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ARTICLE

FUNCTIONAL GOVERNMENT IN 3-D: A FRAMEWORK FOR EVALUATING ALLOCATIONS OF GOVERNMENT AUTHORITY

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The creation of new administrative agencies and the realignment of existing governmental authority are commonplace and high-stakes events, as illustrated by the recent creation of the Department of Homeland Security after 9/11 and of new financial regulatory agencies after the global recession of 2009. Scholars and policymakers have not devoted sufficient attention to this subject, failing to clearly identify the different dimensions along which government authority may be structured or to consider the relationships among them. Analysis of these institutional design issues typically also gives short shrift to whether authority should be allocated differently based on agency function. These failures have contributed to reorganization efforts that have proven ill-suited to achieving policymakers' goals due to mismatches between the perceived defects of existing structures and the allocations of authority chosen to replace them. This Article introduces a framework for assessing how governmental authority may be structured along three dimensions: centralization, overlap, and coordination. Using examples from diverse policy areas including national security, financial markets, and environmental protection, it demonstrates how differentiating among these dimensions and among particular governmental functions better illuminates the advantages and disadvantages of available structural options. Though recognizing that the optimal allocation of authority is inexorably context-specific, the Article concludes with preliminary observations about how certain allocations of authority are likely to better promote certain important policy objectives than others.

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INTRODUCTION

The creation of new programs and administrative agencies and the realignment of existing governmental authority are commonplace. Within just the past decade, high-profile reorganizations have followed the events of 9/11 (which led to the massive reshuffling that accompanied the creation of the Department of Homeland Security),¹ the Deepwater Horizon explosion (which prompted the reallocation of regulatory authority over offshore oil exploration and development),² and the late-2000s global recession (which led to the creation of the Financial Stability Oversight Council and the Consumer Financial Protection Bureau and the merging of the Office of Thrift Supervision into the Office of the Comptroller of the Currency).³ As in these

¹ See generally Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandate*, 59 STAN. L. REV. 673, 718 (2006); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006).

² See Secretary of the Interior, Order No. 3299 (May 19, 2010); Reorganization of The Bureau of Ocean Energy Management, Regulation and Enforcement, <http://www.boemre.gov>.

³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Other notable reorganization initiatives in just the past few years include a 2013 Executive Order to coordinate agency efforts to reduce cyber risks to critical infrastructure, Executive Order: Improving Critical Infrastructure Cybersecurity (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity>, archived at <http://perma.cc/0QnH16Rz6ja>; a 2012 proposal to merge the Securities and Exchange Commission and the Commodity Futures Trading Commission into a new Securities and Derivatives Commission, H.R. 6613, 112th Cong. (2d Sess. 2012); the creation in 2009 and rapid elimination in 2012 of a new Center on Climate Change and National Security within the Central Intelligence Agency, John M. Broder, *C.I.A. Closes Its Climate Change Office*, N.Y. TIMES, (Nov. 20, 2012, 1:39 PM), http://green.blogs.nytimes.com/2012/11/20/c-i-a-closes-its-climate-change-office/?pagewanted=print&_r=0, archived at <http://perma.cc/0m8zf9tj3qK>; a 2012 proposal to increase coordination among seven federal agencies responsible for conducting space weather research under the supervision of the National Science and Technology Council, *National Priorities for Solar and Space Physics Research and Applications for Space Weather Prediction: Hearing Before the Subcomm. On Space and Aeronautics of the H. Comm. On Science, Space, and Technology*, 112th Cong. (2012) (statement of Daniel N. Baker), <http://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-112-SY16-WState-DBaker-20121128.pdf>, archived at <http://perma.cc/0Z9MsfHPWLY>; and a

instances, these changes often occur in response to crisis,⁴ though the prompt for program creation or government reorganization sometimes has been the gradual recognition of deficiencies in existing regulatory programs.⁵

Scholars and policymakers alike have devoted considerable attention to the proper allocation of governmental authority, traditionally focusing on the appropriate scale of government, typically in considering whether authority should be centralized or decentralized as an issue of federalism.⁶ Over the past decade, some scholars have analyzed the appropriateness of jurisdictional overlap.⁷ More recently, others have sought to account for the value of coordination among agencies.⁸ However, these debates over governmental configuration have insufficiently focused on the relationships among these different dimensions of authority—whether authority should be centralized or decentralized, overlapping or distinct, and coordinated or independent. Additionally, such discussions typically ignore whether the fitness of a par-

2011 proposal to create new regional information and response entities to increase coordination among federal and state agencies in addressing cancer clusters, S. 76, 112th Cong. (1st Sess. 2011). *See also infra* notes 9–21 and accompanying text (describing another important recent reorganization proposal).

⁴ *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1152 (2012) (“The most significant government reorganization of the last fifty years occurred after the September 11, 2001 terrorist attacks, when Congress opted to combine scores of agencies into DHS, a new ‘mega-agency.’”).

⁵ The shift of environmental regulatory authority from the states to the federal government during the 1970s is a prominent example. *See* RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 67 (2004).

⁶ *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996) [hereinafter Esty, *Environmental Federalism*]; Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1562 (1999) [hereinafter Esty, *Environmental Governance*]; Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

⁷ *See generally* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION (William W. Buzbee ed., Cambridge U. Press 2009); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM* (Columbia U. Press 2009); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59 (2010).

⁸ *See, e.g.*, Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578 (2010); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009); Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011); Freeman & Rossi, *supra* note 4.

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ticular allocation should depend on the governmental function being exercised. We use the word function to refer to the nature of the authority engaged in by, or the role assigned to, an agency (such as monitoring, information dissemination, financing, planning, standard setting, or enforcement), as opposed to the substantive subject matter of the agency's delegated authority. This Article addresses these neglected dimensional and functional aspects of the analysis of allocating authority and sheds light on how these features illuminate the policy tradeoffs among alternative structural designs.

A recent reorganization proposal concerning small business regulation serves as a useful introduction to the Article's multi-dimensional and functional analysis. In 2012, President Obama proposed to consolidate six agencies into a single new Department that would more efficiently promote competitiveness, exports, and American business.⁹ The six agencies—the business and trade functions of the U.S. Department of Commerce, the Small Business Administration, the Office of the U.S. Trade Representative, the Export-Import Bank, the Overseas Private Investment Corporation, and the U.S. Trade and Development Agency—all focus primarily on business and trade. The White House and others¹⁰ explained that overlapping responsibilities among these agencies had made it hard for small businesses to interact with the government and contributed to “unnecessary waste and duplication.”¹¹ To address these concerns, the Obama proposal would centralize authority by integrating the programs of the six eliminated agencies into four divisions of the new Department. The Administration and congress-

⁹ The White House, Office of the Press Secretary, *President Obama Announces Proposal to Reform, Reorganize and Consolidate Government* (Jan. 13, 2012) [hereinafter *Consolidate Government*], <http://www.whitehouse.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov>, archived at <http://perma.cc/0PprRjA5bBs>. The proposal was introduced in different forms in the Senate and the House of Representatives in 2012. See S. 2129, 112th Cong. (2d Sess. 2012); H.R. 4409, 112th Cong. (2d Sess. 2012). Though the bill did not advance to a vote, the Obama Administration announced its intention to support the proposals in the 113th Congress. See Al Kamen, *The Secretary of What, Now?*, WASH. POST, Dec. 20, 2012, http://articles.washingtonpost.com/2012-12-19/politics/35929276_1_president-obama-second-obama-term-jay-carney, archived at <http://perma.cc/0xR7cWGu2sw>. In mid-2013, President Obama delivered remarks in which he repeated his call for a delegation of expanded presidential authority to reorganize agency authority without making explicit reference to the reorganization of business-related agencies. The White House, Office of the Press Secretary, *Remarks by the President Presenting New Management Agenda* (July 8, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/08/remarks-president-presenting-new-management-agenda>, archived at <http://perma.cc/0urLfpGddtr>.

¹⁰ See *Retooling Government for the 21st Century: The President's Reorganization Plan and Reducing Duplication: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs*, 112th Cong. 2 (2012) (statement of Sen. Tom Carper (D-Del.)), available at <http://www.hsgac.senate.gov/hearings/retooling-government-for-the-21st-century-the-presidents-reorganization-plan-and-reducing-duplication> (describing undesirable duplication created by the existence of multiple agencies “that produce statistical output as a part of their programmatic responsibilities”).

¹¹ The White House, Office of the Press Secretary, *Government Reorganization Fact Sheet* (Jan. 13, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/13/government-reorganization-fact-sheet>, archived at <http://perma.cc/0UqYpHwSdYe>.

sional allies asserted that this consolidation would create a more efficient and effective structure for promoting American business by eliminating duplication and overlap¹² and increasing coordination.¹³ The Department would also create “a one-stop shop for everything from financing and export promotion to patent protection and help commercializing innovative discoveries,” allowing small business owners to work with one agency in receiving “the core Government services that will help them compete, grow, and hire.”¹⁴

Like so many other reorganizations, the Administration’s proposal unfortunately conflates the three distinctive dimensions of authority identified by this Article—the extent of centralization, overlap, and coordination of authority among agencies. As a result, it fails to propose a structure that is likely to directly address the Administration’s underlying concerns. The proposed reorganization is designed to minimize overlap in agency authority and increase coordination. However, the proposed solution is poorly designed to promote those goals. It focuses on reallocating authority along only one dimension of authority—the centralization of the responsibilities of six agencies into a single new Department. Yet the purported problems relate to agency structure and relationships along two entirely different dimensions (unnecessary overlap and lack of interagency coordination). Centralizing authority may or may not decrease the overlap of authority or increase the level of agency coordination.¹⁵ The proposed new Department, in fact, would be comprised of four divisions (small business, trade and investment, technology and innovation, and statistics) with seemingly overlapping jurisdictions.¹⁶ Conversely, though decentralized authority can also overlap, it need not do so.¹⁷ For example, duplication among decentralized institutions can be reduced without centralizing authority if the jurisdiction of existing agencies is redefined so that each agency has distinct rather than overlapping responsibilities. Similarly, both centralized and decentralized allocations of authority can be highly coordinated or independent.¹⁸ It is possible to require

¹² See, e.g., *Consolidate Government*, *supra* note 9; *Retooling Government for the 21st Century: The President’s Reorganization Plan and Reducing Duplication: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs*, 112th Cong. 4 (2012) (testimony of Daniel Werfel, Controller of the Office of Management and Budget), available at <http://www.hsgac.senate.gov/hearings/retooling-government-for-the-21st-century-the-presidents-reorganization-plan-and-reducing-duplication>; *Government Reorganization Fact Sheet*, *supra* note 11.

¹³ See, e.g., Statement of Sen. Tom Carper, *supra* note 10, at 2.

¹⁴ Testimony of Daniel Werfel, *supra* note 12, at 4.

¹⁵ See, e.g., Freeman & Rossi, *supra* note 4, at 1173 (noting that it is possible to achieve coordination “without strong centralized authority”).

¹⁶ See Testimony of Daniel Werfel, *supra* note 12, at 4. For example, the small business and statistics divisions may have overlapping authority over statistics pertaining to small businesses, and the small business and trade and investment divisions may have overlapping jurisdiction over trade and investment issues pertaining to small businesses.

¹⁷ See *infra* Part IV.B.1.

¹⁸ See *infra* Part IV.B.2.

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increased coordination among multiple agencies without centralization of authority or reduction in the number of agencies with relevant jurisdiction. By conflating coordinated and distinct authority with centralization, the Administration's proposal missed an opportunity to tailor its reorganization to actually fix the perceived flaws of the existing government structure.

In addition to these dimensions of governmental authority, the Obama reorganization proposal highlights another feature of governmental organization that is often overlooked—functional jurisdiction. Regulatory authority is organized not only substantively but also on the basis of different governmental functions.¹⁹ Three of the divisions proposed for the new Department would be organized around substantive authority—the small business, trade and investment, and technology and innovation divisions—while the remaining one would be organized around an information-gathering function—the production and analysis of statistics. As this Article explains, focusing on functional jurisdiction provides a number of key insights. For one, two government agencies with substantive authority over the same issue—for example, small businesses—will not have overlapping authority if their functions are distinct. The small business division, for instance, may be charged with planning, standard-setting, and implementation functions regarding small businesses, while the statistics division may be charged with information gathering on those small businesses. Functional division among multiple agencies with jurisdiction over the same subject therefore can reduce duplication even without centralization of agency authority.

Focusing on the largely neglected functional aspect of organization and clearly delineating the differences among the three dimensions of authority provides further valuable insights. In particular, this Article demonstrates that the optimal organizational structure along the three dimensions is likely to differ depending on the particular governmental function at issue.²⁰ It may make sense, for example, to centralize information-gathering authority, such as in the proposed small business division for production and analysis of statistics. At the same time, a decentralized but coordinated structure for program implementation, such as by retaining separate agencies for facilitating trade by and investment in small businesses, may be advisable. As with many prior regulatory design reforms, the Obama reorganization proposal's conflation of the dimensions of authority and inattention to functional jurisdiction obscured the tradeoffs that different reorganization options entail. It is virtually impossible to appreciate the policy tradeoffs involved in choosing how to organize government without understanding the existence of (and relationship between) these three different dimensions and the availability of different configurations based on function.

Analysis of the structures, jurisdictions, and relationships among governmental institutions is vital to understanding and promoting their efficacy

¹⁹ See *infra* Part II.

²⁰ See *infra* Part IV.A.

at advancing public goals.²¹ Yet institutional design questions such as these are regularly overlooked, misanalyzed, or oversimplified.²² Given the recurrence of government reorganization efforts and the high-stakes consequences they may entail, this Article provides an analytical framework for assessing when realignment of agency authority is likely to be beneficial and how it ought to proceed when circumstances warrant it. Using examples from a range of regulatory areas, it demonstrates how differentiating the choices of when to centralize, create overlap, and require coordination among governmental institutions illuminates the advantages and disadvantages of competing reorganization options. The Article also explains how focusing on the particular governmental function at issue further clarifies the advantages and disadvantages of movement along the three dimensions of centralization, overlap, and coordination.

The Article proceeds in five Parts. Part I briefly describes the principal values that tend to be implicated in government reorganization efforts and that may be useful in assessing the merits of a particular initiative. Parts II and III provide a taxonomy of the different means of allocating (and reallocating) authority among government entities. Part II highlights a key but underappreciated distinction between the substantive jurisdiction of regulators and the locus of control over different governmental functions—what we call functional jurisdiction. Affording attention to functional jurisdiction provides insights about the policy and value tradeoffs among available options for allocating government authority that may otherwise be obscured. Part III delineates the dimensions of primary importance for characterizing allocation of regulatory authority—the extent to which jurisdiction is centralized or decentralized, overlapping or distinct, and coordinated or independent.

Part IV illustrates the utility of the analytical framework introduced in Parts II and III, using a range of examples. Many of the examples involve

²¹ As Professor Magill has succinctly put it, “institutions matter.” Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 903 (2009). See also Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 185 (2013) (arguing that “agency interconnectedness will become even more rooted in the bureaucracy over time, as regulatory problems show no sign of becoming simpler and more amenable to single-agency solutions”).

²² As stated by Dean Phil Weiser:

The question of how to design and operate public institutions is often relegated to a second order consideration and takes a backseat to the analysis of substantive policy issues. . . . In particular, few commentators or policymakers have focused on the question of what institutional strategy, structure, or set of processes . . . to use and how any such regime would operate in practice.

The impact of institutional issues as an influence on the ultimate success of an agency is grossly underappreciated. . . . Consequently, any focus on agency effectiveness needs to ask how an agency is doing its work and not merely what work it purports to be doing. Indeed, even the best-crafted statutory or regulatory regime will fail if the institutional structure, processes, and culture undermine the ability to implement the regime’s goals effectively.

Philip J. Weiser, *Towards an International Dialogue on the Institutional Side of Antitrust*, 66 N.Y.U. ANN. SURV. AM. L. 445, 447–48 (2011) (citations omitted).

environmental regulation and natural resource management, although we draw on examples involving many other forms of regulation. We believe that the analysis in this Article is relevant to any form of government organization. We derive three key lessons about the role of functional jurisdiction and the value of clearly distinguishing among the different dimensions of governmental authority. First, Part IV discusses how both policymakers and the substantial federalism and governance literature have largely both neglected the significance of functional jurisdiction and conflated the dimensions identified in Part III in analyzing the relative merit of alternative governmental structures. Second, it explains how our focus on functional jurisdiction enriches the analysis of the most promising ways to allocate governmental authority along a different combination of dimensions based on the agency function involved. Third, Part IV illustrates how crisp delineations among the various dimensions of governmental authority clarify the analysis of the tradeoffs among the policy values discussed in Part I that alternative organizational options entail. By using this analytical framework, policymakers will be better able to select the government structure that strikes an appropriate balance among competing or conflicting values.

Undoubtedly, the appropriate choices along each of the dimensions, and decisions on whether to differentiate structure based on function, will necessarily be context-specific. In Part V, we nonetheless provide preliminary observations about the relative merits of allocating governmental authority for each governmental function at different points along the three dimensions. We assert that arguments for centralization and coordination are likely to be more persuasive for certain kinds of agency research, information distribution, and financing functions. We also posit that, in general, arguments for decentralized authority usually will be strongest for implementation and enforcement functions, and to a lesser extent planning. Likewise, though the considerable calls for increased coordination among regulatory authorities may often be persuasive for functions such as financing, information distribution, planning, and even standard setting, we assert that the benefits from maintaining regulator independence and even competition will typically be stronger for agencies performing implementation and enforcement functions. Finally, although we largely concur with the growing literature promoting the value of shared substantive jurisdiction,²³ we postulate that providing for distinct functional jurisdiction will often provide opportunities to maintain the advantages of redundancy while minimizing its disadvantages.

I. NORMATIVE CONSIDERATIONS FOR ALLOCATION OF AUTHORITY

Determining how best to allocate the authority to design and implement government programs requires a comparative assessment of the extent to

²³ See the sources cited *infra* Part III.B.2 discussing the benefits of overlapping jurisdiction.

which alternative allocations promote desired normative values or considerations. We use four such evaluative yardsticks in the discussion below: effectiveness, efficiency, equity, and legitimacy.²⁴ When these measures point in different directions, determining the optimal balance requires choosing among allocations that promote some but not other values better than the available alternatives.

A. Effectiveness

An effective regulatory design is one that achieves the identified regulatory goals.²⁵ A regulatory program that fails to achieve its goals cannot be deemed a success even if it operates efficiently and fairly and is administered by accountable officials.²⁶ The effectiveness of a government program may depend not only on how governmental authority is allocated, but also on whether it is feasible to achieve the identified goals, whether sufficient resources are available to government officials, and whether those officials have the requisite expertise to implement the program.²⁷ Our focus is on the impact of government structure on program effectiveness. Decentralized government authority, for example, may create uncertainty about the jurisdictional contours of affected agencies. If so, a problem that could have been addressed effectively by any of the affected agencies may instead be ignored by all of them.

B. Efficiency

Assuming multiple options of equal efficacy exist, some may operate more efficiently than others. Efficiency involves committing no more resources—including the administrative costs a program imposes on government and the compliance costs imposed on the private sector—to addressing a problem than necessary.²⁸ Institutional design may bear on the efficiency of government action. For example, the costs of administering redundant

²⁴ Administrative law scholars have used similar metrics to evaluate regulatory programs. See, e.g., Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 111–12 (1964) (offering accuracy, efficiency, and acceptability to agency, participants, and the public as metrics).

²⁵ Freeman & Rossi, *supra* note 4, at 1150.

²⁶ Cf. Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 107 (1996) (referring to effectiveness as an administrative process value).

²⁷ See, e.g., Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 460 (1999) (discussing relevance of resource adequacy to effectiveness of regulation); Sidney A. Shapiro, *Agency Priority Setting and the Review of Existing Agency Rules*, 48 ADMIN. L. REV. 370, 374 (1996).

²⁸ See, e.g., Freeman & Rossi, *supra* note 4, at 1181–82. Efforts to improve efficiency seek to “minimize the administrative costs of enforcement.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972).

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structures “represent lost funds for other tasks. In other words, if resources are fixed, redundant structures impose additional opportunity costs.”²⁹

C. Equity

Although the concept of equity involves distributional considerations, there are different ways to determine whether a particular allocation of societal benefits and burdens is fair.³⁰ Policy analysts of regulatory issues sometimes use equity to refer to everything other than efficiency.³¹ Dan Farber has used the term to include “any standard for determining the just distribution of resources.”³² One widely used distinction is between distributive and corrective justice. The former deals with the allocation of desirable resources in proportion to the “possession of some morally relevant characteristic” such as humanity (which supports an egalitarian distribution) or virtue (which favors some more than others).³³ Corrective (or compensatory) justice “seeks to correct transactional wrongs” by requiring wrongdoers to compensate those whom they harm, and may turn on whether mere causation is sufficient to trigger a compensatory obligation or whether fault is also required.³⁴ Making matters even more complex, distributional concerns may arise in several guises, including vertical,³⁵ horizontal,³⁶ geographical,³⁷ and

²⁹ O’Connell, *supra* note 1, at 1680.

³⁰ See CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA* 252 (1993) (discussing the “difficulties of sorting through . . . competing standards of ‘fairness’ to find the morally right one”).

³¹ See, e.g., Wallace Wen-Yeu Wang & James Ting-Yeh Yang, *Financial Institutions in Taiwan: An Analysis of the Regulatory Scheme*, 4 J. CHINESE L. 3, 33 (1990); Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1192 (1977). *But cf.* Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2160 (2004) (discussing market liberalism’s “view that efficiency, equity, and sustainability are separable goals”).

³² Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791, 1794 (2003).

³³ Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 38 (2011). See also STONE, *supra* note 30, at 247–48 (describing distributive justice as dealing with “situational disparities,” not actions).

³⁴ Oman, *supra* note 33, at 38.

³⁵ Vertical equity implicates “the fairness of the distribution of wealth among different income groups.” Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 415 (1977). A disaster preparedness plan that facilitated evacuation of affected wealthy but not poor neighborhoods would raise vertical equity concerns. Vertical equity concerns are the focus of the environmental justice movement, which posits that all persons are equally entitled to protection from environmental harm. ROBERT R.M. VERCHICK, *FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD* 118 (2010).

³⁶ “Horizontal equity requires government to treat like persons alike.” Ellickson, *supra* note 35, at 415. A plan that required individuals of similar income levels to pay different amounts to finance protection measures, on the basis of some characteristic unrelated to the degree of benefit individuals would accrue from the plan, would invoke horizontal equity concerns.

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temporal.³⁸ Institutional design may have equitable implications. Centralized authority, for example, may diminish the likelihood that decisionmakers will be cognizant of and address unique local circumstances that merit differential rather than uniform treatment. On the other hand, decentralized decision making may increase the risk of disparate treatment of similarly situated entities in different jurisdictions because decisionmakers are not aware of or disagree with what other regulators are doing.

