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AGENCY COORDINATION IN SHARED REGULATORY SPACE

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Interagency coordination is one of the great challenges of modern governance. This Article explains why lawmakers frequently assign overlapping and fragmented delegations that require agencies to "share regulatory space," why these delegations are so pervasive and stubborn, and why consolidating or eliminating agency functions will not solve the problems these delegations create. Congress, the President, and agencies have a variety of tools at their disposal to manage coordination challenges effectively, including agency interaction requirements, formal interagency agreements, and joint policymaking.

This Article also assesses the relative strengths and weaknesses of these coordination tools using the normative criteria of efficiency, effectiveness, and accountability, and it concludes that the benefits of coordination will frequently be substantial. To varying extents, these instruments can reduce regulatory costs for both government and the private sector, improve expertise, and ameliorate the risk of bureaucratic drift without compromising transparency. Coordination can also help to preserve the functional benefits of shared or overlapping authority, such as promoting interagency competition and accountability, while minimizing dysfunctions like discordant policy.

Shared regulatory space can be challenging for the executive branch, but it also presents the President with a powerful and unique opportunity to put his stamp on agency policy. This Article recommends a comprehensive executive branch effort to promote stronger interagency coordination and improve coordination instruments. Any presidential exercise of centralized supervision will often be politically contentious and must, of course, operate within legal bounds. On balance, however, presidential leadership will be crucial to managing the serious coordination challenges presented by modern governance, and existing political and legal checks on potential overreach are sufficient to manage any conflicts with Congress.

This Article concludes by exploring the implications of enhanced interagency coordination for judicial review. Courts might adjust standards of review to promote coordination, but even if they do not, policy decisions arrived at through strong

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interagency coordination likely will attract greater deference. Greater coordination is relatively unlikely to impact the outcome of the Chevron *inquiry when reviewing agency legal interpretations. Some minor doctrinal adjustments could lead to greater deference where agencies use certain coordination instruments to adopt shared interpretations, but no major change in how courts approach judicial review is necessary for coordination to flourish.*

The larger conceptual purpose of this Article is to draw attention to the phenomenon of shared regulatory space and highlight the pressing need for interagency coordination as a response. It invites scholars and practitioners to focus on interagency dynamics, which requires a departure from the single-agency focus that has traditionally been central to administrative law.

> There are 12 different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there's my favorite example: The Interior Department is in charge of salmon while they're in freshwater, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated once they're smoked.
>
> — President Barack Obama[1]

INTRODUCTION

This Article argues that interagency coordination is one of the central challenges of modern governance. Many areas of regulation and administration are characterized by fragmented and overlapping delegations of power to administrative agencies.[2] Congress often assigns more than one agency the same or similar functions or divides authority among multiple agencies, giving each responsibility for part of a larger whole. Instances 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.[3]

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[1] President Barack Obama, State of the Union Address (Jan. 25, 2011), *in* 157 CONG. REC. H461 (daily ed. Jan. 25 2011), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2011-01-25/pdf/CREC-2011-01-25-pt1-PgH457-6.pdf. In early 2012, President Obama proposed to consolidate and eliminate a number of agencies and requested that Congress grant him the authority to do so through a streamlined process requiring an up-or-down vote by Congress. *See* Mark Landler & Annie Lowrey, *Obama Bid to Cut the Government Tests Congress*, N.Y. TIMES, Jan. 14, 2012, at A1.

[2] Fragmented delegations create situations in which different agencies possess the authority necessary to tackle different aspects of a larger problem. *See, e.g.*, Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 806–13 (2005) (describing the complex distribution of federal and state authority over environmental regulation and resource management).

[3] As the Comptroller General of the United States has noted, "[v]irtually all of the results that the federal government strives to achieve require the concerted and coordinated efforts of two or more agencies." U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-00-95, MANAGING FOR RESULTS: USING GPRA TO HELP CONGRESSIONAL DECISIONMAKING AND STRENGTHEN OVERSIGHT 19 (2000), *available at* http://www.gao.gov/assets/110/108330.pdf (statement of David

Such delegations may produce redundancy, inefficiency, and gaps, but more than anything else, they create profound coordination challenges.[4] These delegations can be difficult for administrative agencies to navigate and for future Congresses to oversee. And they present the President, whose constitutional duty it is to faithfully execute the laws,[5] with a monumental management challenge. A key advantage to such delegations may be the potential to harness the expertise and competencies of specialized agencies. But that potential can be wasted if the agencies work at cross-purposes or fail to capitalize on one another's unique strengths and perspectives.

The coordination challenges presented by overlapping and fragmented delegations have yet to be fully explored in legal scholarship. Administrative law, the field most concerned with government agency action, generally focuses on individual agency procedures and policy choices, and not on the interplay among agencies. With very few exceptions,[6] scholars largely have ignored the terrain of agency coordination. Recently, however, a handful of legal scholars have begun to consider the origins and purposes of overlapping delegations[7] and to

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M. Walker, Comptroller General of the United States, before the Subcomm. on Rules & Org. of the H. Comm. on Rules).

[4] Three recent events in particular — the U.S. government's failure to prevent the terrorist attacks on September 11, 2001, the Bush Administration's lackluster performance in the aftermath of Hurricane Katrina in 2005, and the Obama Administration's uneven response to the oil spill in the Gulf of Mexico in 2010 — have drawn scholarly and public criticism for a lack of coordination among federal agencies. *See, e.g.*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 400–03 (2004), *available at* http://www.911commission.gov/report/911Report.pdf; FRANCES FRAGOS TOWNSEND ET AL., DEP'T OF HOMELAND SEC. & COUNTERTERRORISM, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 52–55 (2006), *available at* http://library.stmarytx.edu/acadlib/edocs/katrinawh.pdf; Michael N. Widener, *Bridging the Gulf: Using Mediated, Consensus-Based Regulation to Reconcile Competing Public Policy Agendas in Disaster Mitigation*, 74 ALB. L. REV. 587, 598–99 (2011). A lack of coordination also has been blamed for broader policy failures, such as energy shortages and negative consequences for human health and the environment caused by the electric power industry. *See* Peter Huber, *Electricity and the Environment: In Search of Regulatory Authority*, 100 HARV. L. REV. 1002, 1002–03 (1987).

