supra* Part III.C.
372. *See supra* Part IV.B.
373. *See supra* notes 294–95 and accompanying text.
374. *See supra* notes 294–95 and accompanying text.
375. *See supra* notes 357–58 and accompanying text.
376. *See supra* notes 357–58 and accompanying text.
377. *See supra* notes 357–58 and accompanying text.
378. *See supra* notes 340–42 and accompanying text.
379. *See supra* notes 206–11 and accompanying text.
380. *See supra* notes 202–03 and accompanying text.
381. *See supra* Part III.A.1, B.

adjudications. However, requiring agencies to give or withhold collateral estoppel effect to prior administrative adjudications, either through *B & B Hardware*'s two-step analysis or per se rules, is inappropriate. Rather, courts should defer to agency determinations when reviewing agency use of collateral estoppel. Not only does this approach allow agencies the discretion and flexibility to apply their expertise and promote public welfare, it is the only approach that is compatible with the larger corpus of administrative law.