D. Legitimacy

Although there is broad consensus that legitimacy is a core administrative law concern, and thus bears on the structure of government,³⁹ legitimacy encompasses multiple considerations, which scholars define and assess differently.⁴⁰ We focus here on the aspects of legitimacy most relevant to assessing alternative ways to organize government regulatory or management programs. Legitimacy may be defined as “the acceptability of [a] regulation to those involved in its development,”⁴¹ which may be enhanced through the availability of opportunities for public participation.⁴² Social psychologists contend that participation enhances perceptions of legitimacy “independ-

³⁷ Geographic concerns may arise from a regime that concentrates health and safety risks in a particular location, such as the area surrounding a waste disposal facility or a high-volume pollution source.

³⁸ Temporal equity deals with “the preservation or defeat of expectation interests.” RICHARD B. STEWART & JAMES B. KRIER, ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS AND NOTES 168 (2d ed. 1978). Temporal concerns, for example, may arise when a government program foists costs on future generations that will not be able to enjoy the benefits of the resource allocations that produce those costs. See generally Neil H. Buchanan, *What Kind of Environment Do We Owe Future Generations?*, 15:2 LEWIS & CLARK L. REV. 339 (2011). These concerns would be implicated, for example, if the government chose to indefinitely forestall taking steps to avoid damage caused by the activities of the present generation, even though it would be far more expensive to resolve the issue on a deferred basis.

³⁹ See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) (“From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.”); Sidney A. Shapiro, et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463 (2012) (“The history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.”).

⁴⁰ See Shapiro, et al., *supra* note 39, at 466 (“Legitimacy is a notoriously treacherous concept.”).

⁴¹ Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 63 (2000).

⁴² Transparency also promotes legitimacy because it “tends both to improve the quality of decisions and to facilitate accountability to the electorate.” William H. Simon, *Democracy and Organization: The Further Reformation of American Administrative Law*, at 42, 7–8, available at http://www.utexas.edu/law/journals/tr/sources/Volume%2091/Issue%207/Metzger/metzger.fn075.simon.democracy_and_organization.pdf (arguing that transparency fosters “openness to ongoing diffuse democratic pressures”).

dently of whether outcomes ultimately favor . . . participants.”⁴³ In addition, opportunities to participate are consistent with democratic government.⁴⁴

The legitimacy of a regulatory system also turns on the degree to which it protects against deviation from legislative goals due to capture of regulators by special interests.⁴⁵ Regulators with conflicts of interest are especially vulnerable to capture.⁴⁶ Procedural mechanisms such as transparency and opportunities to participate can combat capture.⁴⁷ So, too, can the availability of judicial review, which may be invoked by stakeholders to prevent those implementing regulatory programs from straying beyond legislative bounds.⁴⁸

Similarly, perceptions that decision makers are honest, unbiased and competent promote legitimacy.⁴⁹ In addition, assigning tasks to those with expertise and providing them the tools to perform such tasks can also increase the likelihood that programs will operate effectively, illustrating that the four values we have identified are interrelated and may overlap.⁵⁰ Likewise, the requirement that agencies provide reasons for their decisions that are based on facts and rooted in the agencies’ statutory authority provide constraints that promote legitimacy.⁵¹ Institutional design can affect the legitimacy of a government program. Shared regulatory authority, for exam-

⁴³ Freeman & Langbein, *supra* note 41, at 67 (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988)).

⁴⁴ *See id.* at 133 (noting that broad participation and inclusiveness are generally laudable goals and that, “all things being equal,” greater participation is more consistent with democratic values than less participation). Cynthia Farina has called government decision making that reflects the “will of the people” “the wellspring of legitimacy.” Cynthia R. Farina, *The Consent of the Governed: Simple Rules for a Complex World*, 72 *CHI.-KENT L. REV.* 987, 990 (1997). Government processes that are fair enhance “identification with, and commitment to, the legal-political system.” *Id.* at 1035.

⁴⁵ Freeman & Rossi, *supra* note 4, at 1185–87 (addressing the risks of capture of agencies). A captured agency seeks to promote the agenda of those to which it is beholden, even if that agenda deviates from statutory goals.

⁴⁶ *See* Arthur E. Wilmarth, Jr., *The OCC’s Preemption Rules Exceed the Agency’s Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 *ANN. REV. BANKING & FIN. L.* 225, 232 (2004).

⁴⁷ *See* Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 *BROOK. J. INT’L. L.* 883, 946 (2008).

⁴⁸ *See, e.g.*, Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 *DUKE L.J.* 522, 525 (1989) (discussing the traditional view that “the basic function of the courts might be described as the promotion of ‘legitimacy’ in the administrative process”).

⁴⁹ *See, e.g.*, Farina, *supra* note 44, at 1035 (noting that legitimacy is the result of public confidence in the competence and trustworthiness of officials); Terence R. Mitchell & William G. Scott, *Leadership Failures, the Distrusting Public, and Prospects of the Administrative State*, 47 *PUB. ADMIN. REV.* 445, 446–47 (1987) (explaining that vesting decision-making authority in those with expertise on issues within their jurisdiction can enhance the perception of competence, and therefore foster legitimacy).

⁵⁰ *See* Freeman & Rossi, *supra* note 4, at 1185 (arguing that programs capable of improving analysis by adding data and expertise are “likely to make decisions better”). Another overlap involves consistent treatment of similarly situated entities, which promotes both a sense of non-arbitrariness (and therefore of legitimacy) and of fair treatment.

⁵¹ This requirement of “deliberation” enhances accountability by guarding against arbitrariness. Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review:*

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ple, that authorizes one agency to review and veto the decision of another can be useful in combating capture.⁵²

E. Balancing Values in Allocating Government Authority

The four evaluative yardsticks discussed above are not meant to be an exclusive recitation of the values implicated by government organization or reorganization. They are among the most important measures for assessing an allocation of governmental authority, however. Although it is possible that all four criteria will support a particular allocation, an initiative designed to promote one of the measures often may adversely affect one or more of the others.⁵³ The proper balance among the four criteria identified here will necessarily be context-specific.⁵⁴ For example, it may be preferable to reject the option that promises to most effectively achieve regulatory goals if that option is harshly inequitable or vests in decision-makers authority that threatens legitimacy. These kinds of tradeoffs of course are common under the American system of government.⁵⁵ As long as the yardsticks are clearly identified and the impact of a particular allocation on each is assessed, policymakers will be able to make informed decisions on the best way to achieve an appropriate balance among them. Parts III through V below illustrate in more detail the kinds of tradeoffs likely to be implicated in choosing among possible allocations of authority.

Building Legitimacy from the Inside-Out, 37 HARV. ENVTL. L. REV. 313, 316 (2013). The reasons requirement provides evidence of a commitment to rationality. *Id.* at 325.

⁵² See, e.g., Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78, 81 (2012). Cf. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 55 (2010) (arguing that “if the insulated agency’s enforcement authority is merely shared with another agency, but the other agency does not have the ability to veto the insulated agency’s enforcement decisions, this structure does not formally undercut the insulated agency’s authority to bring actions to protect the beneficiaries of the regulation. Rather, this structure puts more cops on the beat to ensure that an agency’s rules or a statute’s requirements are taken seriously.”).

⁵³ See, e.g., Biber, *supra* note 52, at 79 (“So long as there are multiple things for the government to do, there will always be a question about what organizational structure will allow it to be most successful in dealing with the interactions among . . . different goals.”).

⁵⁴ Accountability, for example, “guarantees responsiveness, although not necessarily effectiveness.” O’Connell, *supra* note 1, at 1719.

⁵⁵ See, e.g., *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (stating that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . .”); *id.* at 958–59 (stating that “the Framers ranked other values higher than efficiency.”). The Court, in striking down the legislative veto in *Chadha*, emphasized the Framers’ choice to sacrifice efficient government for accountable, democratic government through the imposition of requirements such as bicameralism and presentment. See *id.* at 959.

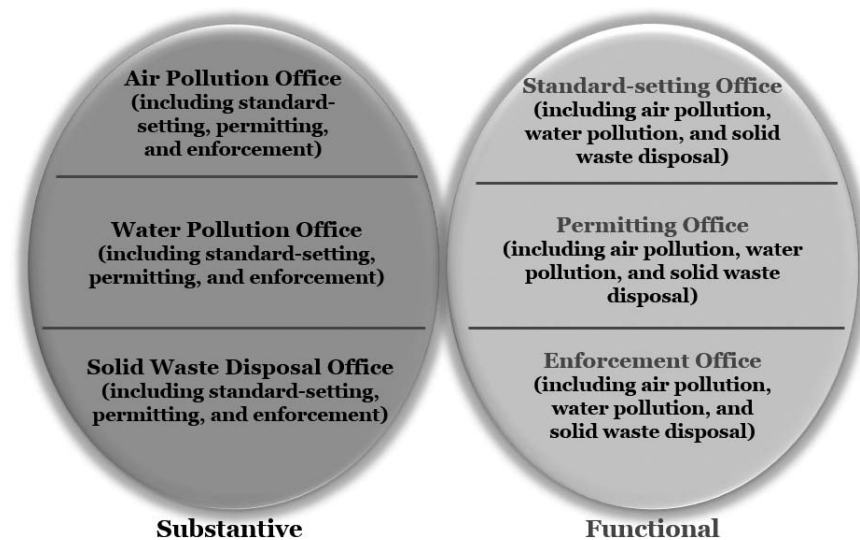
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II. SUBSTANTIVE AND FUNCTIONAL ALLOCATIONS OF AUTHORITY

Regulatory authority can be assigned in two different ways. First, an agency’s jurisdiction can be determined on the basis of the subject matter it is authorized to regulate or manage (such as activities that result in air pollution or mineral extraction on public lands). Second, jurisdiction can be defined in terms of the functions an agency performs, such that different agencies may be responsible for performing discrete tasks (such as standard setting, permitting, and enforcement) within the same substantive area. For example, as illustrated in Figure 1 below, although federal pollution control authority could be apportioned into substantive silos according to the particular type of resource (e.g., air, water, or solid waste), such authority could also be divided into functional categories according to the governmental activity at issue (e.g., standard setting, permitting, and enforcement). Alternatively (and more commonly), a legislature or administrative agency might adopt a hybrid of substantive and functional allocations in creating or reorganizing authority, in which agencies are only provided authority over certain regulatory functions for particular types of resources or regulatory problems.⁵⁶

Figure 1. Substantive and Functional Jurisdiction



In characterizing governmental jurisdiction, primary attention tends to be given to evaluating agency management based on the scope of the substantive authority of the governmental entity. However, regulatory authority

⁵⁶ See *infra* notes 71–78 and accompanying text (describing organization of EPA and the Internal Revenue Service).

is also consistently apportioned based on the function or functions that a particular governmental institution may exercise.⁵⁷ Though some scholars have noted the existence of division of authority along functional lines,⁵⁸ the significance of this component is considerably underappreciated in the regulatory design literature.⁵⁹

A. *Substantive Jurisdiction*

Perhaps the most elementary component for assessing how authority is allocated in the management of social problems for which regulatory programs have been created is substantive jurisdiction. Congress grants to administrative agencies limited substantive authority to regulate or manage specific social issues or problems. Workplace health and safety falls within the purview of the Occupational Safety and Health Administration. The U.S. Department of Agriculture deals with the agriculture industry. Transportation infrastructure is addressed by the Federal Highway Administration and the Department of Transportation. Immigration is an activity supervised by the U.S. Citizenship and Immigration Services. The Centers for Disease Control and Prevention conduct disease research and coordinate disease prevention measures. The Federal Emergency Management Agency is charged with conducting disaster planning and management.

In environmental regulation, administrative authority is typically restricted to regulation or management of a particular environmental resource (such as clean air or clean water). Indeed, substantive authority may be further divided based on particular features or components of a protected resource or “medium.” For example, surface water quality is regulated by the U.S. Environmental Protection Agency (EPA) and designated state water quality agencies (such as California’s State Water Resources Control Board), while the allocation of water supply falls within the domains of different state and local water resources agencies (such as the California Department of Water Resources and Metropolitan Water District of Southern California). Similarly, management of terrestrial or freshwater (including endangered or threatened) species is under the jurisdiction of the Interior Department’s United States Fish and Wildlife Service (FWS), while marine species are managed by the Commerce Department’s National Marine Fisheries Service. Public land management is divided based on particular land management

⁵⁷ See *infra* Part II.B.

⁵⁸ Scholars investigating government organization who do refer to agency functions frequently do so in a different sense than we are using that term. Rather than focusing on the different kinds of tasks agencies perform, these scholars use functions to describe the scope of an agency’s substantive jurisdiction (such as the authority to regulate air pollution, but not water pollution). See, e.g., David A. Hyman & William E. Kovacic, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?* (forthcoming) (Feb. 20, 2013 draft at 11–12), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2110351 (discussing the allocation of authority among three agencies to provide services for veterans).

⁵⁹ See *infra* Part IV.A.1.

goals, with the National Park Service (NPS) and the U.S. Fish and Wildlife Service (FWS) being charged primarily with the duty to preserve natural resources and provide recreational opportunities, while the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM) are required to promote a broader range of multiple uses of the lands under their jurisdiction.⁶⁰

Such division is not unique to pollution control or natural resources law. Some food products are generally regulated by the Food and Drug Administration, while other foods (meat, poultry, and processed egg products) are under the jurisdiction of the United States Department of Agriculture's Food Safety and Inspection Service.⁶¹ The Dodd-Frank Act⁶² vested authority to regulate providers of consumer financial products and services, including insured banks, savings and loans, and large credit unions, in one agency, but delegated to a different agency regulatory control over smaller depository institutions, and retained authority in still other agencies to regulate transactions in securities and commodities futures.⁶³ In addition, "informational privacy is governed by a variety of different laws, administered by different agencies . . . setting forth divergent requirements governing the treatment of information by type and business sector."⁶⁴

Relatedly, substantive authority may be delegated to a particular authority in recognition of that agency's technical expertise that may be brought to bear on the regulatory problem. For example, an expertise in atmospheric chemistry is useful for understanding and regulating air quality, an ecology background for managing biological resources, a public health or medical background for disease prevention, or forestry expertise for forest management.⁶⁵ California has vested multiple agencies with authority to regulate different aspects of the electric utility industry to reflect the expertise

⁶⁰ See 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 6:14-6:17 (West 2d ed. 2007).

⁶¹ See *Drugs*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Drugs/default.htm> (last visited Oct. 6, 2013), archived at <http://perma.cc/0K6JQ5PHw29>; *Cosmetics*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Cosmetics/default.htm> (last visited Oct. 6, 2013), archived at <http://perma.cc/QQSjXyG8eKX>; *Foods*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/default.htm> (last visited Oct. 6, 2013), archived at <http://perma.cc/0BKKQgpiKk7> (identifying FDA authorities); *About Us*, U.S. FOOD SAFETY & INSPECTION SERV., http://www.fsis.usda.gov/About_FSIS/index.asp (last visited Oct. 6, 2013), archived at <http://perma.cc/0MTctxecTmB> (outlining FSIC authorities).

⁶² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No., 111-203, 124 Stat. 1376 (2010).

⁶³ Elizabeth R. Schiltz, *The Paradox of the Global and the Local in the Financial Crisis of 2008: Applying the Lessons of Caritas in Veritate to the Regulation of Consumer Credit in the United States and the European Union*, 26 J.L. & RELIGION 173, 183-84 (2010).

⁶⁴ Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 257 (2011).

⁶⁵ For discussion of how different scientific disciplines affect the design and management of natural resource regulatory systems, see Eric Biber, *Which Science? Whose Science? How Scientific Disciplines Can Shape Environmental Law*, 79 U. CHI. L. REV. 471 (2012).

of each agency.⁶⁶ Similarly, scholars have urged expansion of the Copyright Office's authority over complex and dynamic issues in which it has expertise.⁶⁷

B. Functional Jurisdiction

Although the academic literature often focuses on agencies' substantive jurisdiction, the manner in which Congress allocates authority along functional lines also may bear on the degree to which a regulatory program achieves statutory goals. Governmental authority may be organized according to the particular regulatory activities or tasks in which the agency is authorized to engage. Thus, although a statute may delegate to several agencies the authority to regulate a particular set of private activities, each agency may be in charge of a particular aspect of the regulatory program. One agency, for example, may be responsible for collecting information needed to make regulatory decisions, while another may be charged with using that information to adopt regulatory standards that constrain private conduct. Agency functions include monitoring (whether ambient,⁶⁸ compliance,⁶⁹ or effect and effectiveness monitoring⁷⁰); scientific research and data generation; information organization and distribution; funding; planning; standard setting; implementation and permitting; and enforcement.

For many agencies, functional jurisdiction is a subordinate form of regulatory division. The primary organizing principle for determining the bounds of such an agency's authority involves substantive authority, while the agency's jurisdiction is secondarily based on function. Typically, an agency is provided substantive authority over particular resources, issues, or problems, for which it creates offices or divisions that focus on sub-topics of that substantive authority. For example, EPA includes Offices for Air and Radiation, Chemical Safety and Pollution Prevention, Solid Waste and Emergency Response, and Water, corresponding with its various substantive authorities to regulate air quality, pesticides and toxic substances, solid and

⁶⁶ See Timothy P. Duane, *Greening the Grid: Implementing Climate Change Policy Through Energy Efficiency, Renewable Portfolio Standards, and Strategic Transmission System Investments*, 34 VT. L. REV. 711, 743–44 (2010).

⁶⁷ See, e.g., Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 148 (2004). *But cf.* Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 130 (2002) (criticizing New York's child protection laws on ground that "[d]omestic violence expertise within the agency is isolated and without substantive authority").

⁶⁸ See, e.g., Eric Biber, *The Problem of Environmental Monitoring*, 83 U. COLO. L. REV. 1, 9 (2011) (detailing problems with ambient monitoring, defined as "the state of the environment at the local, regional, national, or global scale," by resource agencies).

⁶⁹ See, e.g., Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,241, 35,252–53 (June 1, 2000) (defining compliance monitoring).

⁷⁰ See, e.g., *id.* (defining effect and effectiveness monitoring to include whether the action or plan is achieving its stated goals and objectives).

hazardous waste, and water quality, respectively.⁷¹ These subdivisions often have authority over a range of functions, including monitoring, standard setting, and implementation/permitting, with authority further subdivided either by substantive subcategory and/or by functional activity.⁷²

However, agencies also often contain divisions or offices dedicated to particular regulatory functions, regardless of their substantive focus. At EPA, these include the Office of Enforcement and Compliance Assurance, the Office of Environmental Information, the Office of General Counsel, the Office of Inspector General, the Office of International and Tribal Affairs, and the Office of Research and Development.⁷³ These offices are charged with enforcement, gathering information, and research, respectively, across the entire range of EPA's substantive authority.⁷⁴ The Internal Revenue Service has separate offices to handle tax issues concerning small businesses and tax-exempt organizations, a substantive division of authority, but it also reflects functional divisions, with separate offices for privacy and disclosure, whistleblowers, and criminal investigations, all of which cut across substantive lines.⁷⁵ Agencies routinely have separate offices to deal with congressional relations, media and communications, and legal matters, regardless of the substantive nature of the issue for which negotiations with the legislature, outreach to the media, or legal advice is required.⁷⁶ Such division of functional authority also occurs between agencies. Under the Clean Air Act, for example, the EPA is charged with developing national ambient air quality standards to protect the public health and welfare,⁷⁷ but the states are primarily responsible for devising plans to implement and achieve those standards.⁷⁸

Furthermore, though most regulatory authority is delegated primarily based on substantive scope, with functional jurisdiction usually a secondary

⁷¹ EPA *Organizational Structure*, <http://www.epa.gov/aboutepa/organization.html> (last visited Oct. 6, 2013), archived at <http://perma.cc/0HHPzEC3NBG>.

⁷² In 1993, EPA reorganized the Office of Compliance and Enforcement by centralizing in it enforcement authority previously dispersed among five offices. *U.S. Environmental Protection Agency Office of Environmental Justice in the Matter of the Fifth Meeting of the Environmental Justice Advisory Council*, 9 ADMIN. L. REV. AM. U. 623, 663 (1995). This shift illustrates that the structural relationships among offices within a single agency may differ along each of the three dimensions identified in this Article, just as relationships may differ among separate agencies.

⁷³ EPA *Organizational Structure*, *supra* note 71.

⁷⁴ See Alfred A. Marcus, *EPA's Organizational Structure*, 54 LAW & CONTEMP. PROBS. 5, 23 (1991).

⁷⁵ See IRS Organizational Chart, http://www.irs.gov/pub/irs-news/irs_org_chart_2012_.pdf (last visited Oct. 6, 2013), archived at <http://perma.cc/0V8ab6xCvE3>.

⁷⁶ See, e.g., *USDA Agencies and Offices*, http://www.usda.gov/wps/portal/usda/usdahome?navid=AGENCIES_OFFICES_C (last visited Oct. 25, 2013), archived at <http://perma.cc/0zM6wTATELX> (describing offices within the Department of Agriculture, including the Office of Communications, the Office of Congressional Relations, and the Office of the General Counsel).

⁷⁷ 42 U.S.C. § 7409(b) (2006).

⁷⁸ *Id.* § 7410(a). EPA may adopt a plan if a state fails to submit an acceptable plan in limited circumstances. *Id.* § 7410(c).

organizing criterion, some agencies are organized with function as the principal basis for their authority. For instance, Congress has delegated to the United States Government Accountability Office responsibility for audit, investigation, reporting, and evaluation of the federal agencies, regardless of the substantive area of regulation.⁷⁹ The United States Geological Survey is a research-only agency that generates biological, geographical, geological, and hydrological information that helps inform policy by regulatory authorities, but has no regulatory functions of its own.⁸⁰ More broadly, of course, the separation of legislative, executive, and adjudicative power among the branches of government is a form of functional jurisdiction.⁸¹ As more fully explored in Part IV, one of the principal aims of this Article is to encourage policymakers and scholars to focus more attention on whether evaluating and allocating agency authority along functional rather than substantive lines holds greater promise of achieving the policy goals of a particular government program at less cost to competing policy objectives.

III. A TAXONOMY OF ALLOCATION OF AUTHORITY

For any substantive area of regulation and governmental function, regulatory authority can be further evaluated along three key dimensions. As illustrated in Figure 2, these include how centralized the authority is; how much overlap in governmental authority there is among multiple government bodies with concurrent jurisdiction over a particular regulatory problem; and the extent to which such authority is exercised independently or in coordination with other governmental entities with authority over a particular substantive area or function.