[5] *See* U.S. CONST. art. II, § 3.

[6] *See generally* Teresa M. Schwartz, *Protecting Consumer Health and Safety: The Need for Coordinated Regulation Among Federal Agencies*, 43 GEO. WASH. L. REV. 1031 (1975) (citing a number of new consumer protection statutes enacted in the 1970s, noting the significant jurisdictional overlaps among agencies charged with their implementation, and suggesting coordination techniques); Louis J. Sirico, Jr., *Agencies in Conflict: Overlapping Agencies and the Legitimacy of the Administrative Process*, 33 VAND. L. REV. 101 (1980) (describing how multiagency processes can expand the representation of underrepresented groups in the administrative process).

[7] *See generally, e.g.*, Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201. Political scientists have used game-theoretic models to explain why redundancy arises and whose interests it serves. *See generally* Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274 (2003).

explore the problem of "redundancy" in greater depth,[8] while others have begun to theorize about agency interactions.[9] We build on the existing literature, but we go further to provide a more comprehensive picture of overlapping and fragmented delegations and the coordination problems they present. Because we think it misleading, we eschew characterizing such delegations as redundant,[10] which suggests literal duplication, and instead favor the more nuanced concept of "shared regulatory space."

Part I explains how overlapping and fragmented delegations arise and why, in our political system, they are inevitable, pervasive, and stubborn. This Part then distinguishes among the quite different types of delegation that are sometimes lumped together under the banner of "redundancy" and suggests why coordination, rather than consolidation, has significant promise for overcoming their dysfunctions. Part II describes three types of coordination tools that agencies might adopt voluntarily or that political principals might require them to use: interagency consultation, interagency agreements, and joint policymaking.[11] Part II also discusses the ways in which the President might seek to exert more control over fragmented authority through centralized White House–coordination efforts, including not only regulatory review but also deployment of a variety of councils, task forces, and other mechanisms largely under his control. The goal of this Part is to produce a tentative typology of coordination tools currently at the disposal of political principals.

In Part III, we compare the strengths and weaknesses of these coordination tools, in terms of their potential to improve the efficiency, effectiveness, and accountability of agency decisionmaking. Thus we analyze the extent to which different coordination tools might, for example, reduce transaction costs for government and private parties,

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[8] *See* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 184 (2011) (describing "duplicative delegations" to agencies and the "antiduplication institutions" that help avoid the problems redundancy would create).

[9] *See, e.g.*, J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221 (2005) (arguing that Congress can empower agencies to "lobby" each other to force attention to secondary mandates); Freeman & Farber, *supra* note 2, at 798 (proposing a "'modular' conception of [environmental] regulation" to facilitate agency interaction (footnote omitted)); *see also* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 5–6 (2009) (arguing that multiple-goal agencies can be monitored by competing agencies in the context of public land management); Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 746–47 (2011) (describing the power agencies have over each other and arguing that the President can control the administrative state by directing their interactions).

[10] This term has been adopted from public policy and political science scholarship. *See* JONATHAN B. BENDOR, PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT 1–3 (1985).

[11] For a survey of some additional examples of coordinated agency approaches, see JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 359–61 (4th ed. 2006).

mitigate the risk of capture by interest groups, and check the prospect of bureaucratic drift. We argue that, as a general matter, greater interagency coordination will be desirable where it helps to maximize the purported strengths of shared regulatory space by preserving "functional" aspects of overlap and fragmentation, while minimizing its dysfunctions in terms of compromised efficiency, effectiveness, and accountability. In addition, we discuss the traction particular tools have to overcome specific types of problems, since not every situation giving rise to opportunities for coordination can be traced to the same type of delegation. Even if coordination tools seem beneficial in theory, the prospects for their success will depend partly on the initial reasons lawmakers created shared regulatory space and the extent to which coordination advances those goals.

Part IV then turns to the implications of coordination for political and legal oversight of agencies. While overlapping and fragmented delegations substantially burden the President, they also present him with opportunities to put his stamp on policy. The President is uniquely motivated and relatively well equipped to impose coordination on executive (and to some extent even independent) agencies. Yet efforts to "coordinate" the bureaucracy must be understood as part of the power struggle between the President and Congress to control administrative agencies. Presidential coordination efforts thus will be more likely to succeed where they arguably advance, and at least do not directly conflict with, a purposeful congressional design.

Finally, we consider how judicial review might advance or hinder interagency coordination. We show that courts, applying existing standards of review, are likely to defer to interagency coordination that strengthens the analytic basis of agency policy decisions, but unlikely to defer simply because more than one agency agrees on a policy. Although courts could in theory incentivize interagency coordination with greater deference, we argue that this shift is neither likely to occur under current doctrine nor warranted, and that the main drivers of coordination should be the legislative and executive branches. Courts do have important roles to play in ensuring that coordination stays within lawful bounds and policing its potential impact on the separation of powers. This is no different than what courts normally do when reviewing decisions made by agencies acting independently, so we do not envision any need for a special approach to judicial review in order for coordination to flourish. However, as a normative matter, our study of coordination suggests that the conventional understanding about how courts should review agency legal interpretations may be ripe for reassessment, at least in contexts where multiple agencies share interpretive authority.

Though much of the Article is descriptive and analytic, its larger goal is conceptual. More than ever, it seems, a proper understanding of the administrative state requires a fuller grasp of interagency dy-

namics.[12] This requirement has developed because so many domains of social and economic regulation now seem populated by numerous agencies, which — to satisfy their missions — must work together cooperatively or live side by side compatibly. One cannot recognize this challenge using the single-agency lens that has been central to administrative law. It requires an appreciation of shared regulatory space.

I. LEGISLATIVE DELEGATIONS AND THE INEVITABLE COORDINATION CHALLENGE

This Part explains why overlapping and fragmented delegations are so pervasive. We discuss prevailing theories of why lawmakers create these delegations and why, once created, they can prove resistant to change. We also provide some illustrative examples to convey the range of coordination problems these delegations can create, as well as their functional benefits. The exercise of delineating types of delegations serves to show the limitations of the concept of redundancy. This Part also explains why we view the problem in terms of managing shared regulatory space, rather than the alternative of consolidating agencies, which can create as many problems as it solves.

A. Explaining Congressional Delegations to Multiple Agencies

Scholars have long debated the pros and cons of bureaucratic "redundancy,"[13] a term that describes situations in which agency jurisdiction overlaps or is duplicative. On one view, redundancy is wasteful and allows agencies to abdicate responsibility.[14] Yet from another perspective, redundancy has certain benefits, like providing a form of insurance against a single agency's failure.[15] It is hard to generalize about redundancy, since sometimes it leads to beneficial outcomes and other times does not. In Professor James Q. Wilson's terms, there are

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[12] *See* DeShazo & Freeman, *supra* note 9, at 2303–04 ("Once one peels back the skin of administrative decisionmaking, one finds not lone agencies making isolated decisions in a cocoon of bureaucratic insularity, but collections of agencies intervening in each other's decisionmaking processes, sometimes quite formally and sometimes less so.").

[13] *See generally* Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969) (defending redundancy in public administration).

[14] Redundancy can lead to wasteful overregulation or risky underregulation. *See* Schwartz, *supra* note 6, at 1032; *see also* Marisam, *supra* note 8, at 211–13 (arguing that abdication is the most common result of duplicative delegations).

[15] For example, imagine if the Bureau of Ocean Energy Management (formerly the Minerals Management Service) failed to enforce rigorously safety standards for offshore drilling but a Coast Guard inspection of an offshore rig turned up evidence that it did not meet international standards. In this case, dividing up authority between two agencies provides more than one opportunity to catch safety violations and prevent disasters.

"good" and "bad" redundancies, but it is hard to determine which is which.[16]

In recent years, political scientists have tried to account for redundant or duplicative delegations by showing how they might benefit political principals such as Congress.[17] Drawing on this work, legal scholars too have argued that overlapping delegations can produce positive goods by generating productive interagency competition[18] and prompting agencies to produce "policy-relevant information."[19] Dispersing regulatory authority across multiple agencies may also reduce congressional monitoring costs[20] by, in effect, creating a system of interagency "fire alarms."[21]

Perhaps such delegations are best explained as by-products of the congressional committee system, which incentivizes members to expand the jurisdiction of the agencies they oversee in order to direct benefits to their constituencies. This view predicts that, whenever the assignment of bureaucratic authority is up for grabs, committees will work hard to ensure that *their* agencies get some piece of the pie.[22] Thus, "redundant" delegation flows from a "redundant" internal congressional structure, in which numerous committees frequently share oversight or budgetary functions as a way of maximizing the ability of members to advance the interests of constituents and thus their own prospects for reelection.[23] In simple public choice terms, one might

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[16] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 274 (1989).

[17] For example, Professor Michael M. Ting has modeled how redundancy can help principals achieve their policy outcomes where their preferences deviate from those of their agents, suggesting that redundancy can be efficient under some circumstances. Ting, *supra* note 7, at 287. Ting does not explicitly define redundancy, but his analysis includes congressional delegations that create overlapping programs, joint responsibility, and duplication.

[18] *See, e.g.*, Gersen, *supra* note 7, at 212.

[19] Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1463 (2011) [hereinafter Stephenson, *Information Acquisition*]. Elsewhere, Professor Matthew Stephenson has highlighted how congressional overseers' attention to agency decision costs can help to produce greater expertise. Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 492 (2007) [hereinafter Stephenson, *Bureaucratic Decision Costs*].

[20] Public choice theorists have emphasized how competition among institutions can decrease monitoring costs. *See, e.g.*, William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 637–38 (1975).

[21] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

[22] For a theory of intercommittee competition to control delegated power, see DeShazo & Freeman, *supra* note 9.

[23] Indeed, members of Congress sometimes treat the assignment of regulatory authority as a deal breaker when considering whether to vote in favor of certain pieces of legislation, especially when the regulatory assignment is important to their constituencies. *See, e.g.*, Allison Winter, *Farm Groups Prevail as House Climate Bill Puts USDA in Charge of Ag Offsets*, N.Y. TIMES

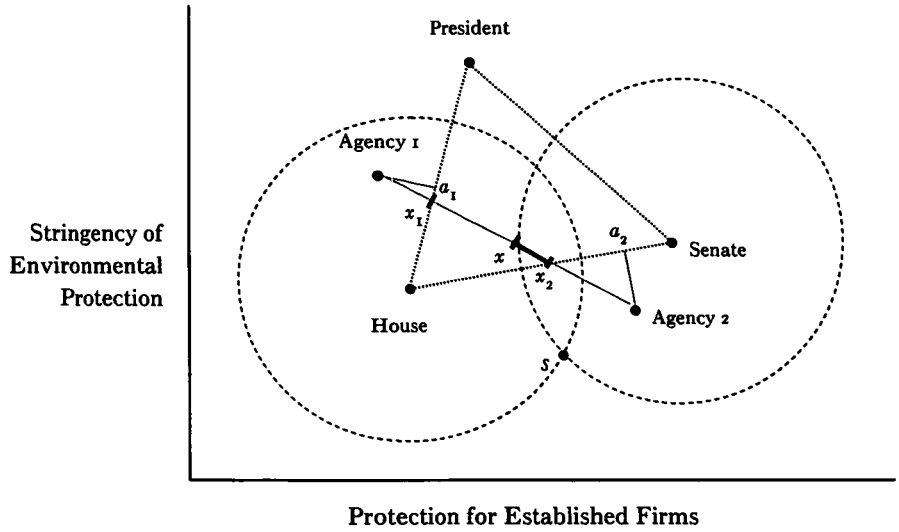

Fig. 1. Bargaining to dispersed agency authority

say that overlapping or fragmented delegations enhance the opportunities for members of Congress to claim credit and deflect blame. When responsibility is shared among agencies, members can take credit for decisions that benefit their constituents and can blame the agencies they do not oversee when things go wrong.

One can imagine still other reasons why Congress may choose to fragment or splinter authority. Perhaps Congress sees fragmentation, much like the creation of an independent agency, as a way to "remove certain policies from presidential political influence,"[24] since coordinating far-flung authority (as we discuss in greater detail below) can be expected to consume considerable executive resources. If this were true, we might expect Congress to engage in relatively more fragmentation in anticipation of periods of divided government.