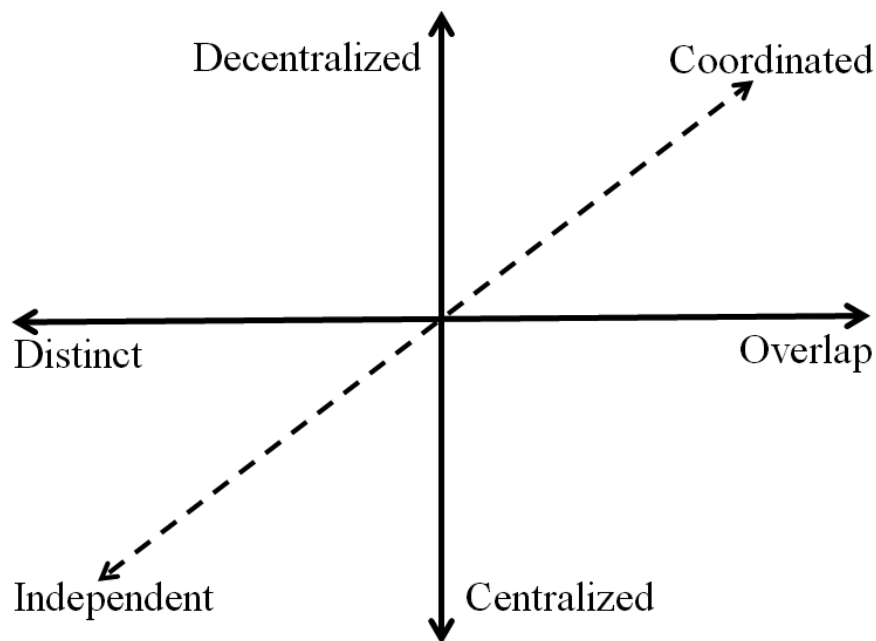
As explained in Part IV, some of these dimensions have been ignored or conflated in the federalism and governance literature. Yet each measures a particular component of regulatory authority, representing different sets of policies and ultimately values tradeoffs over the appropriate design for managing social problems. Accordingly, changes in the allocation of authority to address a regulatory problem may be appropriate along one dimension, but not others.

⁷⁹ *About GAO*, <http://www.gao.gov/about/index.html> (last visited Oct. 25, 2013), archived at <http://perma.cc/0j8U/nhcTXBJ>.

⁸⁰ *About USGS*, <http://www.usgs.gov/aboutusgs/> (last visited Oct. 25, 2013), archived at <http://perma.cc/0hjH/13yg1Yi>.

⁸¹ See, e.g., William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323, 348 (2005) (discussing “institutional fragmentation,” which results from allocation of authority to “diverse institutions such as legislatures, agencies, courts and legally empowered citizens”).

Figure 2. Dimension Relationships



A. Decentralized versus Centralized Authority

At least in the legal academic literature, perhaps the most frequently analyzed dimension for characterizing the allocation of regulatory authority is the scale or level of government which is granted jurisdiction. As illustrated in Figure 3 below, governmental authority could be allocated anywhere in a range between highly centralized and highly decentralized. On one extreme, a regime may be preemptively federal (e.g., the regulation of immigration⁸² or space exploration). On the other end of the spectrum are regimes where authority is primarily local, such as land use zoning or the administration of water rights. In between, there is a range of hybrids of federal, state, and local authority. Some regimes involve various federal agencies;⁸³ others consist of a federal regulator and single state regulator

⁸² *But cf.* *Arizona v. U.S.*, 132 S. Ct. 2492, 2507 (2012) (refusing to enjoin implementation of state law requiring police to determine the immigration status of persons they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is” an unlawful alien).

⁸³ *See, e.g.*, 16 U.S.C. § 1536(a)(2) (2006) (requiring consultation among federal agencies on impacts of proposed activities on endangered species); 42 U.S.C. § 7475(d) (2006) (establishing role for federal land management agencies in EPA review of state disposition of permit applications for construction of sources whose emissions might affect federal lands such as national parks).

whose standards other states can opt to follow;⁸⁴ still others combine both federal and state agencies.⁸⁵

Accordingly, one key question for this dimension is whether authority to address a social problem is primarily decentralized to a local or state jurisdiction or more centralized at the federal level. Another question, however, is whether regulatory authority within a certain level is delegated to one entity or divided among two or more entities. Thus, if a statute allows only federal agencies to address a problem (preempting supplemental state or local regulation), the regime is centralized compared to one in which regulators in all fifty states were allowed to regulate. Within the federal government, regulatory authority could be fully centralized in one agency or decentralized by dividing authority among multiple federal agencies or among local offices of a single federal agency.⁸⁶ We regard the degree of fragmentation of authority among multiple regulators at the same level as a second aspect of characterizing a regulatory regime as centralized or decentralized.⁸⁷

1. Decentralized Authority

For centuries, at least as far back as the origination of the concept of subsidiarity,⁸⁸ scholars have promoted the idea that authority is best allo-

⁸⁴ An example is automobile tailpipe emission regulation under the Clean Air Act, which grants EPA exclusive standard-setting authority, but allows California regulators to set alternative standards that, if approved by EPA, other state agencies can follow. Clean Air Act, 42 U.S.C. §§ 7507, 7543 (2006).

⁸⁵ For example, stationary source regulation under the Clean Air Act, 42 U.S.C. §§ 7410(a), 7411, 7475(a)(1), 7502(c)(5) (2006), or public land management. *See* 1 COGGINS & GLICKSMAN, *supra* note 60, § 1:1.

⁸⁶ An example may best illustrate the point. With some exceptions, the authority to regulate federally-owned lands is typically centralized in the federal government. *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 205 (2005) (stating that “[u]sually, the federal government has ultimate authority to make a preemptive determination” concerning management of natural resources on federal lands). In those substantive areas in which states retain concurrent jurisdiction, such as wildlife management, authority is more decentralized. *See* 3 COGGINS & GLICKSMAN, *supra* note 60, § 32:8. If Congress had vested federal land management authority in a single federal agency, authority would have been centralized still further. Instead, jurisdiction to manage different kinds of federal lands systems (e.g., national parks, national forests, wildlife refuges, and other public lands) has been delegated to (and decentralized among) a group of agencies, including the National Park Service, the National Forest Service, the FWS, and the Bureau of Land Management.

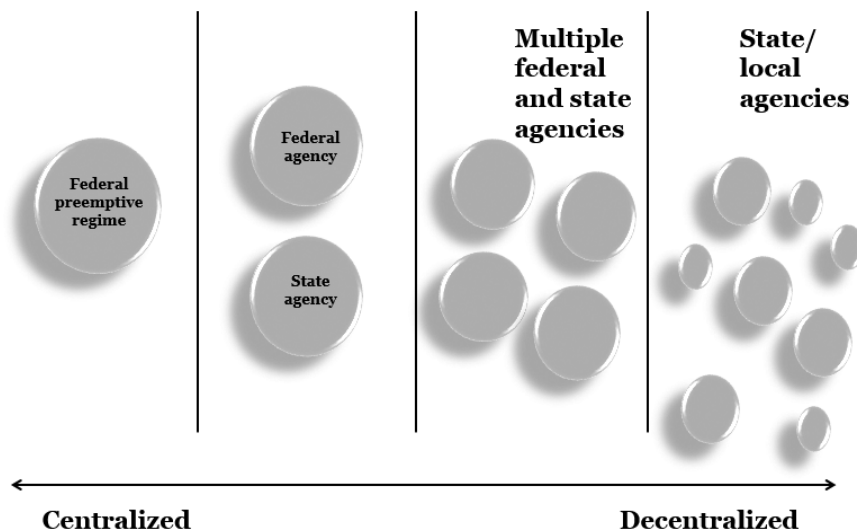
⁸⁷ Similarly, even if authority is delegated exclusively to one agency, federal or state, that agency may contain multiple offices, divisions, or bureaus. If so, authority is decentralized within the agency, and authority among the components within the agency can be overlapping or distinct, and coordinated or independent. For purposes of this Article, when we refer to a fully centralized agency, we mean an agency that has no internal subdivisions. We recognize, however, that subdivisions within an agency may be aligned at different points along the overlap and coordination dimensions, just as multiple agencies may be so aligned.

⁸⁸ Subsidiarity is the organizing principle “that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.” *Subsidiarity*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/>

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Figure 3. Centralized versus Decentralized Authority



cated at the local level.⁸⁹ A popular rationale for decentralized regulation is its ability to leverage local knowledge and expertise,⁹⁰ while a related, second justification is to ensure regulation is better tailored to local conditions, preferences, and economic conditions.⁹¹ Third, many argue that decentralized government of this first kind allows opportunities for regulatory experimentation that can encourage innovation.⁹² We refer to these justifications

view/Entry/193007?redirectedFrom=subsidiarity#eid (last visited Oct. 6, 2013), *archived at* <http://perma.cc/0Vc7ptuKhjD>. It is a general principle of European Union law. See Consolidated Version of the Treaty on European Union art. 5(3), Feb. 7 1992, 2010 O.J. (C 83) 13.

⁸⁹ See Jeffrey S. Dornbos, *All (Water) Politics Is Local: A Proposal for Resolving Transboundary Water Disputes*, 22 *FORDHAM ENVTL. L. REV.* 1, 17 (2010) (“[T]he Constitution’s structure of reserving non-enumerated powers to the states suggests a principle of subsidiarity”) (citation omitted) (internal quotation marks omitted).

⁹⁰ See, e.g., *id.* at 17. Professor Vermeule distinguishes between “local” and “global” knowledge, with proponents of decentralized authority tending to prefer context-specific knowledge about economic or regulatory programs, while advocates of centralized programs tend to focus on the benefits of a broader “synoptic” approach to regulation. Adrian Vermeule, *Local and Global Knowledge in the Administrative State* 2, 18 (Harvard Public Law, Working Paper No. 13-01, 2012), *available at* <http://ssrn.com/abstract=2169939>. Much as we do in this Article with respect to the three dimensions we address, Professor Vermeule recognizes that the distinction between contextual and synoptic knowledge is “highly stylistic, whereas in reality there is a continuum between the two extremes and everything is a matter of degree.” *Id.*

⁹¹ See, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 *N.Y.U. ENVTL. L.J.* 130, 136–37 (2005).

⁹² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); David L. Markell, *States as Innovators: It’s Time for a New Look to Our “Laboratories of Democracy” in the Effort to Improve Our Approach to Environmental Regulation*, 58 *ALB. L. REV.* 347, 355 (1994) (describing capacity of state and

respectively as the expertise, diversity, and experimentation rationales for decentralized regulation. These three justifications for localizing regulation are primarily (although not exclusively) based on the pursuit of more effective regulation.⁹³

A fourth related and commonly purported benefit of decentralized governance is that interlocal competition maximizes social utility by allowing each local community to shape its interests and goals.⁹⁴ As indicated below, however, even though some level of decentralization may be a necessary condition for competition to occur, we think that competition of this kind flows more precisely from what we define as independently structured government authority than from decentralization.⁹⁵ Fifth, and finally, some also argue that localized allocation of authority makes decision-makers more accessible and therefore promotes more accountable and democratic governance.⁹⁶ A related claim postulates that local regulators tend to be more accountable than regulators at higher government levels.

These justifications explain at least in part the predominance of state or local regulation of certain social problems. Pre-1960 environmental law is a good example. Before 1960, state and local laws were the only significant governmental constraints on pollution in the United States, with a few exceptions.⁹⁷ These included state common law causes of action such as nuisance, trespass, negligence, and strict liability, as well as local land use regulations designed to segregate industrial from residential uses, thereby minimizing opportunities for pollution produced by the former to harm the latter.⁹⁸ Other examples of traditional state and local regulation that the Supreme Court has identified include matters of health care and protection of

local governments to act as “innovation centers” for environmental regulation by providing “the opportunity to try a wide variety of approaches simultaneously or within short periods of time”); Adler, *supra* note 91, at 137.

⁹³ Though primarily based on promoting effective regulation, the diversity justification for decentralization—allowing regulation more closely tailored to local conditions and circumstances—can also be justified on equity grounds.

⁹⁴ See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (promoting decentralization model premised on interlocal competition for consumer-voters); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1977) (same). According to one source, “[u]nder competitive federalism, state and federal governments compete with one another to provide regulation to a mobile citizenry.” Bruce Johnsen, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 405 (2004).

⁹⁵ See *infra* Part III.C.2.

⁹⁶ See, e.g., GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999).

⁹⁷ See The River and Harbors Act of 1899, 33 U.S.C. § 407 (prohibiting the discharge of “refuse matter” without a federal permit when the program’s principal objective was to promote commerce by preserving navigability); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 729 (2006) [hereinafter Glicksman, *Mutation*].

⁹⁸ Local governments also enacted smoke control ordinances and laws. Glicksman, *Mutation*, *supra* note 97, at 729–30.

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public safety,⁹⁹ such as regulation of vaccines,¹⁰⁰ advertising,¹⁰¹ family and probate law,¹⁰² employee welfare benefit plans,¹⁰³ protection of the security of real estate titles,¹⁰⁴ insurance contracts,¹⁰⁵ education, and enforcement of criminal laws.¹⁰⁶

Though decentralized authority is most likely to be associated with local or state regulatory control, federal regulatory authority could be modified to be more or less decentralized (or fragmented) as well. Some of the same justifications for local or state regulatory authority may be similarly levied for delegating jurisdiction over particular substantive areas or regulatory functions to a variety of disparate federal agencies or local offices within a single agency. Particularized expertise¹⁰⁷ and regulatory experimentation to promote innovation¹⁰⁸ may lead to the allocation of federal authority away from a heavily consolidated model toward one with more decentralized federal jurisdiction. These expertise and experimentation rationales tout the effectiveness advantages of decentralized regulation. The diversity and accountability rationales for decentralizing regulation to state or local authorities, however, are less relevant to this second aspect of decentralization because decentralization among multiple federal agencies is not especially likely to result in either government action that is more tailored to local conditions or greater accessibility to decisionmakers.

2. Centralized Authority

Despite the diversity, experimentation, democratic, and expertise critiques of centralized government,¹⁰⁹ many legislatures and scholars have in-

⁹⁹ See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002); *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000).

¹⁰⁰ See, e.g., *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1096 n.15 (2011).

¹⁰¹ See, e.g., *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

¹⁰² See, e.g., *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001).

¹⁰³ See, e.g., *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 330 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655–56 (1995).

¹⁰⁴ See, e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

¹⁰⁵ See, e.g., *Metrop. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

¹⁰⁶ See, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995).

¹⁰⁷ See, e.g., *Freeman & Rossi*, *supra* note 4, at 1142 (noting that dispersal of authority can “harness the unique expertise and competencies of different agencies,” and that these benefits may justify resulting policy inconsistencies and wasteful redundancy).

¹⁰⁸ See Alejandro E. Camacho, *Transforming the Means and Ends of Natural Resources Management*, 89 N.C. L. REV. 1405, 1423 (2011) (noting how decentralized governance can promote “regulatory experimentation to reduce uncertainty”).

¹⁰⁹ See, e.g., Liesbet Hooghe & Gary Marks, *Unraveling the Central State, But How?*, POLITICAL SCIENCE SERIES, INSTITUTE FOR ADVANCED STUDIES, VIENNA 6 (2003), available at http://aei.pitt.edu/530/2/pw_87.pdf (“Centralized government is not well suited to accommodate diversity. Ecological conditions may vary from area to area. . . . Preferences of citizens may also vary sharply across regions within a state, and if one takes such heterogeneity into account, the optimal level of authority may be lower than economies of scale dictate.”); Dornbos, *supra* note 89, at 17 (“[O]ver-centralized approaches to environmental regulation are

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creasingly accepted that at least for some regulatory problems, centralization makes sense. Centralization can take advantage of economies of scale that are forfeited if regulatory authority is dispersed.¹¹⁰ Some have argued, for example, that certain government functions, such as research or standard setting, should be centralized at the federal level because of the economies of scale of a single authority administering the function.¹¹¹ This argument is premised on the comparatively greater administrative efficiency of centralized regulation.

In addition, authority may be best centrally allocated at the federal level because of the national character of the issues involved or because of collective action concerns. Some regulatory matters have national footprints that are best addressed by a federal authority.¹¹² These might include immigration policy,¹¹³ pension plan administration,¹¹⁴ protection of intellectual property rights,¹¹⁵ protection of union-related advocacy,¹¹⁶ or control of activities on the high seas,¹¹⁷ such as maritime commerce.¹¹⁸ In environmental law and other contexts, some harms may cross jurisdictional lines, necessitating more centralized regulatory control to prevent or manage interstate spillovers.¹¹⁹ Trade wars among the states¹²⁰ and state product labeling requirements¹²¹ have been characterized as other kinds of activity that generate interstate spillovers that justify centralized federal regulation. Similarly, state public utility regulators have adopted policies designed to benefit in-state interests

inflexible and do not adequately account for local environmental conditions.”) (citing Adler, *supra* note 91, at 137); ENVIRONMENTAL FEDERALISM 259, 263 (Terry L. Anderson & Peter J. Hill eds., 1997) (arguing that a centralized approach to environmental justice issues would be unresponsive to local conditions and needs).

¹¹⁰ O’Connell, *supra* note 1, at 1680.

¹¹¹ See, e.g., Esty, *Environmental Federalism*, *supra* note 6, at 614; Esty, *Environmental Governance*, *supra* note 6, at 1562 (discussing value of economies of scale through consolidation of scientific or analytic work needed for environmental regulation); Adler, *supra* note 91, at 148.

¹¹² Whether a particular set of issues should be regarded as primarily of national or local concern may be contested. See, e.g., Ngai Pindell, *Nevada’s Residential Real Estate Crisis: Local Governments and the Use of Eminent Domain to Condemn Mortgage Notes*, 13 NEV. L.J. 888, 900 (2013).

¹¹³ See J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363, 423 (2009).

¹¹⁴ See *Boggs v. Boggs*, 520 U.S. 833, 838–39 (1997).

¹¹⁵ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964).

¹¹⁶ See *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 76 (2008).

¹¹⁷ See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986).

¹¹⁸ See *U.S. v. Locke*, 529 U.S. 89, 103 (2000); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674–75 (1982).

¹¹⁹ Adler, *supra* note 91, at 139; Richard Stewart, *Introduction to ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT* 11 (Richard L. Revesz et al. eds., 2000); Daniel A. Farber, *Climate Adaptation and Federalism: Mapping the Issues*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 259, 266 (2009).

¹²⁰ See Johnsen, *supra* note 94, at 449.

¹²¹ See Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 666 (1985).

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at the expense of outsiders.¹²² In addition, states can export economic burdens to other jurisdictions if they regulate the sale of products that produce local harms but that are manufactured (and produce employment and economic benefits) in other states.¹²³ In these contexts, centralized regulatory structures may be more effective than decentralized regulation.¹²⁴

Finally, James Madison and others have argued that centralized regulation has comparative fairness advantages because of its ability to promote uniform treatment of similarly situated entities regardless of location, and to temper the ability of self-interested factions to control the levers of power to the disadvantage of less powerful groups or interests.¹²⁵

A desire to address collective action problems underlies much of modern federal environmental law. Much of that law is premised on averting a “race to the bottom” from decentralized governance, in which local jurisdictions compete with each other by progressively lowering environmental standards.¹²⁶ Under this dynamic, individual states have incentives to lower standards to compete for industry whether or not other states do the same, even though the states as a collective would be better off not doing so.¹²⁷ Congress raised the undesirable specter of a race to the bottom when, in 1977, it amended the Clean Air Act.¹²⁸ A House report warned that “[i]f there is no Federal policy, States may find themselves forced into a bidding war to attract new industry by reducing pollution standards.”¹²⁹ Such a dynamic has been noted in other regulatory areas as well.¹³⁰

¹²² See generally Amy L. Stein, *The Tipping Point of Federalism*, 45 CONN. L. REV. 217 (2012).

¹²³ See Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 599–600 (2008).

¹²⁴ See Stewart, *supra* note 6, at 1215 (discussing how interstate “spillover[s] . . . generate conflicts and welfare losses not easily remedied under a decentralized regime”).

¹²⁵ See, e.g., THE FEDERALIST NO. 10, at 54 (James Madison) (E.H. Scott ed., 1894) (defining faction as citizens “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”); Dornbos, *supra* note 89, at 17 (“[E]nvironmental interests are often under-represented at the local level and centralized regulation may . . . ensur[e] that a broad spectrum of interests is represented.”).

¹²⁶ See, e.g., Kirsten Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?* 48 HASTINGS L.J. 271 (1997); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67 (1996).

¹²⁷ If other states do not lower standards, an individual state is in a better position to attract industry, while if other states lower standards, then the state must act in a similar manner to compete effectively.

¹²⁸ Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

¹²⁹ H.R. REP. NO. 95-294, at 152 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1231. See also *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 281–82 (1981) (characterizing statute regulating coal mining as a response to a congressional finding that nationwide standards were needed to prevent competition among coal producers in different states from undermining states’ ability to maintain adequate standards on coal mining operations within their borders).

¹³⁰ See, e.g., Cary, *supra* note 6, at 666 (identifying value of centralized regulation for preventing a race to the bottom in shareholder rights against corporations); Lynn LoPucki &

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In some instances, Congress has chosen to centralize authority for only a particular governmental function, or to centralize authority incrementally over time on a function-by-function basis, as it did in adopting air and water pollution control laws. Beginning in the 1950s, the federal government enhanced its responsibility for performing certain functions in halting air and water pollution before others. In 1966, Congress imposed greater centralization of information gathering and dissemination through the passage of laws that funded research into the causes and effects of pollution.¹³¹ These laws reflected the judgment that the states and localities lacked the resources to engage in or fund the research needed to support the adoption of effective pollution control laws.¹³² Armed with the information that federally assisted research could provide, the states and localities were presumed to be able to attack pollution and avoid public health effects more effectively.¹³³ In the 1960s, Congress chose to provide technical and financial assistance to the states, such as by subsidizing the construction of municipal sewage treatment works.¹³⁴ By the end of the decade, the federal government had increased its role in standard setting in a limited range of situations in which state and local regulation had been ineffective—namely, the control of interstate pollution that the state in which the pollution originated lacked the incentive to control and that states adversely affected by the pollution lacked the authority to control.¹³⁵ Congress subsequently gave EPA and other federal agencies broad standard-setting authority over a range of environmental media, including air, water, hazardous and solid waste, pesticides, and other toxic substances.¹³⁶

Sara Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND. L. REV. 231, 266 (2001) (bankruptcy law); Laurence H. Tribe, *The Constitutionality of the Patient Protection and Affordable Care Act: Swimming in the Stream of Commerce*, 35 HARV. J.L. & PUB. POL'Y 873, 880 (2012) (health care for the uninsured); Dan T. Coenen, *Originalism and the "Individual Mandate": Rounding out the Government's Case for Constitutionality*, 107 NW. U. L. REV. COLLOQUY 55, 71 (2012) (same); Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008); Christopher Paul, *Innovation or a Race to the Bottom? Trust "Modernization" in New Hampshire*, 7 PIERCE L. REV. 353, 372 (2009) (discretionary asset protection trusts).

¹³¹ See, e.g., An Act to Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution, Pub. L. No. 88-206, 77 Stat. 392 (1963).

¹³² See, e.g., Clean Air Act Amendments of 1966, H.R. REP. NO. 89-2170, at 4 (1966), reprinted in 1966 U.S.C.C.A.N. 3473, 3476; Federal Water Pollution Control Act Amendments of 1961, H.R. REP. NO. 87-306, at 5 (1961), reprinted in 1961 U.S.C.C.A.N. 2076, 2079 ("The need for a much greater Federal research effort was consistently recognized during the hearings on the bill.")

¹³³ See William L. Andreen, *Fables and Federalism: A Re-examination of the Historical Rationale for Federal Environmental Regulation*, 42 ENVTL. L. 627, 653 (2012) (describing belief that federal funding for air pollution programs would help build state capacity to address air pollution).

¹³⁴ Glicksman, *Mutation*, supra note 97, at 730.

¹³⁵ See, e.g., H.R. REP. NO. 84-1446, at 2 (1955), reprinted in 1955 U.S.C.C.A.N. 3023, 3024 (explaining efforts to "strengthen and extend" the Water Pollution Control Act).

¹³⁶ See LAZARUS, supra note 5, at 70–73.

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B. Overlapping versus Distinct Authority

Another important dimension takes the form of a spectrum ranging from overlapping to distinct regulatory authority. As represented in Figure 4 below, on one extreme, governmental authority over a particular substantive issue or governmental function may be separate from any other governmental authority. For the purposes of our analysis, two governmental entities have overlapping jurisdiction only to the extent that both their substantive and functional authority intersect and affect each other.¹³⁷ We do not treat agencies which share authority to regulate a particular subject matter but which perform wholly separate functions within that area as agencies with overlapping authority. Similarly, in federal land management, the USFS manages designated forests, NPS manages designated parks, and the BLM manages designated public lands, and in general each agency has little authority over how the others do so.¹³⁸ On the other end of the spectrum are regimes in which there are many governmental institutions with considerable intersecting authority. For instance, the Council on Environmental Quality (CEQ), NPS, NFS, FWS, and state wildlife and land agencies share authority over the management of wildlife.¹³⁹

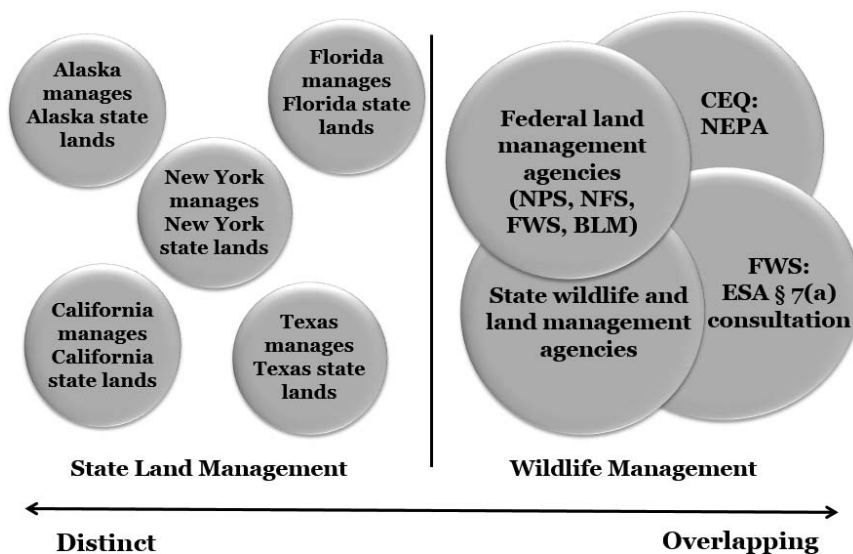
If regulatory power is fully centralized in one regulator, that power necessarily falls at the distinctness end of this dimension because by definition overlap requires the existence of at least two regulators. If, however, policymakers decide to divide authority among more than one entity, this dimension implicates two key questions. The first is whether authority over a particular resource or regulatory problem (e.g., water pollution) should be divided up so that, even though there are multiple regulators, each is responsible for addressing a distinct component of the larger problem (e.g., one controls industrial sources and another controls diffuse runoff from agricultural or construction activity, or one controls pollution by non-nuclear mater-

¹³⁷ Geographically distinct authority provides a straightforward illustration of agencies with different ranges of substantive authority. For example, each state has sovereign public trust and police powers (including the authority to manage its public lands and regulate land use) within its particular geographic boundaries. *See, e.g.*, *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491–92 (4th Cir. 2007) (discussing constraints on extraterritorial application of the police power). Accordingly, the authority of a municipality in Australia to regulate land use is effectively distinct from the authority of a municipality in Maine to do the same, even though both regulate land use.

¹³⁸ *See* 1 COGGINS & GLICKSMAN, *supra* note 60, §§ 2:11–2:14, 6:14–6:18 (discussing the various federal lands systems and the jurisdictions of the agencies that manage them). R

¹³⁹ *See* 3 COGGINS & GLICKSMAN, *supra* note 60, §§ 32:6–32:17 (discussing jurisdiction of federal and state agencies over wildlife on federal lands). CEQ is granted some authority under the National Environmental Policy Act over information and planning, FWS engages in planning and standard setting over endangered species pursuant to the Endangered Species Act, while federal and state land management agencies have planning, implementation, and enforcement authority. *See generally* 2 & 3 COGGINS & GLICKSMAN, *supra* note 60, ch. 17, 29, 32. R

Figure 4. Prototypical Examples of Distinct and Overlapping Authority



ials while another has sole authority over nuclear materials).¹⁴⁰ The second is whether regulatory functions should overlap (e.g., if one agency is authorized to review and, if appropriate, veto, the issuance of permits by another) or instead comprise distinct mandates (e.g., if one agency sets standards, while another applies those standards in the context of resolving individual permit applications).¹⁴¹ We do not treat authority as overlapping unless two or more agencies perform the same governmental function within the same substantive area (e.g., shared enforcement authority between federal and state regulators for state requirements adopted under delegated federal authority).

1. *Distinct Authority*

Legislatures have long adopted and scholars have promoted the idea that authority over a particular regulatory problem is best allocated to a single or few regulators. Such a perspective is primarily based on an explicit or implicit “matching principle”—that legislatures should match each regulatory problem (or aspect of a regulatory problem) to the *single* authority that can best address that problem.¹⁴² Advocates of the matching principle urge,

¹⁴⁰ See, e.g., Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 864 (2006) (discussing jurisdictional overlap, in which agencies have “regulatory authority over the same individuals or institutions, with regard to the same or related issues”).

¹⁴¹ See, e.g., 33 U.S.C. §§ 1311(b), 1342(b) (2006) (delegating standard-setting function to EPA and permitting function to states meeting certain minimum requirements).

¹⁴² See generally HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY (1996).

for example, that environmental regulatory authority generally should be vested in “the political jurisdiction that comes closest to matching the geographic area affected by a particular externality.”¹⁴³

In addition, scholars have identified various weaknesses of a regulatory system with overlapping regulatory authority. Some criticize overlapping governance because regulator accountability to the public may be diminished in a regulatory system where authority intersects.¹⁴⁴ Agencies with shared authority may shirk their responsibilities, blaming co-regulators for program failures.¹⁴⁵ The resulting inaction may unfairly impose risks or costs on those affected by the unregulated activity that may not occur in jurisdictions in which at least one regulator with shared authority is more conscientious in the exercise of that authority. Others have posited that overlapping jurisdiction can lead to a lack of finality in the regulatory process.¹⁴⁶

One of the more common criticisms of overlapping jurisdiction is that it is wasteful and inefficient, both for regulators and regulated entities. The government’s “transaction costs” of regulating increase if multiple agencies perform tasks that could have been handled by a single agency.¹⁴⁷ Efforts to coordinate among multiple regulators can address redundancy, but can themselves be costly.¹⁴⁸ Consolidation of authority, therefore, may make sense within a governmental level. As the proposed reorganization of the six agencies with jurisdiction over small businesses discussed in the introduction to this Article illustrates, such consolidation is often seen as a way to minimize redundancy and duplication of effort, thereby promoting administrative efficiency.¹⁴⁹

For regulated entities, multiple bodies of regulation require tracking and complying with disparate and potentially conflicting sets of obligations.¹⁵⁰ Overlapping regulation also can reduce certainty and thus effectiveness if

¹⁴³ *Id.* at 48. See also Adler, *supra* note 91, at 133.

¹⁴⁴ See e.g., Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 17 (2006); Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812–13 (2008); Engel, *supra* note 7, at 162.

¹⁴⁵ See Freeman & Rossi, *supra* note 4, at 1187; Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 288 (2011) (“Regulatory overlap thus may lead each regulator to shirk . . . within an area of overlapping jurisdiction.”).

¹⁴⁶ Engel, *supra* note 7, at 162.

¹⁴⁷ Freeman & Rossi, *supra* note 4, at 1150. Freeman and Rossi cite as an example the shared responsibility of the Department of Justice and the Federal Trade Commission in enforcing the federal antitrust laws. *Id.* at 1146. See also Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 214 (discussing duplicative monitoring and enforcement costs).

¹⁴⁸ Aagaard, *supra* note 145, at 288; Vermeule, *supra* note 90, at 24 (discussing increased costs of communication among agencies that accompany the creation of dense networks of related agencies).

¹⁴⁹ See Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 184 (2011); Gersen, *supra* note 147, at 214.

¹⁵⁰ Marisam, *supra* note 21, at 223 (stating that such entities would be burdened “more than under federal law alone”); Freeman & Rossi, *supra* note 4, at 1150.

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the relationships among the mandates of different regulators are unclear.¹⁵¹ Some suggest it would be fundamentally unfair if an entity were regulated by multiple government bodies and potentially subject to various different standards.¹⁵² Some also claim that overlapping authority can lead to over-regulation where “numerous regulators are confronted with a more particularized project or proposal with localized and discernible effects.”¹⁵³ These scholars consider overlapping authority ineffective “because it may result in the development of inefficient standards, both through the introduction of regulatory goals other than externality elimination, and through interference with the free movement of firms through government overappropriation of fixed capital assets.”¹⁵⁴

Others, however, have asserted that overlapping jurisdiction can lead to under-regulation, an unintended result of what Professor William Buzbee has dubbed the creation of a “regulatory commons,”¹⁵⁵ especially when the regulated problem or harm is large-scale and broadly dispersed.¹⁵⁶ Buzbee attributes this to high information costs of developing a regulatory response, limited credit for regulators, bias toward the regulatory status quo, and regulator risk aversion.¹⁵⁷ The result may be that although multiple regulators have authority to address a particular problem, regulatory gaps develop as each assumes or hopes that others are addressing it.¹⁵⁸ Buzbee suggests that reducing the number of potential regulators and/or combining the regulatory authority of particular regulators could lessen the incentives for regulatory inaction in some contexts.¹⁵⁹ Thus, some argue that distinct regulation may be more effective than overlapping regulation.

Other collective action problems may support distinct regulation. Congress adopted exclusive federal jurisdiction over standard setting for nuclear waste disposal facilities, transportation of hazardous waste, transportation and disposal of other forms of nuclear material, and management of biomedical waste based on concerns that state and local governments would adopt constraints on locally unwanted activities with broader, more diffuse

¹⁵¹ See Ahdieh, *supra* note 140, at 897.

¹⁵² Cf. Laura E. Little, *Empowerment through Restraint: Reverse Preemption or Hybrid Lawmaking?*, 59 CASE W. RES. L. REV. 955, 984 (2009) (referring to the “problems of legal instability and unfairness resulting from multiple regulations on one wrong”).

¹⁵³ See Buzbee, *supra* note 81, at 349. See also James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 11–12 (2000).

¹⁵⁴ Engel, *supra* note 7, at 165–66.

¹⁵⁵ Buzbee, *supra* note 7, at 5–6.

¹⁵⁶ See Buzbee, *supra* note 81, at 348–49 (noting incentives of multiple potential regulators for regulatory inattention, especially for cross-jurisdictional problems).

¹⁵⁷ See William W. Buzbee, *State Greenhouse Gas Regulation, Federal Climate Change Legislation, and the Preemption Sword*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 23, 30–36 (2009).

¹⁵⁸ Ahdieh, *supra* note 140, at 897–98 (noting the costs of intersystemic regulation, including shirking, diminished oversight, free-riding, loss of incentives to regulate carefully, and tendency to blame co-regulators).

¹⁵⁹ See Buzbee, *supra* note 7, at 51.

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social benefits.¹⁶⁰ For example, Congress passed the Low-Level Radioactive Waste Policy Act of 1980¹⁶¹ to distribute the environmental burdens of the disposal of nuclear waste more equitably.¹⁶²

Though obviously related, at least in some cases the centralization and overlap dimensions do not necessarily present the same choices to policymakers, and moves along the two dimensions may have different effects on regulatory authority. Typically, a centralization of substantive regulatory power results in a decrease in overlap. Federal deregulation that provides for unitary state regulation would decrease overlap in authority, just as federal ceiling preemption of state law (under which state governments are barred from regulating more stringently than the federal government)¹⁶³ would. For example, in addition to being a shift toward centralization, the creation of certain federal authority over automobile tailpipe emission standards,¹⁶⁴ pesticides,¹⁶⁵ and nuclear waste¹⁶⁶ each represented movement away from overlap by preempting supplemental state standards, even if those standards were more stringent than the federal standards.

On the other hand, a federal law establishing a new federal agency with only floor preemption authority—under which state authorities may adopt more stringent regulation than their federal counterpart—would result in an increase in centralization as well as overlap.¹⁶⁷ Moreover, decreases or increases in overlap may occur not only over substantive jurisdiction but also over particular regulatory functions. For example, increasing limitations on or barring the authority of federal agencies to overfile—to commence enforcement action against permit holders in addition to state agency enforcement¹⁶⁸—would decrease overlap in enforcement functions.¹⁶⁹

¹⁶⁰ See, e.g., 49 U.S.C. § 5125 (2006) (preempting some state regulation of hazardous waste packaging and transportation); *Tennessee v. United States Dep't of Transp.*, 326 F.3d 729, 730–31 (6th Cir. 2003) (describing federal hazardous materials transportation legislation as “an effort to create a coherent approach to . . . problems posed by the interstate transportation of hazardous material”).

¹⁶¹ 42 U.S.C. §§ 2021b–2021d (2006).

¹⁶² See Glicksman & Levy, *supra* note 123, at 600–01.

¹⁶³ See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1555 (2007) (discussing arguments for and against ceiling or “unitary federal choice” preemption that “eliminates institutional diversity”).

¹⁶⁴ See 42 U.S.C. § 7543 (2006) (generally prohibiting the adoption or enforcement of state tailpipe emission standards, but allowing EPA to waive prohibition by granting a waiver to California).

¹⁶⁵ See 7 U.S.C. § 136v(b) (2006) (preempting state regulation of labeling and packaging of pesticide products).

¹⁶⁶ See 49 U.S.C. § 5125 (2006).

¹⁶⁷ Thus, many of the federal pollution statutes provide for floor preemption, retaining state authority to adopt regulations that are more stringent than their federal counterparts. See, e.g., 33 U.S.C. § 1370 (2006); 42 U.S.C. § 7416 (2006).

¹⁶⁸ See *infra* note 271 and accompanying text (discussing the advantages and disadvantages of overlapping enforcement authority).

¹⁶⁹ Similarly, in adopting the Atomic Energy Act of 1954, Congress chose to preempt all state regulation of the manner in which nuclear power plants operate, but to retain state authority to decide whether to bar issuance of operating permits based on economic reasons (such as

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2. *Overlapping Authority*

Overlapping authority has its proponents. A large and growing literature identifies a variety of effectiveness and accountability benefits associated with a regulatory system with concurrent regulatory authority. Some scholars have reasoned that an approach that minimizes overlap and consolidates decision making in a single or few authorities can have a number of negative consequences. In addition to pointing to the implausibility of eliminating already extensive regulatory segmentation,¹⁷⁰ many scholars have detailed the undesirability of doing so.¹⁷¹

Some scholars argue that the redundancy that occurs through overlapping jurisdiction can be advantageous.¹⁷² Though much of this literature relates to allocation of authority between the federal government and the states and localities,¹⁷³ the same dynamic applies to overlap within a particular level of government. To begin with, although overlap can create inefficiencies, as described above,¹⁷⁴ it can enhance the prospects for effective regulation. The key idea is that concurrent jurisdiction increases the likelihood of regulatory action because there are more actors with authority to regulate.¹⁷⁵ Should one regulatory entity backslide or fail to regulate, others would be available to fill the gap.¹⁷⁶ Concurrent jurisdiction thus may be particularly valuable for regulatory contexts¹⁷⁷ where the costs of under-regulation are high, such as those that seek to address high-cost or irreversible effects or

the affordability of the energy produced by nuclear plants). *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

¹⁷⁰ See Buzbee, *supra* note 7, at 51.

¹⁷¹ See, e.g., Ruhl & Salzman, *supra* note 7; see Buzbee, *supra* note 7, at 51; see Adelman & Engel, *supra* note 7, at 1800–01.

¹⁷² Jared Snyder & Jonathan Binder, *The Changing Climate of Cooperative Federalism: The Dynamic Role of the States in A National Strategy to Combat Climate Change*, 27 UCLA J. ENVTL. L. & POL'Y 231, 252 (2009).

¹⁷³ See, e.g., Blake Hudson, *Reconstituting Land-Use Federalism to Address Transitory and Perpetual Disasters: The Bimodal Federalism Framework*, 2011 BYU L. REV. 1991, 2037 (2011).

¹⁷⁴ See *supra* notes 147–149 and accompanying text.

¹⁷⁵ Buzbee, *supra* note 157, at 53.

¹⁷⁶ See Freeman & Rossi, *supra* note 4, at 1138 (arguing that redundancy provides insurance against a single agency's failure); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354 (2011) (arguing that overlap “opens space” for each regulator “to prod and plea with one another when the danger . . . is one of government *underreach*”); Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1819 (2011) (arguing that redundancy can “provid[e] an important failsafe”).

¹⁷⁷ Professor Biber has argued that the desirable amount of overlap is likely to be highly contextual, depending on factors such as whether the agencies concerned have goals that are complementary or in tension with one other, the cultures and professional backgrounds of agencies and their personnel, and the political context. See Biber, *supra* note 52, at 80. The location of the relevant agencies along the other dimensions identified in this article is also likely to be important, such as whether the agencies have cooperative or competitive relationships.

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the management of nonrenewable resources.¹⁷⁸ Relatedly, concurrent jurisdiction has the potential to improve decisions and enhance the effectiveness of government programs by allowing authorities with a range of different competencies to be brought to bear on a problem.¹⁷⁹

The regulatory safety net resulting from overlap also can foster accountability by indirectly combating interest group capture that may exist for one governmental entity but not another.¹⁸⁰ As Anne Joseph O'Connell has noted, "[o]ne interest group generally will find it more difficult to capture several agencies than a single agency; to wield power over multiple agencies, interest groups may have to work together, which is a costly enterprise for the groups."¹⁸¹ In addition, agencies with overlapping subject matter and functional jurisdiction may be more reluctant to respond favorably to interest group pressure because other agencies sharing regulatory authority may detect and cast adverse light on that behavior.¹⁸²

Both distinct and overlapping authority, therefore, have the potential to enhance accountability, depending on the circumstances and incentives of regulators. Distinct authority is better situated to promote accountability if the primary accountability problem is the tendency of co-regulators to shirk their responsibilities and to blame co-regulators for program failures.¹⁸³ On the other hand, overlapping authority is better designed to promote accountability if one co-regulator's likely response to another's lack of regulation is not to assign blame, but instead to step into the regulatory breach, or if capture is a prominent concern. Which account is more compelling to policymakers may depend on assessments of the history of the particular regulatory program and social problem in question, and policymakers' philosophies about institutional incentives and behavior.¹⁸⁴

Some also argue that overlapping authority may provide space for initial regulatory strategies by one entity that can serve as a proving ground.¹⁸⁵ These commenters contend that a dispersed and overlapping regulatory system, such as the delegation of authority to the states allowing the adoption of pollution controls more stringent than federal standards,¹⁸⁶ may allow for a

¹⁷⁸ See Engel, *supra* note 7, at 179; see also Ewing & Kysar, *supra* note 176, at 410 ("Overlapping governance mechanisms . . . ensure a fuller and more inclusive characterization of emerging threats to social and environmental well-being.")

¹⁷⁹ Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1, 67–68 (2009).

¹⁸⁰ See Engel, *supra* note 7, at 178–79 (noting that overlap can combat excessive influence of interest groups that prevents effective regulation).

¹⁸¹ O'Connell, *supra* note 1, at 1677. Likewise, agencies with broader jurisdiction are harder to capture than agencies with narrower ones because "all of the covered industries must bid against one another to capture the regulator." Hyman & Kovacic, *supra* note 58, at 19.

¹⁸² See Aagaard, *supra* note 145, at 294.

¹⁸³ See Freeman & Rossi, *supra* note 4, at 1187.

¹⁸⁴ *Id.* at 1157.

¹⁸⁵ See Carlson, *supra* note 7, at 1100–01.

¹⁸⁶ The Clean Air Act, for example, authorizes EPA to adopt technology-based emission controls for certain sources and pollutants, 42 U.S.C. §§ 7411–12 (2006), but it allows states to adopt more stringent emission control standards in most areas. *Id.* at § 7416.

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diversity of tailored approaches, promoting innovative management experimentation and creating the opportunity for learning about the advantages and disadvantages of particular management strategies.¹⁸⁷ According to these scholars, concurrent authority can promote innovation by providing regulators close access to information about the efficacy of alternative management strategies based on their observations of the experience of co-regulators.¹⁸⁸ As detailed in Part IV, however, these arguments touting the diversity benefits of overlapping jurisdiction appear to be erroneously conflating it with decentralized authority.¹⁸⁹

C. Independent versus Coordinated Authority

A final dimension for characterizing the allocation of authority focuses on the extent of formal or informal coordination among authorities with jurisdiction over a particular regulatory problem or government function. For this dimension, the key question is how much multiple regulatory authorities communicate, coordinate, and collaborate in addressing any particular substantive problem or in performing a delegated governmental function. As illustrated in Figure 5, on one end of the spectrum¹⁹⁰ is a regulatory framework in which governmental entities are highly independent and isolated in their regulatory activities. At the other end is a regulatory relationship characterized by close agency collaboration and regulatory coordination. This dimension assumes some level of decentralization because if there is only one regulator there is no other entity with which to coordinate its actions.¹⁹¹ It may come into play whether or not there is jurisdictional overlap among authorities, and, if so, whether that overlap is substantive and/or functional. Coordination among agencies with distinct jurisdictional charges is possible, just as it is among those with overlapping responsibilities. For example, two agencies might seek to coordinate efforts to address the risks posed by exposure to asbestos, even if one agency is responsible for controlling asbestos emissions from factory smokestacks and another regulates the use of asbestos in brake linings. The two agencies could agree that their regulations should limit human exposure to a certain level of acceptable health risk.

¹⁸⁷ See Adelman & Engel, *supra* note 7, at 1820–21; Ahdieh, *supra* note 140, at 892.

¹⁸⁸ Engel, *supra* note 7, at 177 (noting that “regulatory activity at one level . . . may be a stepping stone to regulation at the governing level that dual federalism proponents label ‘optimal’”).

¹⁸⁹ See *infra* notes 301–310 and accompanying text.