Alternatively, delegating to two or more agencies might be explained as a compromise among lawmakers with different preferences,

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(June 24, 2009), http://www.nytimes.com/cwire/2009/06/24/24climatewire-farm-groups-prevail-as-house-climate-bill-pu-24287.html (noting Representative Collin Peterson's insistence as Chair of the House Agriculture Committee that Congress give the U.S. Department of Agriculture and not the Environmental Protection Agency (EPA) authority to certify which agricultural emissions would count as "offsets" in the carbon emissions trading regime at the core of the American Clean Energy and Security Act of 2009).

[24] DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 7 (2003); *see also id.* at 11, 164.

a dynamic illustrated by figure 1.[25] Figure 1 assumes a two-dimensional policy space in which lawmakers bargain about where to set motor vehicle emissions standards, which affects the stringency of environmental protection and the degree of protection for established firms in the transportation industry. In the bargaining space, the President, House, and Senate each has a different ideal point, meaning that each prefers a different set of levels for these two goals.[26] These lawmakers face four choices: (1) do nothing (s, representing the status quo); (2) delegate policy discretion to one of two existing agencies (Agency 1 or Agency 2); (3) create a new agency to address the problem; or (4) delegate authority to address the problem to both existing agencies.[27]

The model shows that delegating to a single existing agency produces an outcome that is outside the lawmakers' zone of agreement.[28] However, delegating to the two existing agencies allows lawmakers to reach a bargain along the line segment between x and x_2,[29] within the half-lens of decision points that all three players would prefer ex

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[25] Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 472 (1989) [hereinafter McNollgast]. As Professor Anne Joseph O'Connell has illustrated in the national security context, lawmakers balancing two policy issues might prefer to divide authority between two intelligence agencies rather than integrate them in a single agency. *See generally* Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1703 (2006) (building on the stylized bureaucratic delegation model proposed by McNollgast).

[26] Like McNollgast, this stylized model treats each of the three lawmakers as homogeneous.

[27] The half-lens area within the triangle represents the players' "zone of agreement." The bolded portion of the line between x and x_2 represents a set of expected points to which both Agency 1 and Agency 2 would agree if both had authority to address the problem within the space lawmakers would find acceptable ex ante. Without belaboring the technical formalities of the model here, the actual zone of possible agreement is represented by the area within the triangle that falls within the intersection of the curves of three circles drawn around each lawmaker's ideal point (each with a radius equal to the distance between that party's ideal point and s); for purposes of this illustration, it includes the entire half-lens within the triangle (since the entire triangle falls within the circle drawn around the President's preferred point). For discussion of these important formalities, see McNollgast, *supra* note 25, at 438–39.

[28] If lawmakers were to delegate authority to an existing agency, that agency would enact a policy at the point within the triangle closest to its ideal outcome (a_1 for Agency 1, or a_2 for Agency 2). However, each of these points is outside the lawmakers' zone of agreement, so the players would not choose either option. It is an inevitable simplification of the model that the ideal agency preference is represented by a single point. In fact, agencies will choose from a range of possible options and will likely not choose their respective preferred points because they lie outside the triangle, which represents drift that lawmakers will seek to correct. *See* section III.A.5, pp. 1187–89.

[29] As O'Connell observes, in making a decision to delegate new authority, both chambers of Congress and the President may prefer to delegate authority to both agencies, "if the ultimate outcome would fall between the outcomes of each agency acting alone," because that point would actually fall quite close to the true policy preferences these institutions would bargain for. O'Connell, *supra* note 25, at 1704. Although lawmakers could create a new agency to implement a policy outcome, they might be reluctant to do so for a number of reasons, including significant cost and disruption of existing interagency balances of power.

ante.[30] Put simply, lawmakers might prefer to delegate overlapping authority to two existing agencies where (1) creating a new agency to address multiple issues is very costly and (2) the ultimate outcome the two agencies are likely to reach is closer to the outcome lawmakers would negotiate if they were to bargain among themselves than would occur if one agency possessed all of the authority.[31] Like the other explanations above, this one sees shared regulatory space as an arrangement that serves congressional interests.

From a more "public interest"–oriented perspective, it is also possible that some members of Congress vote to disperse authority because they recognize that social and economic problems are complex, and they wish to harness the unique expertise and competencies of different agencies. Even if this strategy would occasionally create jurisdictional conflicts and policy inconsistencies or result in some wasteful redundancy, members might decide that the benefits of engaging multiple expert bodies are worth the costs. Congress may also choose to fragment authority specifically to promote independence where it is deemed critical to the agencies' mission, or where the mission is so uncertain that its articulation would benefit from agency competition.[32] In the same publicly interested vein, perhaps such delegations represent an enlightened attempt to mitigate the risk of agency capture. By fragmenting authority among multiple agencies, Congress re-

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[30] For example, if the players were attempting to balance the stringency of environmental protection, on the one hand, with setting vehicle standards subject to efficiency considerations that do not disadvantage incumbents, on the other, EPA might be said to have an ideal point similar to Agency 1's, while an agency like the National Highway Traffic Safety Administration (NHTSA) or the Department of Transportation (DOT) might have an ideal point more like Agency 2's. Lawmakers would not choose to delegate solely to EPA since the outcome the agency would adopt is outside the potential zone of agreement. The alternative of delegating to NHTSA alone would be preferred only by the Senate and is also outside the potential zone of agreement. Barring creating a new agency to address both issues, lawmakers will sometimes prefer to delegate discretion to both Agency 1 and Agency 2 rather than sticking with the status quo or delegating to one agency alone. This solution provides an opportunity for the two agencies to either implicitly or explicitly settle on an ex post solution that lies within lawmakers' zone of agreement.

[31] Of course, lawmakers must monitor the agencies ex post, to ensure the agencies do not drift too far from their bargained preferences because there is no guarantee that the agencies ultimately will choose outcomes within the "zone of agreement." The model does not make a predictive claim about what will happen, or a normative claim that this shared authority is best. It simply illustrates why dispersing authority among two or more agencies might sometimes be a preferable ex ante delegation strategy for lawmakers. *See* McNollgast, *supra* note 25, at 439. For further discussion in the context of this Article, see section III.A.5, pp. 1187–89.