¹⁹⁰ It is more difficult to conceptualize the coordination-independence dimension as a simple spectrum ranging from greater to lesser degrees of coordination because coordination can be measured in different ways, including the frequency, duration, scope, and voluntariness of coordination. It is typically simpler to determine with respect to a given substantive area or government function whether the authority to address that area or function is centralized or decentralized, or distinct or overlapping. See *infra* notes 213–221 and accompanying text.

¹⁹¹ If regulatory power is concentrated in one entity, the issue of whether that authority should be exercised in independent or coordinated fashion is moot (although the degree of coordination among employees or offices within a single agency can differ).

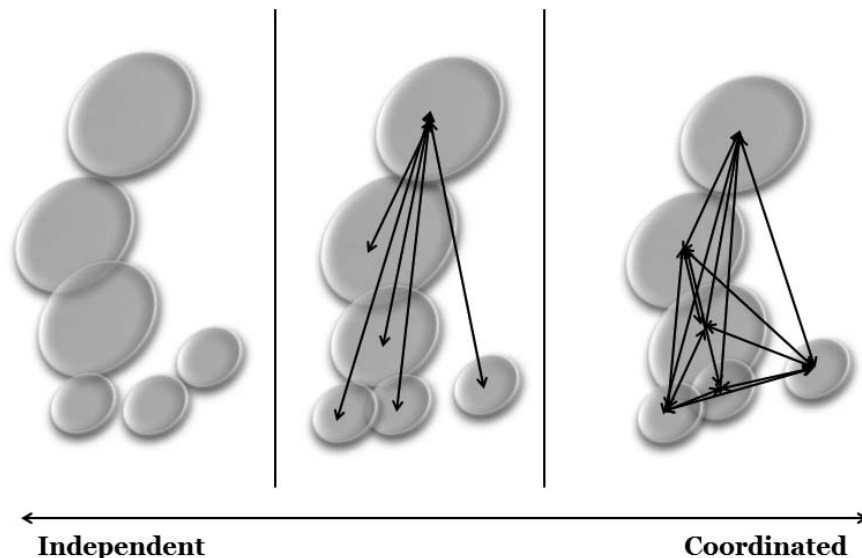
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Alternatively, they could coordinate by doing joint research on the degree of health risks posed at different levels of exposure, and then make independent decisions on what degree of risk to regulate.

Figure 5. Independent versus Coordinated Authority



1. Coordinated Authority

In response to the considerable incentives and effects of regulatory fragmentation, some scholars and regulatory actors have called for more coordination among regulatory authorities. Indeed, coordination exists or has been proposed over a wide range of substantive jurisdictions, such as natural resources,¹⁹² food safety,¹⁹³ and bioterrorism.¹⁹⁴ Though eliminating fragmen-

¹⁹² Many inter-jurisdictional natural resource management coordination regimes have been created. *See, e.g.*, California Bay-Delta Authority (CBDA), CALIFORNIA BAY-DELTA PROGRAM ARCHIVED WEBSITE, <http://calwater.ca.gov/calfed/oversight/CBDA/index.html> (last visited October 25, 2011), archived at <http://perma.cc/0aFjAMMjkUF>; *see also* Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 217–18 (2002).

¹⁹³ *See, e.g.*, FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885, §421(d) (2011) (requiring the Departments of Homeland Security, Health and Human Services, Agriculture, Commerce, and EPA to coordinate in information collection, analysis, and reporting on foodborne illnesses, outbreak response planning, and technical assistance to local governments).

¹⁹⁴ *See, e.g.*, Drinking Water Security and Safety Amendments, adopted as part of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107–188 §§ 401–03, 116 Stat. 594, 682–87 (2002) (requiring coordination, led by EPA, to abate and respond to threats to drinking water infrastructure security). *See generally* Steven D. Shermer, *The Drinking Water Security and Safety Amendments of 2002: Is America's Drinking*

tation or overlap may be implausible or even undesirable, many scholars have emphasized the value of agency dialogue and collaboration to reduce fragmentation's adverse effects.¹⁹⁵ Coordination can increase the effectiveness of government action by promoting exchanges of ideas and the pooling of the expertise of different agencies.¹⁹⁶ Although efforts to coordinate require the investment of time and resources that need not be incurred when agencies act independently, some claim that these costs may be more than offset by reductions in duplication of effort and inconsistent action, so that coordination can result in a net administrative efficiency gain.¹⁹⁷

Scholars also argue that coordination can promote accountability by combating drift,¹⁹⁸ shirking,¹⁹⁹ and free-riding through facilitation of inter-agency monitoring.²⁰⁰ Coordination also can promote accountability by providing governmental authorities the opportunity and even the duty to review and serve as a check on other authorities in the performance of delegated governmental functions, thereby reducing the risk of regulator capture.²⁰¹ Each regulatory authority can essentially serve as an accountability check on the others.²⁰² Finally, the coordinated exercise of multi-jurisdictional authority can promote fairness by minimizing the imposition of inconsistent or redundant demands on regulated entities.²⁰³

Water Infrastructure Safer Four Years Later?, 24 UCLA J. ENVTL. L. & POL'Y 355, 395–96 (2006).

¹⁹⁵ See, e.g., EUGENE BARDACH, *GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP* (1998) (providing recommendations for fostering interagency collaboration); Ruhl & Salzman, *supra* note 7, at 66 (discussing a system of “weak ties” for alleviating the effects of fragmentation). R

¹⁹⁶ See Freeman & Rossi, *supra* note 4, at 1184 (noting potential for coordination to improve decision making by adding data and expertise and diversifying perspectives). R

¹⁹⁷ See *id.* at 1183.

¹⁹⁸ See *id.* at 1187 (“In traditional principal-agent theory, whenever Congress delegates authority to an agency, the delegation inevitably provides the agency with discretion, which creates a risk of drift away from the preferences of the lawmakers who enacted the delegation.”).

¹⁹⁹ See *id.* at 1187–88 (defining shirking as a form of drift that involves inaction). Shirking is often driven by the hope that another regulator will address a problem, relieving the shirker of the need to do so. See, e.g., William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 131 (1999) (referring to the incentives of localities within a metropolitan region “to shirk and let others provide essential amenities”).

²⁰⁰ See Freeman & Rossi, *supra* note 4, at 1189 (noting that coordination can “control drift by providing structured opportunities for agencies to account to each other”). R

²⁰¹ See *id.* at 1186 (“[A]gencies are harder to isolate and neutralize to the extent that their approaches are . . . aligned.”).

²⁰² Affording government officials access to information on the performance of other regulators can provide increased capacity to pressure those other regulators to comply with regulatory requirements. See Camacho, *supra* note 179, at 74–75. R

²⁰³ Cf. Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 *CORNELL INT'L L.J.* 171, 195 (2007) (discussing “efforts of [African] state regulators to coordinate their regulatory approaches and ensure equitable treatment in international negotiations . . .”); Maribeth Wilt-Seibert, *Unemployment Compensation for Employees of Educational Institutions: How State Courts Have Created Variations on Federally Mandated Statutory Language*, 29 *U. MICH. J.L. REFORM* 585, 611

Recently, a number of scholars and government officials have examined the various characteristics of interagency coordination.²⁰⁴ For several reasons, its definition is unsettled. Different schools of organizational theory seek to explain institutional coordination, and each of their definitions differ from one another.²⁰⁵ In addition, coordination can take any number of forms. Coordination can be formal or informal.²⁰⁶ It can be long or short-term,²⁰⁷ and frequent or occasional.²⁰⁸ Coordination can be voluntary and cooperative,²⁰⁹ or mandated by legislative or executive action.²¹⁰ The National Environmental Policy Act,²¹¹ discussed below,²¹² is a prominent example of mandated, formal federal interagency coordination, but primarily only over agency planning and information-gathering functions.

Coordination also can be understood as a spectrum that ranges from less active inter-jurisdictional relationships to those that require significant synchronization.²¹³ The range of coordination activities includes mere com-

(1995) (encouraging coordination among states to ensure consistency and equitable treatment of similarly situated employees with respect to unemployment compensation benefits).

²⁰⁴ See generally Freeman & Rossi, *supra* note 4; Bradley, *supra* note 8; DeShazo & Freeman, *supra* note 7.

²⁰⁵ Gregg Macey, *Environmental Crisis and the Paradox of Organizing*, 2011 BYU L. REV. 2063, 2113 (2011) (discussing different definitions of interorganizational coordination in game theory, resource exchange, contingency theory, and transaction cost economics).

²⁰⁶ See Freeman & Rossi, *supra* note 4, at 1156 (describing the presence of considerable informal coordination that may or may not involve explicit communication between agencies). See also Vermeule, *supra* note 90, at 22 (referring to “myriad” devices and mechanisms for achieving coordination, ranging from conversations to formal interagency memoranda of agreement); Hyman & Kovacic, *supra* note 58, at 29 (same).

²⁰⁷ See, e.g., Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355, 364 (2013) (referring to long-term collaboration among community members on land use matters); Jesse Hahnel Caroline Van Zile, *The Other Achievement Gap: Court-Defendant Youth and Educational Advocacy*, 41 J.L. & EDUC. 435, 473 (2012) (discussing long-term collaboration among child welfare agencies, education agencies, and juvenile court systems in promoting child welfare); Bryan McDonald, Book Review *Making Collaboration Work: Lessons from Innovation in Natural Resources Management*, 4 NAT. RESOURCES J. 1033, 1033 (2001) (“Collaborations could be short term or long term and involve a single area or issue or interactions among regions or ecosystems.”).

²⁰⁸ Charlene D. Luke, *The Relevance Games: Congress’s Choices for Economic Substance Gamemakers*, 66 TAX LAW. 551, 553 n.7 (2013) (discussing frequent collaboration among federal agencies responsible for enforcing the Internal Revenue Code).

²⁰⁹ See CRAIG W. THOMAS, BUREAUCRATIC LANDSCAPES: INTERAGENCY COOPERATION AND THE PRESERVATION OF BIODIVERSITY 24 (2003) (describing non-mandatory interagency cooperation). Professor Marisam has identified three kinds of benefits that agencies may derive from cooperation with other agencies: the power they derive from influencing other agencies’ actions, the reputational benefits that may flow from contributing to the solution to another agency’s problem, and reciprocation from other agencies in the future. Marisam, *supra* note 21, at 7.

²¹⁰ See Freeman & Rossi, *supra* note 4, at 1157.

²¹¹ 42 U.S.C. §§ 4321–4370h (2006).

²¹² See *infra* Part IV.A.3.

²¹³ See Bradley, *supra* note 8, at 757–58 (describing spectrum of interagency coordination, including advisory, mandated interaction, veto power, and lobbying power).

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munication of adopted agency actions;²¹⁴ creation of formal or informal fora for inter-jurisdictional discussion;²¹⁵ providing to other governmental authorities an opportunity to comment on or respond to potential or proposed agency actions, whether discretionary²¹⁶ or mandatory;²¹⁷ required consideration of or response to the comments or recommendations of other governmental authorities;²¹⁸ the harmonization of agency activities through voting arrangements or mutual/consensus agreement;²¹⁹ and providing a governmental authority a de facto or express veto power over the activity of another authority.²²⁰ Of course, even each of these types of coordination can vary considerably. For example, inter-jurisdictional agreements can range in scope, strength, and duration.²²¹

Because of this multiplicity of factors, it may at times be challenging to characterize one regulatory program as more or less coordinated as another. To be sure, infrequent and short-term communication typically would be less coordinated than continued and enduring interaction; cooperation on a few issues ordinarily involves less coordination than cooperation on many issues; and voluntary discussion between agencies usually would be less coordinated than mandatory consultation. However, in some circumstances these various factors may point in different directions. For example, voluntary

²¹⁴ Publication of public notices by government agencies in the Federal Register may be the most recognizable example at the federal level.

²¹⁵ Formal examples of these include some functions of federal interagency task forces such as the Interagency Climate Change Adaptation Task Force (<http://www.whitehouse.gov/administration/eop/ceq/initiatives/adaptation>, archived at <http://perma.cc/0izpgFeDBJw>), or the National Endowment for the Arts Federal Interagency Task Force (<http://www.nea.gov/news/news11/Task-Force-Announcement.html>, archived at <http://perma.cc/0zcvEu6gvm7>).

²¹⁶ See Freeman & Rossi, *supra* note 4, at 1157 (describing “discretionary consultation”). For example, the Federal Insecticide, Fungicide, and Rodenticide Act provides that when considering applications for pesticide registration, EPA “may consult” with any other federal agency.

²¹⁷ See *id.*; Bradley, *supra* note 8, at 750–56 (discussing examples of mandatory agency consultation requirements); Biber, *supra* note 8, at 41–60 (same).

²¹⁸ See Bradley, *supra* note 8, at 755 (describing how the Federal Power Act requires Federal Energy Regulatory Commission to consider input from fish and wildlife agencies before approving plans to construct new hydroelectric dams); Freeman & Rossi, *supra* note 4, at 1158 (citing EPA’s duty under federal pesticide laws to solicit opinions from Departments of Agriculture and Health and Human Services before promulgating regulations).

²¹⁹ Some international treaties or interstate compacts, such as those that help govern use of the Colorado River, exemplify relatively robust forms of harmonization over standard setting. See, e.g., Colorado River Compact of 1922, 70 CONG. REC. 324 (1928); Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 (1949). Other versions focus primarily on the information-gathering function. See, e.g., Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414, 415–17 (1968) (establishing the Great Lakes Commission to gather information and make non-binding recommendations to member states).

²²⁰ See Bradley, *supra* note 8, at 755–56 (discussing de facto veto and express veto powers).

²²¹ THOMAS, *supra* note 209, at 25 (“[S]pecific cooperative agreements should be measured in terms of their scope, strength, and duration, not simply their existence. Scope refers to the range of issues covered. . . . Strength refers to the binding nature of the agreements, ranging from verbal or tacit agreements to legally binding documents. Duration refers to the endurance of an agreement.”).

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weekly meetings between agencies to discuss issues of common concern may be considered more or less coordinated than a program that requires an agency to solicit and integrate comments from another agency annually. Similarly, a short-term inter-jurisdictional agreement involving a wide range of problems may be more or less coordinated than a long-term one on a narrow issue. For purposes of this Article, however, we do not seek to devise a formula weighing these various factors for calculating where a particular government program rests along the coordination/independence dimension. Instead, our point is that policymakers should consider whether the goals of a decentralized regime, whether distinct or overlapping, would best be promoted by requiring coordination or allowing independent exercise of authority. Part of that assessment, of course, will entail consideration of various forms of coordination, each of which will have its own set of costs and benefits.

2. *Independent Authority*

Although coordination of regulatory efforts has theoretical effectiveness and administrative efficiency advantages, many of the calls for collaboration and the formation of coordinating regimes are reflexive, without any additional discussion of the costs of such additional regimes. Adding layers of consultation and collaboration requirements to an overlapping regulatory landscape will undoubtedly divert already limited agency resources, and it is worth considering whether the benefits of particular communications or collaborations among authorities are worth these opportunity costs. Particularly if they are not designed properly, efforts at collaboration may not be worth the cost.²²² In the past, at least some inter-jurisdictional collaborations have failed to provide meaningful opportunities for cross-jurisdictional information sharing and collaboration.²²³

Moreover, close agency coordination may impair regulatory effectiveness, particularly in the management of complex and uncertain regulatory problems. In discussing the benefits of divided regulatory authority, numerous scholars have focused on the value of inter-jurisdictional competition in promoting socially optimal environmental regulation. Richard Revesz argued in an influential article that interstate competition for industry should produce “an efficient allocation of industrial activity among the states.”²²⁴

²²² Freeman & Rossi, *supra* note 4, at 1182 (noting substantial “up-front investments required to coordinate agencies,” and that giving one agency veto power may elevate costs substantially by requiring extensive negotiations). R

²²³ See Camacho, *supra* note 179, at 30–36 (analyzing inter-jurisdictional collaborations for managing resources in the Great Lakes and criticizing these efforts as serving as “yet another layer of fragmentation to the already disjointed regulatory landscape”). R

²²⁴ Revesz, *supra* note 6, at 1211–12. See also Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961 (2007) (discussing how the Supreme Court’s modern federalism jurisprudence “privileges state sovereignty in order to promote efficiency and intergovernmental competition.”). R

Jonathan Adler argues that inter-jurisdictional competition “can encourage policy innovation as policymakers seek to meet the economic, environmental, and other demands of their constituents,” while allowing competing authorities “to act as environmental ‘laboratories’ developing new and improved ways of addressing environmental concerns.”²²⁵ Competition among authorities may be a contest for political credit, resources, or additional regulatory responsibilities. Such competition is premised on the regulatory autonomy and independence of individual regulators from the activities of other government authorities. Though these competition benefits are often ascribed as a feature of decentralization,²²⁶ it is the fact that regulators are acting independently rather than in a coordinated fashion that yields the competitive dynamic.

In addition, some forms of coordination may lead to an “anti-commons” problem.²²⁷ The most acute forms of coordination, such as required harmonization of agency activities, include requiring all governmental authorities with jurisdiction over a particular problem to agree to a particular regulatory strategy.²²⁸ Some scholars have argued that a consensus decision rule can encourage holdouts and mutual vetoes that can result in the underutilization of resources because regulatory action viewed as beneficial by most co-regulators is blocked by a lone holdout.²²⁹

Though arguments promoting regulatory independence are typically raised in conjunction with arguments promoting the devolution of regulatory authority to localities or states,²³⁰ regulatory independence can be valuable even among federal agencies. In the context of analyzing the possible reorganization of the governmental provision of national security intelligence, Professor Anne Joseph O’Connell has argued that competition among even federal authorities in some instances may be preferable to coordination because it may prevent “pernicious” collusion, encourage a creative “race to the top,” motivate correction of other agencies’ mistakes, and facilitate adaptation to changing conditions.²³¹

²²⁵ Adler, *supra* note 91, at 134.

²²⁶ See, e.g., Cohen et al., *supra* note 1, at 710–11 (noting that centralization can diminish inter-agency competition and prevent efficient performance).

²²⁷ See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622–26 (1998). An anti-commons regime is one “that requires everybody’s consent to achieve socially beneficial outcomes.” See also Eyal Benvenisti, *Sovereign and Trustees for Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295, 312 (2013).

²²⁸ See *supra* notes 217–223 and accompanying text.

²²⁹ See, e.g., Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 590 (2001); Heller, *supra* note 227, at 622–26.

²³⁰ See, e.g., Carlson, *supra* note 7, at 1102.

²³¹ O’Connell, *supra* note 1, at 1677–78. Professor O’Connell provides the following example:

[I]f multiple intelligence agencies are tasked with finding Osama bin Laden, the competition to find him might motivate each agency to achieve more than it would if it were the only agency working to achieve that objective. In addition, such competi-

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In addition, O'Connell asserts that providing multiple governmental entities with regulatory authority over a particular problem can help prevent "group think"²³² and increase the diversity of viewpoints.²³³ Any such benefits result from the existence of multiple governmental authorities acting autonomously. Finally, assuming alternative mechanisms for obtaining information about the performance of other regulators, inter-jurisdictional competition also may serve as a source of accountability. Regulators may have substantial incentives to vigilantly review and challenge the actions of other intersecting authorities,²³⁴ particularly when there are inter-jurisdictional spillovers or attempts by an authority to obtain a competitive advantage.

As in the case of the distinctness/overlap dimension,²³⁵ proponents of both coordination and independence have identified accountability benefits. Both accounts note the potential for one agency armed with information about what others are doing to serve as a check on the failures of co-regulators. Whether one finds one account or the other more convincing in a specific context may turn on a number of factors, including the particular governmental function at issue.²³⁶ It may also depend on whether this checking function is best promoted by the relatively greater access to information about the activities of co-regulators among coordinating agencies, or by the potentially greater willingness of competing, as opposed to coordinating, agencies to call other agencies to account for drift, shirking, capture, or other forms of regulatory failure.

In some circumstances, then, maintaining agency independence and limiting cooperation may be more important for managing certain regulatory problems than a heavily collaborative model. Most prominently, depending on the governmental function at issue, regulator independence may be more consistent with—and may better promote—the redundancy benefits of overlapping jurisdiction than a heavily coordinated model. Such a circumstance

tion may "make it easier for the organization[s] to adapt to a changing environment."

Id. at 1167–68 (citations omitted).

²³² See IRVING JANIS, VICTIMS OF GROUPTHINK 8–9 (1972) (coining the term "groupthink" as a product of cohesive ingroups "when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action"); Susan Cain, *The Rise of the New Groupthink*, N.Y. TIMES, Jan. 15, 2012 (citing research showing that brainstorming sessions do not stimulate creativity).

²³³ O'Connell, *supra* note 1, at 1676. Though Professor O'Connell focuses on this as a benefit of regulatory redundancy, it is more properly understood as a feature of whether the applicable regulators are independent from each other. R

²³⁴ Cf. Engel, *supra* note 7, at 178–79 (discussing how intersecting agencies can promote accountability by monitoring each other's compliance). R

²³⁵ See *supra* Part III.B.

²³⁶ Coordinated information gathering, for example, may allow co-regulators to stretch their resources farther than they could acting independently. If so, a shared information base among those regulators may foster experimentation if each acts independently in putting that information to use, such as in planning or standard setting.

might exist during periods of change,²³⁷ when there is considerable uncertainty, harm may be catastrophic, and prevention or mitigation of such harm by one of the independent authorities is possible.²³⁸

IV. THE SIGNIFICANCE OF FUNCTIONAL JURISDICTION AND THE DIMENSIONS OF GOVERNMENT AUTHORITY

As one scholar has noted, “arguing that lines of organization are entirely inconsequential is likely to be as difficult as arguing that lines of geographic jurisdiction are inconsequential.”²³⁹ A variety of academic disciplines suggest “that formal lines of authority, jurisdictional limits, and formal hierarchical arrangements should be expected to change how legal mandates are carried out.”²⁴⁰ This Article focuses on two aspects of agency institutional structure that we believe have not been fully appreciated in the literature: (1) the role of functional jurisdiction in allocating agency authority, introduced in Part II, and (2) the existence of, and relationships among, three different dimensions of governmental authority, introduced in Part III.

Section A, below, documents the neglect of functional jurisdiction in both academic and political considerations of agency structure, and illustrates why it is important to differentiate between substantive and functional jurisdiction in allocating government authority. Section B substantiates the tendency of policymakers and scholars to conflate the three dimensions of authority, and analyzes how the failure to fully appreciate the effects of allocating authority along each of the dimensions may defeat the goals of government programs or prevent them from realizing their full potential. By choosing to structure the exercise of various functions at a different point along each of the three dimensions, it may be possible for policymakers to harness the advantages of certain dimensions when they are particularly prominent for certain governmental functions, while minimizing the shortcomings when they exist for others. Part V provides some tentative recommendations for fully integrating functional and dimensional considerations into the analysis of government structure.

A. *The Importance of Appreciating Functional Jurisdiction*

The literature on government organization and structure is rich. A few commenters have noted problems with organizing administrative agencies

²³⁷ Ahdieh, *supra* note 140, at 890 (arguing for “intersystemic regulation” that minimizes inertia and promotes regulatory competition and learning, especially “amidst transition.”).

²³⁸ Cf. Marisam, *supra* note 21, at 224 (touting the benefits of redundancy “where there are potentially catastrophic or irreversible risks from agency failures”).

²³⁹ Mariano-Florentino Cuellar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 644 (2009).

²⁴⁰ *Id.* According to Cuellar, these include institutional sociology, political economy, and social psychology. *Id.*

primarily based on substantive jurisdictional authority.²⁴¹ Relatively little attention has been paid, however, to the possibility of allocating agency authority along functional, as opposed to substantive, lines. Only a few scholars have identified the possible division of authority along functional lines²⁴² or noted the relative scarcity of functional divisions of government authority.²⁴³ This tendency to emphasize substance rather than function is reflected in comparisons of centralized and decentralized, overlapping and distinct, and coordinated and independent organizational structures.

Consideration of functional jurisdiction expands the options available in crafting government programs to deal with social problems. Awareness of the option of allocating jurisdiction functionally provides a more nuanced framework for analyzing the advantages and disadvantages of alternative structural designs. Through the prism of governmental function, legislators can better understand, and then design, allocations of authority to promote chosen regulatory goals.

1. *Functional Jurisdiction and the Centralization-Decentralization Dimension*

Though there is an extensive literature on the advantages and disadvantages of centralized and decentralized governmental authority, the literature largely neglects the significance of functional jurisdiction. Academics frequently offer arguments for or against centralized authority without considering whether the persuasiveness of those arguments differs depending on the agency function involved.²⁴⁴ Similarly, when creating or reorganizing

²⁴¹ See, e.g., Elizabeth Glass Geltman & Andrew E. Skroback, *Reinventing the EPA to Conform with the New American Environmentalism*, 23 COLUM. J. ENVTL. L. 1, 6–12 (1998) (discussing problematic development of EPA’s media-specific enforcement approach); Peter J. Fontaine, *EPA’s Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 50 (1993) (noting that EPA’s organizational structure and culture have produced separate program offices with their own parochial agendas). See also Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 350 (2012) (suggesting reform of “specific counterterrorism intelligence functions, to set policy-appropriate balances of centralization and localization”).

²⁴² See, e.g., Geltman & Skroback, *supra* note 241, at 10 (discussing functional organization at EPA); Freeman & Rossi, *supra* note 4, at 1145 (discussing “overlapping agency functions . . . (as when two agencies share enforcement authority over the same malfeasance)”).

²⁴³ See, e.g., David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 988 (2004). For further discussion analogizing the issues involved in agency organization to those in organizing business entities, and citing some of the literature on the industrial organization of firms, see Vermeule, *supra* note 90, at 21.

²⁴⁴ See, e.g., Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 945–46 (2011) (“Centralized decisionmakers cannot adequately replicate or anticipate the experientially-based and contextual response of interested local actors who base their judgments on their ‘particular circumstances of time and place.’”); ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT, *supra* note 119, at 11 (arguing for benefits of centralized environmental authority without regard to functional differences); Dornbos, *supra* note 89, at 17 (discussing the benefits of decentralization without mentioning functional differences).

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governmental institutions, legislators regularly fail to consider functional jurisdiction as a factor in centralizing or decentralizing authority.²⁴⁵

That failure to consider on a function-by-function basis whether centralized or decentralized authority is appropriate may lead to missed opportunities for better achieving policy goals by centralizing some functions, while decentralizing others. This is because the tradeoffs among competing values may differ based on function. Centralizing authority to gather scientific or technical information, for example, may provide significant economies of scale, while the need to experiment and take advantage of local expertise may be minimal.²⁴⁶ The case for centralizing the task of accumulating the data needed for effective health care regulation, for instance, appears strong.²⁴⁷ In contrast, the diversity, expertise, democratic, and experimentation benefits of decentralizing standard-setting and/or implementation functions may be more important than the efficiencies resulting from having only one regulator perform those functions, as well as any unfairness of subjecting affected entities to multiple standards. As Abigail Moncrieff and Eric Lee have argued with respect to health care regulation:

If the states choose different policy approaches to manage the costs of, quality of, and access to healthcare, then regulators might learn which approaches work and which do not. At a minimum, regulators would learn more through the states' various attempts than they ever could from a single, uniform national policy.²⁴⁸

Thus, it may make sense to centralize some functions but not others. Structuring agency authority without regard to differences based on the particular governmental function may unnecessarily sacrifice important values.

The enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010²⁴⁹ illustrates the benefits of functional distinctions in determining whether to create centralized or decentralized authority. The Obama Administration favored vertical decentralization, opposing preemption of stricter state regulatory protections.²⁵⁰ The statute reflects this stance,

²⁴⁵ See, e.g., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 399–419 (2004) (discussing the unification of national security/intelligence operations, but not the potential for making different judgments on centralization based on governmental function).

²⁴⁶ See Cary, *supra* note 6, at 623.

²⁴⁷ See, e.g., Abigail R. Moncrieff & Eric Lee, *The Positive Case for Centralization in Health Care Regulation: The Federalism Failures of the ACA*, 20 KAN. J. L. & PUB. POL'Y 266, 276 (2011).

²⁴⁸ *Id.* at 276.

²⁴⁹ Dodd-Frank Wall Street Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

²⁵⁰ See DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 61 (2009) (Obama Administration white paper proposing financial regulatory reform). For further discussion of the background of the white paper, see Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 860–61 (2013).

limiting the authority of agencies such as the Financial Stability Oversight Council (FSOC) and Consumer Financial Protection Bureau (CFPB) to preempt state regulation.²⁵¹ Thus, Dodd-Frank preserves decentralization of one function, standard setting.

Dodd-Frank's horizontal decentralization with respect to another function, information distribution, is perhaps of more questionable value. According to the General Accountability Office (GAO), Dodd-Frank's delegation of authority to the CFPB to assist in improving the financial literacy and education of individual consumers of financial products, services, and concepts means that fourteen federal agencies are now responsible for administering sixteen significant federal financial literacy programs or activities.²⁵² The GAO concedes the potential benefits of having multiple federal agencies involved in financial literacy efforts, including the ability to take advantage of "deep and long-standing expertise and experience addressing a specific issue area."²⁵³ But the resulting multiplicity of authority "increases the risk of inefficiency and duplication of efforts,"²⁵⁴ particularly in light of the substantial "similarities in mission between CFPB's statutory responsibilities and those of certain other federal entities."²⁵⁵ Granting the CFPB a significant role in enhancing consumer financial protection provided an opportunity to consolidate federal financial literacy efforts in a more efficient and effective way.²⁵⁶ The GAO urged policymakers to consider consolidating authority over financial literacy information to avoid overlap, duplication, and inefficiency.²⁵⁷ Whether the GAO's assessment is ultimately convincing or not, this example suggests that the pros and cons of centralization and decentralization may differ by function, and that policymakers should carefully consider the possibility of different organizational structures for different functions.

2. *Functional Jurisdiction and the Overlapping-Distinct Dimension*

As with analyses of the appropriate scale of government, a focus on functional jurisdiction makes clear that decisions on whether to provide for jurisdictional overlap are not all-or-nothing propositions. Simply because two agencies share substantive jurisdiction does not mean that they overlap if their functional jurisdictions are distinct. Unfortunately, proponents and detractors of overlapping jurisdiction often ignore whether agency jurisdic-

²⁵¹ Edward F. Greene & Joshua Boehm, *The Limits of "Name-and-Shame" in International Financial Regulation*, 97 CORNELL L. REV. 1083, 1094–95 (2012).

²⁵² U.S. GOVERNMENT ACCOUNTABILITY OFFICE, OVERLAP OF PROGRAMS SUGGESTS THERE MAY BE OPPORTUNITIES FOR CONSOLIDATION, GAO-12-588, at 9 (July 2012), archived at <http://perma.cc/0faWLEK3MWo>.

²⁵³ *Id.* at 14.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 19.

²⁵⁶ *Id.* at 20.

²⁵⁷ *Id.* at 20–21.

tions overlap functionally, losing an opportunity to accommodate some of the accountability benefits of overlap while minimizing inefficiencies.²⁵⁸ Finally, policymakers may be able to better achieve regulatory goals by designing governmental institutions to overlap for some functions but not others.

Congress has sometimes chosen to define distinct realms of agency functional authority, even though the agencies involved share substantive jurisdictions. For example, Congress vested in one agency the authority to adopt and in another the authority to enforce occupational safety standards.²⁵⁹ Similarly, the Homeland Security Act of 2002²⁶⁰ vested authority over the service aspects of immigration, including asylum and naturalization, in the U.S. Citizenship and Immigration Services,²⁶¹ while it placed immigration enforcement duties in the hands of the U.S. Customs and Border Protection.²⁶² Though both agencies have jurisdiction over immigration, their authority is largely distinct because there is little overlap in functional jurisdiction. A member of a commission on immigration reform explained the rationale for this reorganization several years before 9/11:

[P]lacing incompatible service and enforcement functions within one agency creates problems: competition for resources; lack of coordination and cooperation; and personnel practices that both encourage transfer between enforcement and service positions and create confusion regarding mission and responsibilities. Combining responsibility for enforcement and benefits also blurs the distinction between illegal migration and legal admissions.²⁶³

Yet in other cases, opportunities for promoting more efficient and effective regulation through the creation of distinct functional divisions of authority may have been missed. Detractors of overlap often focus on the inefficiencies and ineffectiveness of duplicative regulation, concluding that the solution should be agency consolidation.²⁶⁴ In 1939, for example, President Franklin Roosevelt combined six agencies responsible for matters deal-

²⁵⁸ See discussion *infra* notes 268–269 and accompanying text.

²⁵⁹ See Freeman & Rossi, *supra* note 4, at 1150.

²⁶⁰ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

²⁶¹ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis> (last visited Oct. 6, 2013), *archived at* <http://perma.cc/0CbVnw72pV>.

²⁶² See U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/> (last visited Oct. 6, 2013), *archived at* <http://perma.cc/0CbVnw72pV>; Asa Hutchinson, *Holes in the Fence: Immigration Reform and Border Security in the United States*, Keynote Address, 59 ADMIN. L. REV. 533, 537 (2007).

²⁶³ Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1111 n.84 (2011) (quoting Alternative Proposals to Restructure the Immigration and Naturalization Service: *Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 109-10 (1998) (statement of Susan Martin, Former Director, U.S. Commission on Immigration Reform)).

²⁶⁴ See *supra* Part III.B.

ing with health care, economic security, and education into a new subcabinet-level agency, the Federal Security Agency (FSA).²⁶⁵ Roosevelt justified the consolidation by highlighting the efficiency that would result from combining agencies with shared substantive jurisdiction over matters such as medical research, civil defense, national security, social security, federal education assistance, weapons development, and food and drug regulation.²⁶⁶

An institutional configuration characterized by shared substantive authority but not functional overlap, however, might also have addressed the same concerns. By eliminating duplication of functions, the regime would help minimize administrative costs, the risk of over-regulation, and the imposition of inconsistent mandates that created uncertainty and unfairness. Retaining shared substantive authority, however, might also preserve the accountability benefits from having multiple authorities involved in the regulatory process—albeit in charge of distinct functions. In this way, Roosevelt could have achieved a similar level of efficiency, and perhaps even more effective regulation, by retaining shared substantive authority while minimizing overlap by allocating distinct functional duties to each agency.

Relatedly, attention to functional jurisdiction allows policymakers to focus on whether there are good reasons to decrease overlap for one function but maintain or increase it for another. A few scholars, such as Jody Freeman and Jim Rossi, have helpfully recognized that the arguments in favor of creating overlapping or distinct authority may differ depending on the particular governmental function involved.²⁶⁷ Yet, when most scholars or agencies make assertions promoting overlapping jurisdiction, they appear to underappreciate the significance of differentiating along this dimension based on agency function and give short shrift to whether overlap is appropriate or effective for all governmental functions.²⁶⁸ Proponents of overlapping jurisdiction usually focus on the effectiveness and accountability benefits of redundant institutions, especially for significant or irreplaceable resources or for situations in which massive costs are anticipated if regulatory failure occurs.²⁶⁹ Yet the assessment of whether these redundancy benefits are worth the inefficiency costs may differ from function to function. Policymakers might structure authority differently along the overlap-distinctness dimen-

²⁶⁵ See Karen M. Tani, *Welfare and Rights Before the Movement: Rights as Language of the State*, 122 *YALE L.J.* 314, 314 (2012).

²⁶⁶ See *id.*

²⁶⁷ See Freeman & Rossi, *supra* note 4, at 1146 (arguing that overlapping authority to enforce the antitrust laws may create inefficiencies and disagreements over enforcement policy); *id.* at 1147 (noting that although two agencies set food safety standards, they bring different kinds of expertise to the effort).

²⁶⁸ See, e.g., Aagaard, *supra* note 145, at 286–300 (addressing costs and benefits of overlap, mostly without drawing clear distinctions based on function).

²⁶⁹ See, e.g., Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 *STAN. L. REV.* 669, 745–46 (2010) (describing critical role of local governments in reducing greenhouse gas emissions to “create redundancy to compensate for regulatory failures”).

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sion because the relative value of efficiency and redundancy differs based on the task at issue. Redundant development of information on the health risks of pollutant exposures at different levels, for example, may create waste without significantly improving the quality of the output.²⁷⁰ On the other hand, the efficiency gains of vesting exclusive standard-setting or enforcement authority in one regulator may not justify the loss of the safety net that results from having multiple enforcement authorities to protect against deficient enforcement by a single agency.²⁷¹ In short, failure to consider whether overlapping or distinct authority is preferable on a function-by-function basis may result in the unnecessary sacrifice of effectiveness to achieve efficiency, or vice versa.

3. Functional Jurisdiction and the Coordination-Independence Dimension

A few scholars have addressed the need for agency coordination across not only substantive but also functional domains, recognizing that it may be advisable to require coordinated action for some governmental functions but to allow independent agency action for others.²⁷² In discussing the federal government's approach to agricultural policy, for example, David Weisbach and Jacob Nussim posit that the Internal Revenue Service is well situated to control financing through investment subsidies, while the Department of Agriculture is the best agency to regulate farmers more generally through standard-setting and related functions.²⁷³ They conclude that "separate agencies for each function, and the resulting lack of coordination, could be optimal."²⁷⁴

More frequently, however, those analyzing agency structure promote either increased independence or coordination without fully appreciating or even acknowledging the significance of functional jurisdiction.²⁷⁵ Because the arguments for coordinated or independent authority are likely to vary with the governmental function in question, this oversight creates the risk that analysts will overlook opportunities to achieve the optimal balance of

²⁷⁰ Cf. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1048 (2000) (discussing the value of EPA's technical expertise in adopting air quality standards).

²⁷¹ See Engel, *supra* note 7, at 179–80 (discussing "regulatory safety net" provided by overlapping state and federal jurisdiction over pollution regulation and enforcement). There may be a strong argument for distinct authority, however, if there is directly conflicting authority by regulators—at any level of government—without a discernible difference in subject-matter competence. R

²⁷² See, e.g., Arnold M. Howitt & Herman B. "Dutch" Leonard, *Katrina and the Core Challenges of Disaster Response*, 30 FLETCHER F. WORLD AFF. 215, 220 (2006).

²⁷³ Weisbach & Nussim, *supra* note 243, at 994–95. R

²⁷⁴ *Id.* The authors note the need to recognize "that desirable separation of functions into divisions is going to lead to lack of coordination." *Id.*

²⁷⁵ See, e.g., DeShazo & Freeman, *supra* note 7, at 2221, 2232, 2253 (discussing forms of agency coordination, but failing to differentiate between functional and substantive coordination). R

policy goals by coordinating some functions, while capitalizing on the exercise of independent authority for others. For instance, it may make sense to strike the balance between avoiding the inefficiency or inconsistency (arising from uncoordinated action) and avoiding groupthink (through independent agency authority) differently for the financing or planning and standard-setting functions. Policymakers should not elide these differences by confining their analysis solely to the extent of coordination in substantive authority.

Two examples illuminate the potential value of situating disparate agency functions at different points along the coordination-independence dimension. The first involves requiring multiple intelligence agencies to report to a single supervisor, the Director of National Intelligence. The 9/11 Commission and the Center for Strategic International Studies expressed concerns that such coordination might suppress innovation and competition among intelligence agencies. The commission further posited that enhanced coordination would be likely to discourage opposing views when they were most needed.²⁷⁶ Others have pointed out, however, that the value of competition may be outweighed by the risk that agencies taking inconsistent approaches in acting on accumulated intelligence will operate inefficiently, if not at cross-purposes, thwarting achievement of efforts to thwart terrorist attacks.²⁷⁷ Yet these seemingly dueling arguments are not necessarily irreconcilable; the detractors of coordination were focused primarily on the gathering and analysis of intelligence information, while proponents focused on governmental action in response to the information gathered. In these circumstances, the arguments for allowing agencies to act independently may be stronger for the information-analysis function than for the implementation function, and effective regime design might seek to limit coordination in the former, but promote it in the latter.

The second example involves a comparison of the National Environmental Policy Act (NEPA)²⁷⁸ and the Endangered Species Act (ESA).²⁷⁹ NEPA requires each agency proposing a major federal action to consult with and solicit the comments of other federal agencies with either jurisdiction or special expertise during the process of preparing environmental impact statements (EIS) on such proposed actions.²⁸⁰ The proposing agency must incor-

²⁷⁶ O'Connell, *supra* note 1, at 1685.

²⁷⁷ See Freeman & Rossi, *supra* note 4, at 1135 (arguing that although overlap allows harnessing of specialized agencies' expertise and competencies, "that potential can be wasted if the agencies work at cross-purposes or fail to capitalize on one another's unique strengths and perspectives"); Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577, 2588 (2011) (noting need for coordination to control illegal drugs because law enforcement and health care agencies were ignorant of or hostile to each other's approaches).

²⁷⁸ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370h (2006)).

²⁷⁹ Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (2006)).

²⁸⁰ 42 U.S.C. § 4332(2)(C) (2006).

porate or respond to any comments in the final EIS.²⁸¹ In addition, NEPA created an agency, the Council on Environmental Quality (CEQ), to supervise compliance by other agencies with their NEPA evaluation and disclosure responsibilities, a task it has undertaken through the issuance of binding regulations that govern NEPA implementation by other agencies.²⁸² NEPA thus provides for coordination across the federal government of information-gathering and planning responsibilities²⁸³ concerning agency actions that may affect the environment. NEPA does little, however, to require agencies to undertake or coordinate monitoring of the actual environmental impacts of activities for which impact statements have been prepared once implementation of those activities begins.²⁸⁴ NEPA would likely have been more effective at actually minimizing the adverse environmental consequences of federal agency activities if it had extended coordination obligations to monitoring the effects of project activities so that agencies would have the benefit of information and input from the CEQ in deciding whether to alter ongoing projects to reduce unanticipated adverse environmental effects.²⁸⁵

Some NEPA critics go one step further by criticizing the statute's failure to require substantive changes to a proposed action in response to impacts anticipated in an EIS. The Supreme Court has clearly ruled that NEPA's mandates are procedural in nature, not substantive.²⁸⁶ Critics have urged that NEPA be amended (or reinterpreted by the courts) to infuse substantive content into its environmental protection mandates, such as by requiring agencies to adopt or comply with environmental mitigation measures proposed by the CEQ, or at least to justify departures from the CEQ's recommendations.²⁸⁷ Short of such a fundamental change in the statute, one way to increase the CEQ's coordinating role would be to vest in it the authority to remand projects on the basis of their adverse environmental effects. The resulting system would provide a stronger form of agency coordination, and perhaps a more effective process for avoiding federal actions that harm the environment, than NEPA now provides.

²⁸¹ 40 C.F.R. § 1503.4(a).

²⁸² *Id.* at § 1500.3.

²⁸³ *See id.* at §§ 1501.1, 1501.2(a).

²⁸⁴ The CEQ regulations provide only that “[a]gencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases.” 40 C.F.R. § 1505.3.

²⁸⁵ The CEQ regulations do require the preparation of a supplemental EIS if substantial changes occur that are relevant to environmental concerns or there are significant new circumstances or information relevant to those concerns. 40 C.F.R. § 1502.9(c). However, there is no requirement to coordinate any monitoring of project effects that might give rise to a supplemental EIS. *Id.*

²⁸⁶ *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

²⁸⁷ James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74, 76–77 (2003) (citing critiques to this effect).

Although such a strengthening of NEPA's coordination mechanisms is unlikely to occur any time soon, the ESA provides a model for what that form of coordination might look like. The ESA mandates federal interagency coordination not only in information generation and planning,²⁸⁸ but also in project implementation. Section 7 requires federal agencies to avoid actions that will "jeopardize the continued existence" of listed endangered or threatened species or "result in the destruction or adverse modification of" their critical habitat.²⁸⁹ It requires an agency to consult with the National Marine Fisheries Service (for marine species) or Fish and Wildlife Service (for freshwater and wildlife species) on any agency action which is likely to jeopardize a listed species.²⁹⁰ The formal consultation process concludes when the Service issues a biological opinion on whether the proposed activity is likely to jeopardize a listed species or adversely modify critical habitat, suggesting reasonable and prudent alternatives (RPAs) that would avoid such harms. The opinion may also include an incidental take statement conditionally authorizing the take of individual species members, provided the agency complies with the specified RPAs.²⁹¹ According to the Supreme Court, the Service's Biological Opinion has a powerful coercive effect.²⁹² If the action agency ignores the RPAs, it must articulate its reasons for disagreement. If those reasons turn out to be wrong, the agency runs a substantial risk²⁹³ of violating the statutory prohibition on the taking of listed species,²⁹⁴ while an agency that complies with the terms of an incidental take statement is shielded from a finding that it has violated that prohibition.²⁹⁵

Though both NEPA and the ESA require inter-agency coordination, the ESA's coordination mandates extend beyond information gathering and planning to project implementation, illustrating that it is possible to require coordination for some functions but not others. Policymakers should consider the benefits and disadvantages of coordination and independence on a function-by-function basis. They may conclude that coordination of one function will provide efficiency and policy effectiveness gains that justify the administrative costs of coordination and the risk of groupthink that stifles innovation. For a different function, however, the balance may point in another direction.

²⁸⁸ See 16 U.S.C. § 1535 (governing cooperation between the Interior Department and the states, including consultation and federal financial assistance).

²⁸⁹ 16 U.S.C. § 1536(a)(2) (2006).

²⁹⁰ See 50 C.F.R. § 402.06 (2013).

²⁹¹ 16 U.S.C. § 1536(b)(3)–(4); 50 C.F.R. § 402.14 (2013).

²⁹² *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

²⁹³ See *id.*

²⁹⁴ *Id.* at 170. The taking prohibition is codified at 16 U.S.C. § 1538(a)(1)(B) (2006).

²⁹⁵ 16 U.S.C. § 1536(o)(2) (2006).