[32] RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS 7, 9 (2005) (criticizing the recommendation of the National Commission to Study the Terrorist Attacks Upon the United States to centralize the government's intelligence activities and advocating instead a structure of diversity and competition).

quires interest groups to diversify their lobbying efforts, thus making it more costly for those that seek to capture the regulator.[33]

Yet another explanation is that such delegations are mostly accidental — by-products of a legislative process that occurs on a rolling basis over time, producing inconsistencies, inefficiencies, and unintended consequences.[34] One might be tempted to think that because lawmakers ultimately authorize these delegations by statute, they are intentional,[35] but this assumption places too much faith in lawmakers' prescience in legislating. It is far from clear that even when members vote for such delegations in the first instance, they intend every consequence that flows from them. In many cases, the creation of shared regulatory space is not the result of a single Congress but develops over time, on a piecemeal basis, as enacting majorities engraft new powers and responsibilities onto existing assignments of authority.[36] It is challenging, if not impossible, to anticipate how these authorities will interact once agencies implement them, and how they might be influenced over time by events and by other political principals, including members of Congress, Presidents, and courts. Indeed, some jurisdictional overlaps might result from judicial interpretation long after Congress has passed a statute and, at least arguably, might not have been anticipated by the enacting Congress.[37] The regulatory regime that ultimately materializes may be something no one would vote for again, even if every step of the way members voted for its individual components.

Reasonable people will disagree about the extent to which these accounts, alone or in combination, adequately explain any particular instance of fragmentation or overlap. Regardless of their source, however, these delegations are likely to prove quite sticky. Once congressional committees possess oversight authority, they can be expected to yield it only reluctantly. Agencies will resist efforts to shrink or eliminate their authority and will fight for bigger, not smaller, budg-

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[33] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2325 (2006); O'Connell, *supra* note 25, at 1677; Sirico, *supra* note 6, at 112; *cf.* Jean-Jacques Laffont & David Martimort, *Separation of Regulators Against Collusive Behavior*, 30 RAND J. ECON. 232, 233–34 (1999) (highlighting the advantages of multiple agencies in safeguarding against collusion).

[34] *See generally* LEWIS, *supra* note 24.

[35] To the extent that this view boils down to the claim that a regulatory or administrative regime cannot be dysfunctional because Congress has created it, we think it cannot be right.

[36] Presidents of course bear some responsibility for producing these delegations, too, since they participate in the legislative process and can exercise their veto, but Presidents cannot use veto threats excessively without risking their credibility, and Presidents often allow Congress to dictate many details of legislative structure and process.

[37] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (interpreting the Clean Air Act to authorize EPA regulation of greenhouse gases, and thus creating a potential overlap between EPA regulation of vehicle emissions and NHTSA regulation of vehicle fuel economy).

ets. And clients and beneficiaries of the agencies will advocate for their benefactors' survival. Even where these delegations are accidental rather than intentional, they may nevertheless prove hard to dislodge because of path dependency and bureaucratic entrenchment.

Yet the explanation for why such delegations arise in the first place has implications for the success of later coordination efforts. To the extent that members of congressional committees intentionally seek to deliver benefits to constituents through fragmentation, later efforts to undo these delegations, through coordination or otherwise, likely will meet with congressional resistance. Likewise, members will be reluctant to dispense with delegation regimes that increase their ability to take credit and disperse blame or that help them to manage principal-agent slack.

On the other hand, to the extent that such delegations result from compromises among lawmakers that envision agency bargaining or seek to promote the production of expertise and information, later efforts to coordinate agency decisions may be consistent with, and might even further, the interests of Congress. And to the extent that the delegations are accidental — the result of a chaotic and unpredictable legislative process that is difficult to control perfectly, yet stubborn once in place — members of Congress might actively support coordination efforts. Perhaps this explains why, in recent years, Congress itself has adopted various mechanisms to promote interagency coordination to mitigate the dysfunctions of certain regimes that have evolved over time.[38]

Just as such delegations may serve congressional interests, so too might they serve the President's interests, at least to the extent that interagency competition produces information or allows agencies to function as "laboratories" for policy ideas.[39] But the political risks of dysfunctional delegations are significant for the President, since he is constitutionally charged with the duty to execute the laws and is highly visible as the government's chief executive officer. The public will hold the President to account to the extent that the agencies, whose heads he hires and fires, seem badly out of sync.[40] A President will have a hard time convincing the public that he has limited tools to

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[38] *See* FREDERICK M. KAISER, CONG. RESEARCH SERV., R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS 13 (2011), *available at* http://www.fas.org/sgp/crs/misc/R41803.pdf ("[C]ontemporary examples of interagency collaboration have extended to an increasing number and variety of policy and subject areas.").

[39] *See* Katyal, *supra* note 33, at 2325 (arguing that bureaucratic overlap allows agencies to function more like laboratories, devising new solutions to new problems, and suggesting that this function is one rationale for the division of antitrust authority between the Federal Trade Commission and the Department of Justice).

[40] *See* examples referenced *supra* note 4.

control executive agencies, and the public may not easily distinguish between executive agencies and independent agencies. Delegations authorized by different enacting majorities of Congress, and signed by prior Presidents, land squarely on a new President's shoulders. He has no easy mechanism for undoing this combination of statutory arrangements. Instead, the practical and political imperative the President faces is to manage them.

B. Redundancy Versus Shared Regulatory Space

In this section, we explain why the term "redundancy," which scholars often use to describe a wide variety of delegations to multiple agencies,[41] compresses too much complexity. We prefer to use the term "shared regulatory space" and to characterize the primary challenge it presents as "coordination." This recharacterization helps set the stage for the description and evaluation of potential coordination instruments in Parts II and III.