B. The Importance of Appreciating the Dimensions of Authority

The literature on how to apportion substantive authority is much more extensive than the literature on functional authority.²⁹⁶ Nevertheless, this literature is incomplete for two reasons. First, scholars and policymakers often fail to consider how authority should be allocated along each of the dimensions described in Part III. Second, even when they do consider multiple dimensions of authority, they sometimes conflate the advantages and disadvantages of locating authority along two or more of the dimensions. Regardless of the particular dimensions that are being neglected or conflated, the bottom line is the same—incomplete vetting of the organizational choices and lost opportunities to foster primary goals or achieve complementary objectives. Separating out the dimensions as we suggest will preserve as many policy options as possible among competing organizational structures. Determinations of where to situate a particular program along each dimension should reflect consideration of the values promoted by each dimensional choice and prioritization of any conflicting values.

The three dimensions should not be viewed in isolation; in all but one situation, they are iterative. If policymakers with authority to contemplate the creation of a new government program or the reorganization of an existing one choose to vest all authority to administer the program in a single centralized governmental entity, they need not consider either of the other two dimensions.²⁹⁷ As Figure 6 below demonstrates, if the desired program is decentralized (either among governmental levels or within a level), then more than one agency will necessarily have authority (unless the geographic boundaries of each regulator's jurisdiction are mutually exclusive).²⁹⁸ If more than one governmental entity has jurisdiction, policymakers have meaning-

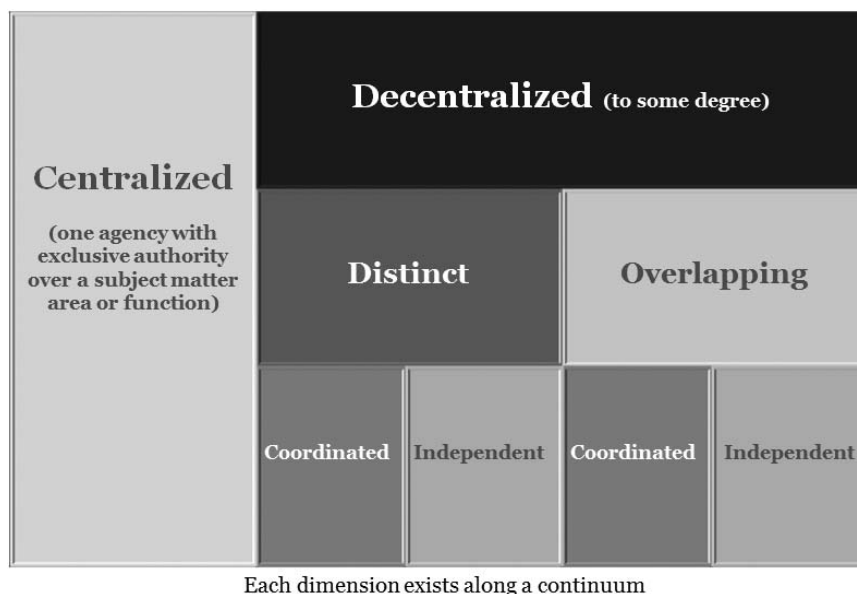
²⁹⁶ The literature on the federalism aspects of government programs is particularly extensive. See Alessandra Arcuri & Giuseppe Dari-Mattiacci, *Centralization and Decentralization as a Risk-Return Trade-off*, 53 J. L. & ECON. 359, 361 (2010) (discussing the literature in this field).

²⁹⁷ Even in this circumstance, the single institution may exercise substantive authority that is at least peripherally within the realm of other entities' substantive powers, both within and outside the jurisdiction. There may be value in considering coordination with these other entities. In addition, agencies are not monolithic entities, and different divisions or offices within a single agency may provide choices along the overlap and coordination dimensions.

²⁹⁸ Both New York City and Los Angeles have the authority to adopt land use controls such as zoning laws. See, e.g., *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 89 (2d Cir. 1998) (“As a proprietor, [New York City]. . . has the power to promulgate reasonable, nonarbitrary and non-discriminatory [land use] regulations.”); CAL. CONST., art. 11, § 7 (providing that a “county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws”). In most respects, this Article is not concerned with the relationship between the authority of those two regulators. They do not have overlapping jurisdiction, as this Article uses that term, even though both are authorized to regulate land use, because no landowner is subject to the jurisdiction of both agencies. The structuring of agency authority to allow geographically distinct regulators to act is relevant to the centralization-decentralization dimension, however, to the extent that decentralization is justified by the desire to promote experimentation and innovation by multiple regulators.

ful institutional design options beyond simply choosing a decentralized structure. The remaining options involve whether to vest the two or more agencies that will have jurisdiction with distinct or overlapping authority, and whether to allow or require those agencies to act independently of one another or to allow or require coordinated action.

Figure 6. Dimension Relationships



The interactions among the dimensions are important because they may act synergistically or at cross-purposes with one another. Although the dividing lines among the dimensions will in some instances blur at the margins,²⁹⁹ we suggest that the values promoted by the poles of each dimension are sufficiently different from one another that there is value in considering each choice sequentially.

Thus, for example, suppose that policymakers have chosen to create a program of both federal and state authority in order to achieve the diversity, experimentation, and accountability benefits of a decentralized regime. They should next consider whether they prefer overlapping authority among federal and state regulators (to provide redundancy and a safety net against inactivity or capture by regulators at one level), or instead prefer to promote the efficiencies resulting from the creation of distinct regulatory responsibilities.³⁰⁰ Finally, policymakers should consider whether they place a higher

²⁹⁹ For example, efforts to reduce overlap may bleed over into centralization.

³⁰⁰ See Hyman & Kovacic, *supra* note 58, at 28–29 (urging that issues concerning overlap be considered in terms of the optimal level of agency and regulatory redundancy/overlap—a

priority on achieving the efficiencies of coordinated regulation among multiple regulators and on minimizing the risk of agencies working at cross-purposes, or instead on the effectiveness advantages that stem from allowing regulators to act independently so as to avoid groupthink that may stifle the experimentation benefits provided by decentralized government.

The discussion below elaborates on the importance of the dimensions of authority, both individually and in relation to one another. It illustrates how regulatory programs may be adversely affected by neglect or conflation of the consequences of moving along each of the dimensions.

1. *Conflation of the Overlap/Distinct and Decentralized/Centralized Dimensions*

As Jody Freeman and Jim Rossi have pointed out, “[i]nstances of overlap and fragmentation are not rare or isolated. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation.”³⁰¹ A growing literature promotes overlapping jurisdiction based on its capacity to provide diversity, experimentation, and expertise benefits, but some scholars appear to commingle the advantages of overlap with those of decentralized authority.³⁰² For example, some have promoted overlapping jurisdiction based on its capacity to take advantage of the exercise of authority that is tailored to particular regulatory circumstances or to benefit from unique agency expertise.³⁰³ Such arguments conflate overlap with decentralization because the benefits of accommodating diversity of circumstances or taking advantage of agency expertise are more appropriately attributed to decentralized governance.³⁰⁴ Put another way, *decentralization* is the feature that allows for localized tailoring of regulation and the application of an array of expertise, not the fact that the authority is overlapping.

Likewise, some proponents of overlapping jurisdiction argue that a key benefit is that it allows significant experimentation opportunities. One scholar, for example, in discussing the benefits of redundancy, posits that “[d]iffering perspectives allow agencies to function more like laboratories,

framing which necessarily requires balancing the costs and benefits of such strategies compared to the alternatives).

³⁰¹ Freeman & Rossi, *supra* note 4, at 1134.

³⁰² See, e.g., O’Connell, *supra* note 1, at 1659 (equating redundancy and decentralization); see also *id.* at 1673 n.104 (same, but recognizing that differences may exist).

³⁰³ See, e.g., Doran, *supra* note 176, at 1820 (stating that information theory “implies that the institutional determinants of redundancy usually facilitate specialization”); see also *id.* at 1849 (discussing theory that Congress enacts redundant programs to pursue informational efficiency).

³⁰⁴ For a description of the expertise and diversity benefits of decentralization, see *supra* text accompanying notes 107–108.

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by devising new solutions to new problems.”³⁰⁵ Another proponent claims that redundancy “enables a range of experts with diverse viewpoints to contribute to the lawmaking process and it fosters competition and rivalry among decisionmakers, leading to a level of innovation and creativity that is impossible to achieve with a single decisionmaking body.”³⁰⁶ Still others have asserted that overlapping authorities “are more likely to discover which instruments most effectively respond” to a particular problem.³⁰⁷

These arguments also largely conflate decentralized with overlapping authority.³⁰⁸ The opportunity to learn from the experiences of other jurisdictions that have adopted different regulatory strategies is more appropriately regarded as a benefit of decentralized governance.³⁰⁹ If policymakers adopt a redundant governmental structure in order to achieve the diversity or experimentation benefits of having multiple regulators, they may fail to appreciate that though decentralization promotes those ends, a decentralized regime can be structured with either overlapping or distinct authority. The choices along that dimension call for analysis of the tradeoff between the efficiency advantages of a system of distinct authority and the protections against capture and agency inaction³¹⁰ provided by overlapping authority.

Conflation of these two dimensions sometimes also occurs in the opposite direction. Scholars have attributed the benefits of creating a regulatory safety net that protects against the risk of capture and agency inaction to decentralization of authority.³¹¹ Decentralized authority may not create such a safety net, however, if each agency is assigned a discrete substantive jurisdiction. It is the overlap and coordination of jurisdiction among multiple agencies that may protect against capture and inaction, not decentralization.³¹²

³⁰⁵ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2325 (2006).

³⁰⁶ Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1200 (2006).

³⁰⁷ Ruhl & Salzman, *supra* note 7, at 107.

³⁰⁸ In rare circumstances when experimentation must occur quickly, such as when the problem to be addressed by government is expected to be ephemeral and/or infrequent, overlap may be a way to spur innovation. In such cases, simultaneous activity by agencies with overlapping jurisdiction may be best suited to generating the lessons provided by experimentation.

³⁰⁹ See Wulf A. Kaal, *Initial Reflections on the Possible Application of Contingent Capital in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 281, 317 (2012) (“[E]xperimentation is probably most effective when several different approaches can be tried simultaneously in different jurisdictions.”); Esty, *Environmental Federalism*, *supra* note 6, at 606 (“A decentralized regulatory strategy permits the simultaneous testing of various policy responses.”).

³¹⁰ See Katyal, *supra* note 305, at 2324 (discussing the risks of relying on one agency because “[w]hen one bulb blows, everything goes”).

³¹¹ See, e.g., Aagaard, *supra* note 145, at 294–95.

³¹² See *supra* notes 175–178 and accompanying text. The degree to which overlap counters capture depends on whether one of the agencies with overlapping jurisdiction has the authority to veto actions by others. It also depends on whether each agency has the authority to proceed without the consent of the others. If, for example, a regulated entity wants to squelch

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Although overlap provides redundancy benefits, it also creates the potential for duplicative regulation that wastes agency resources, regulation that creates conflicting or onerous obligations for regulated entities, or inadequate regulation by agencies seeking to rely on (or blame) the efforts of peer agencies.³¹³ A common response to the incentives toward either over-regulation or under-regulation caused by overlapping governance is to call for the consolidation of regulatory authority.³¹⁴ Proponents of centralized authority argue that consolidation within a governmental level minimizes the pursuit of divergent goals or inconsistent actions by multiple agencies that may interfere with agency missions.³¹⁵ However, consolidation is not the only way to address inappropriate levels or methods of regulation. Instead, policymakers can retain the same number of agencies and delegate distinct tasks to each. Conflation of the overlap-distinctness and decentralization-centralization dimensions masks this option.

The reorganization of federal agencies to establish the Department of Homeland Security (“DHS”) is illustrative. Congress created the DHS in 2002 out of more fragmented federal authorities in part to reduce the likelihood that the numerous existing intelligence-gathering agencies would work at cross-purposes.³¹⁶ Some have questioned whether the pre-2002 landscape actually was characterized by excessive overlap of agency authority.³¹⁷ Even if it was, however, it is not clear that consolidation effectively reduced inter-agency interference. Professors Freeman and Rossi charge that the 2002 Act failed to eliminate overlapping and potentially conflicting functions within the new DHS.³¹⁸

In such cases, rather than centralizing authority by reducing the number of agencies, policymakers should consider either delineating more distinct lines of substantive authority or allocating distinct functional authority to different agencies with jurisdiction over the same subject matter.³¹⁹

regulatory action, it will be easier for it to achieve its goal by capturing an agency with veto power than multiple agencies, each of which has the authority to regulate on its own.

³¹³ See *supra* notes 147–159 and accompanying text. See also Aagaard, *supra* note 145, at 287–88; Marisam, *supra* note 21, at 198.

³¹⁴ See *supra* note 163 and accompanying text.

³¹⁵ See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 803 (2013) (arguing that “centralized control ensures consistency. When the government speaks with one voice, particularly on issues that recur across the government, citizens can better predict what the government’s position will be.”).

³¹⁶ See Cohen et al., *supra* note 1, at 683–84.

³¹⁷ See, e.g., Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1224 (2008).

³¹⁸ Freeman & Rossi, *supra* note 4, at 1153–54.

³¹⁹ According to several observers, folding FEMA into the DHS deemphasized emergency management, thereby hampering the response to Hurricane Katrina. Elizabeth F. Kent, “Where’s the Cavalry?” *Federal Response to 21st Century Disasters*, 40 SUFFOLK U. L. REV. 181, 206 (2006); Cohen et al., *supra* note 1, at 740. Increased centralization may have subordinated emergency management to the DHS’s priority concern—prevention of terrorism. Reduction of overlap by assigning emergency response implementation to one agency and information gathering and planning functions to another may have minimized inter-agency

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2. *Conflation of the Coordination/Independence and Decentralized/Centralized Dimensions*

It is tempting to consider substantial levels of coordination to be akin to centralized authority. However, even at its most robust, coordination is a different characteristic of governance than centralization.³²⁰ The benefits of centralization include achieving economies of scale, addressing collective action problems such as inter-jurisdictional spillovers, and achieving fairness by both creating uniformity and weakening the power of factions.³²¹ Coordination promotes cost-effective government and reduces the risk that the acts of one authority will counteract or frustrate those of another.³²² Though centralization may help decrease the costs of coordination, the two seek fundamentally different goals.

Yet, many policymakers and scholars have touted coordinated government as a way to take advantage of economies of scale.³²³ As Professor Jacob Gersen has noted, the centralized regulatory review literature “often equates coordination with centralized control, even though centralization is neither a necessary nor a sufficient condition for coordination. Strong vertical control over subordinates may facilitate coordination, but there seems to be no shortage of lackadaisical supervisors in the world.”³²⁴ Likewise, extensive inter-jurisdictional coordination can certainly occur in a largely decentralized regime.³²⁵

Though some may fail to differentiate coordination from centralization, others actually have conflated coordinated and decentralized authority. Some scholars have advocated coordination as a way to garner the benefits of multiple perspectives, specialized knowledge, and opportunities for agencies to test new ideas.³²⁶ To be sure, some coordination of information between authorities must occur for these benefits to accrue. However, because these diversity and expertise benefits more fundamentally rely on the existence of various authorities, we assert that these are primarily attributes of decentralization.

Still other scholars conflate decentralization with independence. These commentators have asserted that a key attribute of decentralized governance

interference while continuing to allow agencies to benefit from their respective experience and expertise.

³²⁰ See Hyman & Kovacic, *supra* note 58, at 27 (arguing that “the coordination of functions and responsibilities will not happen merely because previously separate bureaus are combined into a single department”).

³²¹ See *supra* Part III.A.2.

³²² See *supra* notes 196–203 and accompanying text.

³²³ Symposium, *Sustainable Energy Development in Emerging Markets*, 24 U. PA. J. INT’L L. 759, 792 (2003) (remarks of Steven Richards) (concerning energy access).

³²⁴ Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 346 (2010).

³²⁵ See generally COUNCIL OF GREAT LAKES GOVERNORS, THE GREAT LAKES CHARTER: PRINCIPLES FOR THE MANAGEMENT OF GREAT LAKES WATER RESOURCES (1985); see also *supra* note 219 (discussing coordination through interstate compacts).

³²⁶ See Freeman & Rossi, *supra* note 4, at 1210.

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is that it provides a way for governmental authorities to compete with each other and thus promote efficiency and effectiveness. According to one source, for example, “economic insights, such as the heterogeneity of preferences and the efficiency of the competitive process for government regulation, may lead to the conclusion that decentralization guarantees efficiency gains.”³²⁷ However, while some level of decentralization of governmental authority undoubtedly must exist for there to be inter-jurisdictional competition, it is not decentralization, but rather the independence of multiple agencies with jurisdiction over a problem, that provides the primary foundation for competition. For example, lodging considerable governmental jurisdiction in only two or three national agencies might create a fairly centralized regulatory regime, yet such governmental authorities could be designed to be highly competitive.³²⁸ Likewise, a fundamentally decentralized allocation of governmental authority might nonetheless involve considerable cooperation and collaboration between governmental authorities, hardly the hallmark of inter-jurisdictional competition.³²⁹

By conflating the coordination/independence and centralization/decentralization dimensions, scholars and policymakers lose an opportunity to better tailor the design of governmental authority. If a policymaker’s goal is to achieve economies of scale or uniform and equitable regulatory treatment, then centralization is often the best way to do so. If, however, a policymaker decides to create a decentralized regime to take advantage of the democracy, diversity, expertise, and experimentation benefits that such a structure is apt to provide, the policymaker should further consider whether decentralized power should be accompanied by coordination or independence among the multiple agencies authorized to address the problem in question. That choice involves a tradeoff between either the advantages of a fair and cost-efficient structure that minimizes the risk of conflicting policy approaches,³³⁰ or the advantages of a structure that avoids the administrative costs of coordinated action and fosters competition while protecting against groupthink. Conflation of the centralization/decentralization and coordination/independence

³²⁷ Aurélian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 COLUM. J. EUR. L. 231, 239 (2011); but see Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281, 310 (2012) (questioning assumption that decentralized decision making and inter-jurisdictional competition will foster fiscal responsibility and efficiency).

³²⁸ Cf. O’Connell, *supra* note 1 (advocating an almost exclusively federal but competitive governmental regime for national security intelligence gathering). R

³²⁹ See, e.g., Blake Hudson, *Fail-Safe Federalism and Climate Change: The Case of U.S. and Canadian Forest Policy*, 44 CONN. L. REV. 925, 936 (2012) (arguing for decentralized but coordinated forest policy-making process); Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 935 (2011) (supporting decentralized but cooperative regime for renewable energy development).

³³⁰ See Freeman & Rossi, *supra* note 4, at 1182 (discussing potential for conflicting interpretations of legal requirements and incompatible compliance requirements absent coordination). R

dimensions may mask the important tradeoffs involved in situating a regime along the latter dimension.

One example of a reorganization effort that may have failed to appreciate the option of moving along the coordination-independence dimension instead of the centralization-decentralization dimension is the reorganization of agency power over consumer financial products and services that resulted from enactment of the Dodd-Frank Act of 2010.³³¹ Dodd-Frank delegated to the newly created CFPB the combined authority of seven federal agencies previously responsible for protecting consumers of financial services.³³² Part of the impetus for that consolidation was dissatisfaction with the competition between the OTS and the Office of the Comptroller of the Currency (OCC) for new charters by banks and thrift institutions.³³³ By lowering their standards, the OTS and the OCC competed for the ability to issue charters to banks and thrift institutions, which had the option of choosing to subject themselves to either regulator.³³⁴ As two scholars explained, “[t]he combination of fee dependence on the part of the regulators and the ability of regulated institutions to credibly threaten to switch charters is thought by detractors to create a capture-ready environment, in which agencies become beholden to the industries that underwrite their budgets.”³³⁵ The existence of multiple agencies charged with regulating consumer financial transactions created a diffusion of responsibility and lax enforcement.³³⁶ Dodd-Frank consolidated in the CFPB federal regulatory functions—including research, information distribution, and standard setting—over banks and thrifts as a way to eliminate inter-agency competition that reduced the effectiveness of regulation.³³⁷

Greater centralization of regulatory power was not the only way to reduce destructive competition, however. Indeed, the antidote for excessive competition is perhaps more logically found by moving toward the coordination end of the independence-coordination dimension. According to some assessments, congressional efforts to consolidate authority in order to streamline and eliminate destructive inter-agency competition did not fully succeed, since “Congress did not substantially reduce or consolidate existing federal regulators, as some had proposed, [meaning that] information shar-

³³¹ See *supra* notes 62–63, 249–257 and accompanying text (discussing the Dodd-Frank Act).

³³² Arthur E. Wilmarth, Jr., *The Financial Services Industry’s Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. OF BANKING & FINANCIAL L. 881, 882 (2012).

³³³ See Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 543–44 (2012).

³³⁴ Dain C. Donelson & David Zaring, *Requiem for a Regulator: The Office of Thrift Supervision’s Performance During the Financial Crisis*, 89 N.C. L. REV. 1777, 1781 (2011).

³³⁵ *Id.* at 1785.

³³⁶ That configuration also may have contributed to unequal and unfair treatment of participants in those transactions at the hands of different regulators.

³³⁷ ADAM J. LEVITIN, THE PEW ECONOMIC GROUP: THE CONSUMER FINANCIAL PROTECTION AGENCY 7 (2009).

ing and coordination remain significant challenges to the effective operation of the fragmented regime.”³³⁸ As these scholars recognized, Congress may have been better advised to require information sharing and other forms of coordination of the activities of multiple bank and thrift regulators instead of consolidating authority in the hands of the CFPB.³³⁹ For one thing, a single, centralized agency may be more prone to tunnel vision that prevents consideration of multiple avenues of addressing problems and more vulnerable to capture than a series of agencies whose actions are coordinated.³⁴⁰ At the very least, a move toward greater coordination (without centralization) should have been on the table as an option worth considering. Allowing multiple agencies to retain authority but requiring them to coordinate might have reduced destructive (and unfair) inter-agency competition, while taking advantage of the expertise and experimentation benefits that decentralized governance may supply.

A similar story may be told about the adoption of the Homeland Security Act in response to the events of 9/11, which is also discussed above in connection with conflation of the overlap/distinctness and centralization/decentralization dimensions.³⁴¹ Congress consolidated the authority of many federal agencies in the new DHS in part to reduce competition among agencies performing intelligence functions that was perceived as counterproductive.³⁴² Some critics have taken issue with the objective of eliminating competition, which they believe had yielded helpful policy innovations.³⁴³ Even if reduced competition was desirable, however, others have concluded that the creation of the DHS failed to increase the efficiency of intelligence-gathering functions,³⁴⁴ and that coordination across agencies was better than within the sprawling new Department.³⁴⁵ They claim that it may have been possible to accomplish the efficiency and effectiveness gains sought with the creation of the DHS through the creation of a much smaller White House-

³³⁸ Freeman & Rossi, *supra* note 4, at 1148.

³³⁹ *Id.* at 1154.

³⁴⁰ *Cf.* Zywicki, *supra* note 250 at 875–76 (referring to flaws in the CFPB’s bureaucratic organization, including “a tunnel vision selection bias and commitment to regulatory mission, systematic risk-averse bias in agency decisionmaking, a tendency toward agency overreach and expansionism, and a heightened risk of regulatory capture by industry participants”).

³⁴¹ *See supra* notes 316–318 and accompanying text.

³⁴² Cohen et al., *supra* note 1, at 718.

³⁴³ *Id.* at 752.

³⁴⁴ *Id.* at 751–52.

³⁴⁵ *Cf.* Cohen et al., *supra* note 1, at 742 (arguing that the structural problems associated with the creation of the DHS “made things worse” with respect to the effectiveness of disaster response, and that “[e]ven if one makes unrealistic assumptions about the potential coordination payoffs [of a single agency] over time, the shortcomings in FEMA’s and DHS’s responses to Katrina are consistent with the existence of steep transition costs”). Had Congress paid more attention to functional rather than substantive jurisdiction, it might have chosen to coordinate among agencies with authority to protect national security for certain functions but not others. It might have decided, for example, not to coordinate information gathering to preserve the independence of agencies and promote innovative competition among them. It may also have decided, however, to require coordinated implementation of national security plans and programs to prevent agencies from working at cross-purposes.

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based agency that facilitated coordination at a fraction of the administrative costs that the shifting of responsibilities from other agencies to the DHS entailed.³⁴⁶ A decision to increase coordination without centralizing authority previously exercised by many agencies within a single new Department also may have preserved the expertise built up by the agencies folded into the DHS.³⁴⁷

3. *Conflation of the Coordination/Independence and Overlap/ Distinct Dimensions*

Another source of potential confusion among policymakers and scholars is the conflation of coordination and overlap. For example, an article discussing wildfire management policy along the wildland-urban interface describes the governing regime as having shifted from one dominated by the U.S. Forest Service to one in which state and local governments now play a significant role.³⁴⁸ In describing the benefits of this “overlapping authority regime,” the article refers to the strengthening of state and local firefighting resources through increased funding, investment in the dissemination of best practices and standards, resource sharing, and more generally, the strengthening of interagency ties.³⁴⁹ However, the sharing of resources and information, as well as the strengthening of interagency ties, are more accurately attributed to a coordinated regime, not necessarily an overlapping one. Multiple agencies with overlapping authority could work completely in ignorance of what agencies with shared authority are doing, or even at cross-purposes. Likewise, governmental authorities with little overlap in jurisdiction, such as peer agencies from different states, often coordinate and learn from common experiences in their exercise of authority.³⁵⁰

Similarly, some have conflated the opposite ends of these two dimensions—that is, distinct and independent authority. Professor O’Connell, for example, has asserted that distinct authorities can avoid the groupthink to which redundant authority is prone.³⁵¹ Groupthink is more appropriately regarded, however, as the byproduct of highly coordinated authority. It is not the existence of multiple agencies, each with its own discrete set of responsibilities, which is likely to suppress alternative points of view in an effort to achieve harmony and conformity. Rather, it is the process of coordination

³⁴⁶ Cohen et al., *supra* note 1, at 712, 753.

³⁴⁷ According to one observer, congressional neglect of expertise developed by agencies before the creation of DHS “threatens those aspects of the other agencies’ missions that overlap with new homeland security agenda.” Jon Kalmuss-Katz, *Eco Anti-terrorism: EPA’s Role in Securing Our Nation’s Chemical Plants*, 18 N.Y.U. ENVTL. L.J. 689, 733 (2011).

³⁴⁸ Lauren Wishnie, *Fire and Federalism*, 17 N.Y.U. ENVTL. L.J. 1006 (2008).

³⁴⁹ *Id.* at 1015–16.

³⁵⁰ See, e.g., Freeman & Rossi, *supra* note 4, at 1156 n.105 (discussing “Brown Bag Lunch Group” involving information exchange among officials from across the government, to “develop common approaches to shared problems”).

³⁵¹ O’Connell, *supra* note 1, at 1676.

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among agencies that may lead to downplaying or suppression of novel ideas and approaches.³⁵² These tendencies to “go along to get along” can be avoided by allowing and encouraging agencies to act independently—whether or not their respective jurisdictions overlap or are distinct.

Other scholars have identified a tradeoff between specialization and coordination.³⁵³ We regard these as two separate choices—overlap or distinctness (a form of specialization), and coordination or independence. The first pair deals largely with a tradeoff between effectiveness through the creation of redundant authorities and efficiency through the elimination of duplication of functions. The latter, however, largely entails choosing between increasing effectiveness (by reducing opportunities for agencies to work at cross-purposes) and reducing administrative costs (by avoiding the need to coordinate) as well as enhancing effectiveness (by averting groupthink). These two dimensions—overlap/distinctness and coordination/independence—both involve efficiency-effectiveness considerations, but they differ from one another.

The foremost problems with conflating the overlap/distinctness and coordination/independence dimensions are, again, the risks of missed opportunities and thwarted goals. A policymaker may choose to require coordination among multiple regulators as a means of achieving cost-effectiveness and reducing opportunities for conflicting approaches.³⁵⁴ Unless policymakers also consider whether the coordinating agencies should have overlapping or distinct authority, however, they may never address whether it is better to supplement those goals with a structure that creates redundancy as a means of creating a safety net against inaction, or instead with a structure that is designed to achieve the administrative efficiencies resulting from the creation of a distinct set of substantive authorities.³⁵⁵ Likewise, policymakers initially may choose overlapping authority to create a safeguard against regulatory failure. They should also consider, however, whether they prefer a coordinated approach that minimizes opportunities for working at cross-purposes or an approach that stresses the need to combat groupthink.

A recent example of coordination of overlapping authority is the Intelligence Reform and Terrorism Prevention Act of 2004,³⁵⁶ which requires the President to facilitate the sharing of information relating to terrorism among federal, state, and local entities. In 2008, the Director of National Intelligence published a strategy declaring “the imperative need [to move] beyond considering State and local government only [as] ‘first responders,’

³⁵² See John Wood, Note, *The “Constitution of Man”: Reflections on Human Nature from the Federalist Papers to Behavioral Law and Economics*, 7 N.Y.U. J. L. & LIBERTY 184, 188 (2013) (“Publius understood how coordinated action is beleaguered by organizational constraints such as collective action problems, rent-seeking, free-riders, groupthink, and holdouts.”).

³⁵³ See, e.g., Weisbach & Nussim, *supra* note 243, at 992.

³⁵⁴ See *supra* note 197 and accompanying text.

³⁵⁵ See *supra* notes 147–49, 175–78 and accompanying text.

³⁵⁶ 6 U.S.C. § 485 (2006).

preferring instead [to think] of them as the first line of defense in a very deep line of information assets.”³⁵⁷ The federal government, through the DHS, has since financed state-operated “fusion centers” to promote communication and coordination in the information gathering function among regional, state, and local authorities on intelligence matters.³⁵⁸

The USA PATRIOT Act of 2011³⁵⁹ also sheds light on the relationship between the overlap/distinctness and coordination/independence dimensions. Policymakers developed a consensus that national security officials needed to share information to help them “connect the dots” that would allow the government to prevent future attacks.³⁶⁰ Notably, however, coordination did not necessarily mean the elimination of redundancy, which represents a different dimension in our typology. Professor Nathan Sales explained that coupling coordination with redundancy facilitates information sharing, resulting in competitive analysis among intelligence agencies consulting a common pool of information, exposing policy makers to diverse perspectives, and counteracting “groupthink tendencies.”³⁶¹

Though we concur that reliance on redundant authority is not inconsistent with coordination, we would characterize the structure created by the USA PATRIOT Act somewhat differently. We regard competition as a by-product of independent action by co-regulators, not redundancy (or overlap). The Act actually seems to have required coordination among national security with respect to one function—information distribution or sharing—to promote efficiency and avoid waste.³⁶² At the same time, it encouraged competition through independent performance of a different function—information analysis—so as to garner the benefits of competition and to avoid groupthink.³⁶³

In short, by conflating the overlap/distinctness and coordination/independence dimensions, policymakers risk creating institutions unable to act in ways most likely to achieve regulatory goals. By requiring coordination of overlapping authority, for example, policymakers may forfeit the opportunity to reap the benefits of competition that might have resulted from encouraging overlapping regulators to exercise independent authority in carrying out a function such as information analysis.

³⁵⁷ Waxman, *supra* note 241, at 304–05.

³⁵⁸ *Id.* at 308–09.

³⁵⁹ Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of U.S.C.).

³⁶⁰ Nathan Alexander Sales, *Mending Walls: Information Sharing after the USA Patriot Act*, 88 TEX. L. REV. 1795, 1796 (2010).

³⁶¹ *Id.* at 1801–02.

³⁶² See Sales, *supra* note 360, at 1799 (noting that coordination and sharing in intelligence gathering are likely to produce “efficiency gains by allowing different intelligence agencies to specialize in collecting particular kinds of information”).

³⁶³ See O’Connell, *supra* note 1, at 1690 (urging such functional allocation).

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V. PRELIMINARY GENERALIZATIONS ON FUNCTIONAL ALLOCATIONS
ALONG DIMENSIONAL LINES

Decisions on how to allocate governmental authority are critical to the fate of regulatory programs. Unfortunately, scholars and policymakers routinely ignore how the nature of the governmental functions discussed in Part II may affect assessments of the comparative merits of allocating authority along the dimensions of governmental authority we distinguish in Part III. They also regularly conflate these dimensions. As Part IV demonstrates, failure to consider functional jurisdiction or discriminate among the different dimensions of authority risks frustrating efforts to promote public goals or unnecessarily sacrificing complementary values.

The appropriate balance among competing goals or values inevitably depends on context.³⁶⁴ Nevertheless, it is useful to postulate how the relative merits of dimensional allocations of authority are likely to differ by function. Analysis of the interface between functional jurisdiction and allocations of authority along each of the three dimensions may suggest novel opportunities to maximize the advantages of a particular allocation choice while minimizing its risks. In this Part, we begin by providing a few preliminary observations regarding likely general tendencies in the allocation of authority.

A. *Coordinating or Centralizing Research, Information Dissemination,
and Financing*

In general, arguments for centralization and coordination are likely to be stronger for scientific research, information management, and financing than for other governmental functions. Centralization is frequently a way for agencies to overcome collective action problems, assuming information accumulated by one agency will be shared with others.³⁶⁵ In addition, centralization³⁶⁶ or coordination³⁶⁷ can produce administrative efficiencies by reducing duplication of effort. On the other hand, the experimentation and diversity benefits of decentralizing scientific research, as well as the collating and distribution of information, are likely to be more muted than for analysis and policymaking activities, where decentralization and independence are particularly likely to spur valuable innovation.³⁶⁸

³⁶⁴ See, e.g., Aagaard, *supra* note 145, at 280.

³⁶⁵ See, e.g., Eric T. Laity, *The Corporation as Administrative Agency: Tax Expenditures and Institutional Design*, 28 VA. TAX REV. 411, 455 (2008).

³⁶⁶ See O'Connell, *supra* note 1, at 1680.

³⁶⁷ See, e.g., Marisam, *supra* note 21, at 26–27 (arguing that while “the risk of free riding is substantial when Congress assigns the same tasks to multiple agencies,” that risk “is diminished when each agency contributes different information or performs different subtasks”).

³⁶⁸ See *infra* notes 370–75 and accompanying text.

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One factor in determining whether to centralize on the one hand or decentralize and coordinate on the other is the likelihood of innovation by multiple governmental authorities. The more valuable innovations are likely to be, the fewer advantages centralization is likely to offer. The analysis of accumulated information, for example, may benefit from the experimentation and expertise benefits of decentralization, as multiple agencies may interpret the same data in different ways or devise different strategies for acting on that data. Decentralized information analysis therefore can reduce the risk of groupthink that inhibits innovative action.³⁶⁹ Assuming some level of decentralization, the choice between overlapping or distinct authority might often be made by comparing the efficiency gains of distinct authority with the redundancy advantages of overlap.

The value of centralizing scientific research and information dissemination has been recognized in a variety of regulatory contexts. For example, in the environmental area, delegating these functions to state and local regulators will tend to weaken technical capacity and forfeit economies of scale, particularly because many scientific and technical questions will be the same regardless of jurisdiction.³⁷⁰ In the field of national security, the costs of harmonizing state and local data collection efforts may be high, and trust in the accuracy of shared information may be greater if it is accumulated centrally.³⁷¹ Similarly, because healthcare regulation increasingly relies heavily on data in the regulatory process, the need for diversity is not as great as the need to develop the capacity to gather reliable data.³⁷² In addition, the federal government may have incentives to accumulate health care data that lower levels of government lack, creating collective action problems in a decentralized information-gathering regime.³⁷³

As with scientific research and information distribution, collective action problems generally appear to provide a strong justification for centralizing the financing function for many substantive jurisdictional areas. States and localities will often lack incentives to invest in intelligence and national security functions, for example, because the risks of inadequate surveillance may be externalized if terrorist activity is conducted in locations different from where they are planned, and some jurisdictions may regard themselves as at low risk. In addition, the political flack of ineffective counterterrorism measures tends to be borne by the federal government.³⁷⁴ Finally, the federal

³⁶⁹ See O'Connell, *supra* note 1, at 1676.

³⁷⁰ Esty, *Environmental Federalism*, *supra* note 6, at 614–15.

³⁷¹ See Waxman, *supra* note 241, at 344; *but cf. id.* at 345–46 (arguing that local law enforcers or partnerships between them and the federal government are likely to discover terrorist activities conducted inside the United States, seeding “long-term, bottom-up learning”).

³⁷² Moncrieff & Lee, *supra* note 247, at 278, 283.

³⁷³ *Id.* at 280 (arguing that the Affordable Care Act falls short of “the full centralization that seems functionally justified”).

³⁷⁴ Waxman, *supra* note 241, at 340–41.

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government generally will have superior capacity to finance regulatory programs.³⁷⁵

B. Decentralizing and Coordinating Monitoring Activity

The appropriate allocation of authority is likely to differ for other types of information gathering. In contrast to scientific research, information distribution, and financing, the arguments for decentralization are likely to be stronger for various monitoring activities, particularly of localized conditions in fields of regulation such as environmental protection. Knowledge of local pollution sources and conditions will often provide a stronger justification for decentralized monitoring of current levels of pollution, for example, than exists for the accumulation and analysis of information on matters such as the degree of exposure to a particular pollutant that creates unacceptable levels of health risk.³⁷⁶ Similarly, there are advantages to vesting in lower levels of government the task of determining the effect of regulated activity such as pollution on local populations, especially local concentrations of vulnerable or disadvantaged groups. These pockets of vulnerability may be missed if monitoring is conducted at a larger scale by those with less access to knowledge of peculiar local circumstances. Even in these circumstances, however, sound reasons likely remain for coordinating information distribution systems among governmental authorities, or even centralizing the distribution function in a dedicated authority. In addition, top-down mandates to respond to the decentralized accumulation of information may be appropriate. Again, context matters in getting the functional allocation right.

C. Decentralizing and Coordinating Distinct Planning Authority

The case for decentralized but coordinated planning generally seems stronger than for other governmental functions. Planning, as used here, refers to establishing a general framework for achieving regulatory policy that is implemented through subsequent, more particularized management actions that conform to the plan. Superior knowledge of location-specific needs and conditions may often support delegating planning responsibilities to regional or local branches of federal agencies³⁷⁷ or to lower levels of government.³⁷⁸ In addition, the experimentation and learning benefits of planning by many agencies would frequently support decentralization.

³⁷⁵ David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2648, 2652 (2005).

³⁷⁶ See David A. Strifling, *Environmental Federalism and Effective Regulation of Nanotechnology*, 2010 MICH. ST. L. REV. 1129, 1171 (2010).

³⁷⁷ Planning for the national forests, for example, is conducted at the individual forest level. 16 U.S.C. § 1604(f)(1) (2006). The same is true for individual units of the National Park System. See 2 COGGINS & GLICKSMAN, *supra* note 60, § 16:4.

³⁷⁸ The states are responsible for planning to achieve the national ambient air quality standards under the Clean Air Act. 42 U.S.C. § 7410 (2006).

Conversely, economies of scale are likely to be more difficult to achieve when planners must consider localized conditions in detail and the issues are not entirely or even largely national in character, reducing the value of centralization.

Assuming some level of decentralized planning authority is deemed appropriate, policymakers also must consider how to situate that authority along the overlap and coordination axes. Because overlapping planning jurisdiction creates the potential for inconsistent mandates, planning would appear to often be a good candidate for establishing an allocation of substantively distinct authority. Regardless of whether authority is overlapping or distinct, coordinated planning requirements may be essential to avoid disastrous results like those experienced in the responses to Hurricane Katrina.³⁷⁹ If, for example, the federal government is responsible for providing food and water to populations affected by national disasters, they would need to know where local authorities are planning to move at-risk populations.³⁸⁰ As compared to the value of harmonization, the value of competition among agencies may be relatively small at the planning stage. The risk of holdouts, one of the anti-commons problems associated with excessive coordination,³⁸¹ might be minimized in some circumstances by authorizing the federal government to take over the planning function if a state or locality fails to bear its portion of the planning burden.³⁸²

D. Decentralizing Independent Implementation and Enforcement

Though increased inter-jurisdictional coordination may often make more sense for functions such as ambient monitoring,³⁸³ financing, and planning, maintaining regulator independence for enforcement and implementation of centrally established standards or plans may more frequently be beneficial. Arguments for decentralizing implementation and enforcement of regulatory programs will likely be even more persuasive than for the planning function. Decentralized authority allows for a range of management strategies in implementation, which should facilitate the development of specialized approaches tailored to local variations and circumstances. Furthermore, maintaining decentralized implementation and enforcement should continue to provide opportunities for regulatory experimentation. Diversity and experimentation benefits are often cited as justifications for decentraliz-

³⁷⁹ See David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1429–30 (2011); Rep. Bennie G. Thompson (D-Miss.), *A Legislative Prescription for Confronting 21st-century Risks to the Homeland*, 47 HARV. J. ON LEGIS. 277, 305 (2010).

³⁸⁰ See DAVID M. DRIESEN ET AL., AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 27 (Sept. 2005), available at http://www.progressivereform.org/articles/Unnatural_Disaster_512.pdf.

³⁸¹ See *supra* notes 227–229 and accompanying text.

³⁸² See 42 U.S.C. § 7410(c) (2006) (authorizing EPA to adopt federal implementation plan under the Clean Air Act).

³⁸³ See Biber, *supra* note 68, at 9.

ing implementation and enforcement activities in diverse regulatory areas such as environmental,³⁸⁴ energy,³⁸⁵ and health care policy.³⁸⁶ Additionally, collective action problems may be less likely to arise when implementation and enforcement are decentralized than for other functions, particularly when information gathering, financing and standard setting are centralized and/or coordinated.³⁸⁷ On the other hand, decentralized implementation and enforcement risk slippage, deviation from centrally established norms, or an inequitable lack of uniformity. To counter these risks, it may be advisable to retain centralized oversight of implementation and enforcement or centralized authority to supplement or displace decentralized choices.³⁸⁸

E. Reducing Functional Overlap in Conjunction with Stronger Coordination

Though we largely agree with the literature asserting that overlapping substantive jurisdiction provides a number of benefits,³⁸⁹ instituting redundant governmental authority for every function would be valuable only in very rare circumstances. Although shared regulatory authority coalesced around particular substantive areas may often make sense, in many circumstances such jurisdictional redundancy is better focused on certain governmental functions (such as implementation and enforcement) than perfunctory duplication when there are few likely redundancy benefits (such as in information dissemination). Thus, it often may be valuable to reduce overlap in functional jurisdiction even as shared substantive jurisdiction is maintained or increased.

Such reductions in functional overlap may often be usefully accompanied by the establishment of formal, strong coordination mechanisms among the agencies sharing substantive authority. That configuration would help ensure that functionally distinct authorities are administered more efficiently and effectively. Such a combined reorganization strategy may reduce the inefficiencies commonly associated with overlap, while maintaining some of

³⁸⁴ See, e.g., Buzbee, *supra* note 163, at 1588–89; Esty, *supra* note 6, at 623.

³⁸⁵ See, e.g., Pursley & Wiseman, *supra* note 329, at 946.

³⁸⁶ See, e.g., Moncrieff & Lee, *supra* note 247, at 278, 283.

³⁸⁷ Decentralization for either implementation or enforcement may not be appropriate, however, for regulatory activities that raise collective action problems, such as inter-jurisdictional externalities. Cf. Esty, *Environmental Federalism*, *supra* note 6, at 623–24 (discussing trans-boundary problems). Even in those circumstances, however, overlap among regulators—and even delegation of enforcement authority to private entities through mechanisms such as citizen suits—can protect against capture and regulatory inactivity. See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1144–45, 1153 (2012).

³⁸⁸ See, e.g., 42 U.S.C. § 7410(c) (2006) (delegating to EPA the authority to establish federal implementation plans to achieve the Clean Air Act’s national ambient air quality standards if state regulators fail to adopt adequate plans).

³⁸⁹ See *supra* Part III.B.2.

the effectiveness and accountability benefits available through the coordination of shared substantive governance.

CONCLUSION

We have argued that policymakers and scholars analyzing alternative ways of organizing or reorganizing government often fail to appreciate the rich array of institutional design options. In particular, they often gloss over or ignore the potential benefits of dividing up authority along functional instead of purely jurisdictional lines. It is all too common for government officials and academics to consider only whether to create a centralized or decentralized regulatory or management regime. It is more unusual to afford full consideration to whether authority should be distinct or overlapping, and whether multiple regulators should act independently or in coordinated fashion. When these dimensions of authority have been considered, legislators and scholars have typically conflated these fundamentally different features of governmental authority, leading to mismatches between the perceived defects of existing structures and the allocations of authority chosen to replace them. We contend that those analyzing government organizational choices should pay more attention to the option of defining jurisdiction functionally or substantively and to the optimal placement of such authority along each of the centralization, overlap, and independence dimensions. Perhaps most importantly, government programs are most effective if organizational analysis includes assessments of whether the authority to perform one government function should be aligned differently along the three-dimensional axes than the authority to perform others that are part of the same regulatory or management program.

Whether the allocational configurations described preliminarily in Part V represent the optimal balance of values should be tested by further analysis and experimentation in specific regulatory contexts. What is already clear is that when Congress and other policymakers contemplate creating new agencies or reorganizing existing ones, they should compare different ways of structuring agency authority to assess which ones best address the concerns that prompted the desire to create or reorganize agency programs. In doing so, they should take into account both the full range of dimensions along which authority may be structured, as well as the relative merits of dimensional allocations of authority that differ by governmental function. Policymakers may be able to achieve more while losing less, for example, by coordinating existing overlapping agency authority rather than by centralizing it. Further, policymakers should consider whether a shift in functional as opposed to substantive jurisdiction would better promote values such as effectiveness, efficiency, legitimacy, and fairness.