To illustrate, we distinguish among four types of multiple-agency delegations: (1) *overlapping agency functions*, where lawmakers assign essentially the same function to more than one agency (as when two agencies share enforcement authority over the same malfeasance);[42] (2) *related jurisdictional assignments*, where Congress assigns closely related but distinct roles to numerous agencies in a larger regulatory or administrative regime (as when each agency has jurisdiction over a different sector, product, or territory);[43] (3) *interacting jurisdictional assignments*, where Congress assigns agencies different primary missions but requires them to cooperate on certain tasks (as when agencies charged respectively with law enforcement and land management must cooperate on border security); and (4) *delegations requiring concurrence*, where all agencies must agree in order for an activity to occur (as when several agencies must approve a permit or license). This is by no means intended as an exhaustive list of categories of multiple-agency delegation or as the only way to conceptualize the differences among them. They all pose collective action problems, with the most severe creating veto opportunities. Yet this way of organizing things is sufficient for our purposes to illustrate the poverty of the concept of

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[41] *See, e.g.*, Marisam, *supra* note 8, at 222–25.

[42] *See id.* at 215–18 (citing many examples of "duplicative delegations" and arguing that they can give rise to "blurred boundary disputes").

[43] In some cases, Congress draws relatively clear jurisdictional lines but nevertheless creates the potential for conflict and inconsistency. For example, the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811–1835a (2006), is administered by four separate agencies and provides that "more than one agency may be an appropriate Federal banking agency with respect to any given institution." *Id.* § 1813(q). The D.C. Circuit in *Collins v. National Transportation Safety Board*, 351 F.3d 1246 (D.C. Cir. 2003), described this as a "horizontal[]" split enforcement regime. *Id.* at 1251.

redundancy and to explain why we prefer to think in terms of shared regulatory space.

Overlapping agency functions might easily produce inefficiencies if two or more agencies build their own policymaking and enforcement systems where a single apparatus would be adequate. Consider the example of antitrust enforcement, which is shared by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) and which, presumably, just one agency might do.[44] While such overlapping agency functions perhaps most closely resemble what critics of redundancy describe, and probably present the clearest case of potential waste, even in this context the label "redundant" is misleading. Such overlaps may not be literally duplicative, since the two agencies may have different institutional features — for example, DOJ is in the executive branch while FTC is independent — that afford them certain strengths or equip them with different expertise, resources, and remedial tools.[45] Where Congress taps two agencies to perform a single function without clarifying precisely the limits of their respective jurisdictions, however, the agencies must negotiate their relationship. The FTC and DOJ have experienced periodic rifts and disagreements over enforcement policy.[46] The challenge, when faced with such delegations, is to enable the agencies to bring their relative competencies to bear while ensuring they do not pursue conflicting or incompatible policies, which would undermine the larger shared mission under the relevant statutes. Effective administration thus requires the agencies to coordinate to some extent on matters of both process and substance — for example, deciding who will take the lead on what and how aggressive to be against which potential violations of law using which standards of proof.

A similar problem arises when Congress makes *related jurisdictional assignments* to two or more agencies. This type of delegation can seem fairly straightforward, as when Congress gives each of several agencies authority to regulate a different product or activity, but for the same purpose. In theory, the agencies could execute their missions separately. Yet since they are parts of a larger enterprise, they would be more effective if their policies were consistent.

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[44] *See* Kelly Everett, *Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 727, 754–58 (2009) (describing growing tension between FTC and DOJ during the Bush Administration); *see also* Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 199–204 (describing an alternative enforcement regime).

[45] DOJ pursues criminal remedies and treble damages, whereas FTC tends to seek prospective relief. *See Roundtable Discussion with Enforcement Officials*, 63 ANTITRUST L.J. 951, 969–70 (1995) (remarks of Robert Pitofsky, FTC Chairman).

[46] *See* Frankel, *supra* note 44, at 199–204; *see also* Everett, *supra* note 44, at 754–58.

Consider, as an example, the American food safety system, in which fifteen federal agencies play parts.[47] In this regime, the Food and Drug Administration (FDA) performs the principal role.[48] Its standards govern almost all food products except meat, poultry, and processed egg products, which are regulated by the United States Department of Agriculture (USDA).[49] These two agencies perform essentially the same regulatory function — standard setting designed to ensure the safety of the food supply — in their respective domains, although each brings a different kind of expertise to the task.[50] At the same time, food "security" is the responsibility of the Department of Homeland Security (DHS), which conducts monitoring and surveillance programs and creates vulnerability assessments, mitigation strategies, and response plans.[51] The Environmental Protection Agency (EPA) regulates the toxicity of pesticides and maximum allowable residue levels on food commodities and animal feed[52] and has authority over other matters that directly or indirectly affect the food supply, such as water quality.[53] The Government Accountability Office (GAO) reviewed this fragmentation of authority in 2008[54] and concluded that it was characterized by "inconsistent oversight, ineffective coordination, and inefficient use of resources," all of which contribute to food safety risks.[55]

Where the extent of fragmentation is severe, and no single agency has responsibility for the larger whole, related assignments can exacerbate the problem of systemic risk. Many regulatory problems raise

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[47] Lyndsey Layton, *Unsafe Eggs Linked to U.S. Failure to Act*, WASH. POST, Dec. 11, 2010, at A1 ("Fractured oversight remains a problem today. There are more than 15 federal agencies and 71 interagency agreements dealing with food safety. Experts in public health and government accountability say that fragmentation weakens oversight, wastes tax dollars through redundancy and creates dangerous gaps.").

[48] *See id.*

[49] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-435T, FEDERAL OVERSIGHT OF FOOD SAFETY: FDA'S FOOD PROTECTION PLAN PROPOSES POSITIVE FIRST STEPS, BUT CAPACITY TO CARRY THEM OUT IS CRITICAL 8 (2008) [hereinafter GAO FDA REPORT] (discussing how FDA and USDA have "overlapping" and even "duplicative" activities).

[50] In addition, "the National Marine Fisheries Service (NMFS) in the Department of Commerce conducts voluntary, fee-for-service inspections of seafood safety and quality." *Id.* at 3.

[51] *See Homeland Security Presidential Directive 9: Defense of United States Agriculture and Food*, 1 Pub. Papers 173 (Jan. 30, 2004), *available at* http://www.dhs.gov/xabout/laws/gc_1217449547663.shtm#1.

[52] EPA regulates pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act. 7 U.S.C. §§ 136–136y (2006); *see The EPA and Food Security*, U.S. ENVTL. PROT. AGENCY (Jan. 12, 2012), http://www.epa.gov/oppoooo1/factsheets/securty.htm.

[53] For example, EPA administers the Clean Water Act, which governs water pollution discharges into the navigable waters of the United States. *See* 33 U.S.C. § 1251 (2006). Regulation under the Act helps prevent algal blooms, which can affect seafood. *See Food Safety*, U.S. ENVTL. PROT. AGENCY (Mar. 9, 2011), http://www.epa.gov/oecaagct/tfsy.html.

[54] GAO FDA REPORT, *supra* note 49.

[55] *Id.* at 4.

systemic risks, but one of the best illustrations is the American approach to financial regulation, in which five federal agencies, some independent and some executive, play different roles in a regime of "sector-based" regulation.[56] In this system, a single financial institution or financial product may be subject to regulation by multiple federal regulators, creating the potential for inconsistencies.[57] This approach to financial regulation has been criticized in numerous studies and reports as redundant and duplicative on the one hand, and as woefully inadequate on the other, because it leaves certain nonbank financial institutions free of regulation and fails to address the risks posed by new financial conglomerates.[58] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[59] overhauled key aspects of the system and created a new Financial Stability Oversight Council to address systemic risks.[60] Yet much complexity remains in place. Congress did not substantially reduce or consolidate existing federal regulators, as some had proposed.[61] Thus, information sharing and coordination remain significant challenges to the effective operation of the fragmented regime.[62]

By *interacting jurisdictional assignments* we mean to capture situations where Congress creates situational interdependence among agencies that have different and potentially incompatible primary missions. The coordination challenge in such regimes intensifies as the agencies and the missions multiply. For example, responsibility for border patrol is divided among several agencies, including federal resource man-

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[56] *See* Eric J. Pan, *Structural Reform of Financial Regulation*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 796, 817 (2011).

[57] *See* ERIC J. PAN, STRUCTURAL REFORM OF FINANCIAL REGULATION IN CANADA: A RESEARCH STUDY PREPARED FOR THE EXPERT PANEL ON SECURITIES REGULATION 26 (2009), *available at* http://www.expertpanel.ca/documents/research-studies/Structural%20Reform%20of%20Financial%20Regulation%20-%20Pan.English.pdf. The Commodities Futures Trading Commission (CFTC) regulates futures, while the Securities and Exchange Commission (SEC) regulates securities, but both have asserted jurisdiction over security futures.

[58] *Id.* at 29–30.

[59] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code) [hereinafter Dodd-Frank Act].

[60] The Council is chaired by the Secretary of the Treasury and comprises the Chairman of the Federal Reserve, the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau (CFPB), the Chairman of the SEC, the Chairperson of the Federal Deposit Insurance Corporation (FDIC), the Chairperson of the CFTC, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and an independent member with insurance expertise. 12 U.S.C. § 5321 (2006 & Supp. IV 2011).

[61] *See* U.S. DEP'T OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 11 (2008) (proposing consolidation of the CFTC and the SEC). For a detailed description of the Treasury Blueprint's recommendations, see PAN, *supra* note 57, at 30–33.

[62] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-151, DODD FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION 25, 27 (2011) [hereinafter GAO REPORT ON DODD-FRANK].

agers such as the Bureau of Land Management (BLM), Bureau of Indian Affairs, National Park Service, and Forest Service; regulators such as the Fish and Wildlife Service (FWS); and law enforcement agencies such as Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) within DHS.[63] These agencies perform different functions, and have unique missions, under separate statutes. The federal land agencies must manage their resources to balance resource extraction with conservation.[64] Although their primary duty is not border patrol, they manage most of the border territory, especially in the western United States.[65] The FWS is responsible under the Endangered Species Act (ESA) for protecting vulnerable species, and since activity on the federal lands might imperil those species or undermine their recovery, the agency's interests are implicated in border patrol.[66]

Finally, there are multiple-agency *delegations requiring concurrence*, which create particularly acute collective action problems in the form of vetoes. This situation arises, for example, when an activity requires the participation and approval of several agencies, each of which possesses statutory authority over some aspect of the decisional process, such that any one agency can effectively block the enterprise. For example, siting an electric power transmission line on federal land may require the approval of numerous federal regulators and land managers.[67]

In sum, redundancy does not adequately describe the problems created by delegations to multiple agencies, which encompass a variety of collective action problems. While some of these delegations might produce waste and duplication, the larger problem is the need for coordination to minimize inconsistency, maximize joint gains, plug gaps, and prevent systemic failures.[68]

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[63] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-590, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS 7–8 (2004) [hereinafter GAO REPORT ON BORDER SECURITY].

[64] *Id.* at 7, 9.

[65] *See id.* at 4–9.

[66] *See id.* at 7–10. Another example arises in the resource management context, where different agencies carry out specific tasks, but no single agency is responsible for the performance of the entire system. For example, managing the federal government's water resources requires coordination among the Bureau of Reclamation and the Army Corps of Engineers, each of which controls certain federal water assets that it must allocate to a variety of consumers; the Fish and Wildlife Service, which is responsible for protecting fish and wildlife that depend on the water supply; and EPA, which is responsible for protecting the nation's water quality. For a detailed analysis of the water resource management regime, see Freeman & Farber, *supra* note 2, at 839–40. The combination of statutes under which these agencies operate requires the water system to do many things, but none of the agencies is responsible for accomplishing all of them.

[67] *See* discussion *infra* notes 152–156 and accompanying text.

[68] *See* POSNER, *supra* note 32, at 14 (noting the need for coordination, as distinct from centralization, among intelligence agencies).

It is useful to juxtapose these types of delegations with one in which separating and insulating authority among the agencies seems both purposeful and functional. Consider "split enforcement" regimes where Congress divides different aspects of implementation and enforcement for the same program between two (or more) agencies, as when one agency makes standards and another adjudicates claims.[69] A good illustration is the Occupational Safety and Health Act,[70] which authorizes the Occupational Safety and Health Administration to establish workplace safety standards and enforce them through inspections while giving a separate body, the Occupational Safety and Health Review Commission, the power to hear claims against employers for violations of the standards.[71]

This split enforcement regime appears to be the quintessential example of a situation in which coordination is not desirable. In this type of scheme, Congress seeks to divide a regulatory or policymaking function from an essentially adjudicatory or judicial function, often to promote values such as independence and impartiality in decisionmaking, though both roles stem from the same statute.[72] If anything, the challenge posed by such delegations is keeping the functions separate. One can imagine other regimes that similarly seek to insulate one agency's functions from another's, either to promote independence or for some other salutary purpose. Still, even where such separation of functions is intentional and largely desirable, there may be instances in which conflicts will arise — disputes over statutory interpretation, for example — that might benefit from some degree of coordination.

The examples above suggest a number of weaknesses that can hamper the collective ability of agencies to deliver on stated statutory goals.[73] These weaknesses might be framed in terms of efficiency, effectiveness, and accountability. They include (1) transaction costs to government of managing jurisdictional disputes, forgone economies of scale, wasteful duplication of services or functions, and unproductive agency competition; (2) increased compliance costs for regulated parties who may be subject to inconsistent or duplicative rules; (3) the loss of policy effectiveness that might result from a discordant regime, including agencies working at cross-purposes or with partial information; (4) increased monitoring costs for political overseers and the pub-

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[69] *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) (resolving a statutory interpretation conflict between the Secretary of Labor and the Occupational Safety and Health Review Commission in favor of the Secretary).

[70] 29 U.S.C. § 661 (2006).

[71] *See id.*

[72] In so-called horizontal split enforcement regimes, multiple agencies have the authority to enforce the same statute, each against a different set of regulated entities. *See, e.g.*, Federal Deposit Insurance Act, 12 U.S.C. §§ 1811–1835a (2006).

[73] See examples discussed *supra* p. 1147 (food safety) and pp. 1148–49 (border security).

lic; and (5) greater risk of bureaucratic drift, which at the extreme can lead to inaction. The first two considerations raise efficiency concerns, the third poses effectiveness concerns, and the last two present accountability concerns.

Yet it is also true that in some cases shared regulatory space could produce substantial advantages, including (1) constructive interagency competition; (2) better expertise in decisionmaking; (3) insurance against any one agency's failure; (4) opportunities for agency compromise; and (5) reduced monitoring costs for political overseers and the public. The first four enhance efficiency and effectiveness, while the last improves accountability. Another consideration is whether, as some commentators have argued, multiple-agency delegations make capture more difficult.[74]

This is a helpful set of initial considerations against which to assess the desirability of coordination and the relative strengths and weaknesses of different coordination tools. Our claim is that carefully targeted and managed interagency coordination can help to ameliorate the dysfunction in systems where regulatory space is shared, without compromising what might be called "functional fragmentation."

C. *The Limits of Consolidation*

One might respond to the illustrations above by saying that they prove the case for consolidation rather than coordination. Why not eliminate the FTC's role in antitrust enforcement, give the FDA plenary power over food safety, and drastically reduce the number of federal financial regulators, as some other countries have done?[75] Certainly, there are situations where consolidating agency functions is clearly warranted.[76] In 2010, Congress asked GAO to identify duplicative agency programs, and GAO subsequently identified thirty-four areas for consideration.[77] Many of these programs present sensible opportunities to eliminate waste with little loss of functionality.

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[74] *See* O'Connell, *supra* note 25, at 1677 (suggesting same).

[75] *See, e.g.*, Press Release, Dep't of Fin., Ir., Minister for Finance Brian Lenihan TD Announces Major Reform of the Institutional Structures for Regulation of Financial Services in Ireland (June 18, 2009), *available at* http://www.finance.gov.ie/viewdoc.asp?DocID=5839 (discussing consolidation of financial regulatory authority in Ireland).

[76] The report of the National Performance Review under President Bill Clinton recommended eliminating or combining several agency programs, as well as restoring presidential reorganization authority. AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, REPORT OF THE NATIONAL PERFORMANCE REVIEW 140–59, 164–65 (1993).

[77] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-318SP, OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE TAX DOLLARS, AND ENHANCE REVENUE 5–154 (2011), *available at* http://www.gao.gov/new.items/d11318sp.pdf. For example, the report suggested consolidating Department of Defense and Department of Veterans Affairs programs that provide health care services to military families and veterans in order

Yet consolidation cannot be the answer to all of the problems posed by agencies' sharing regulatory space, for at least three reasons. First, it is rarely politically feasible for Congress to consolidate agencies or reassign their functions. As noted above, regardless of why they arise, fragmented regulatory regimes, once in place, develop constituencies of support among congressional committees, within the bureaucracies themselves, and among interest groups in the private sector.[78] As a result, agencies are rarely retired,[79] and consolidating authority already dispersed among multiple agencies can prove difficult. Recent experience bears out this difficulty. Notwithstanding proposals to merge the Commodities Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) during the debate over financial regulatory reform, Congress left them intact.[80] Similarly, despite calls for addressing the fragmentation in food safety regulation[81] in the FDA Food Safety Modernization Act,[82] Congress declined to do so.[83]

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.[84] This combination seemed politically possible only because of the sense of national emergency at the time. In normal circumstances, it is politically costly to embark on a reorganization that might lead congressional committees to lose oversight jurisdiction, create conflicts among congressional committees, provoke a backlash from agencies and their constituencies, and necessitate costly new appropriations.

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to improve the quality and consistency of care. Both departments identified ten areas where they had similar needs, including updating their inpatient electronic health record system. *See id.* at 79–81.

78 *See generally* THEODORE J. LOWI, ARENAS OF POWER (2009) (describing how bureaucratic arrangements, which can help special interests exert power over the legislative process, become resistant to change).

79 *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1218–20 (2000) (describing the circumstances behind the closure of two regulatory agencies).

80 *See supra* notes 59–61 and accompanying text.

81 *See, e.g.*, GAO FDA REPORT, *supra* note 49, at 3–5; Julie Schmit, *Big Changes Called for After Peanut Debacle*, USA TODAY, Feb. 12, 2009, at B2.

82 Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of the U.S. Code).

83 The Act attempts to address the coordination problems between the federal, state, and local governments, *see, e.g.*, *id.* §§ 203, 204, 209, but it does not significantly alter the distribution of authority among agencies or follow the agency coordination suggestions from the GAO report.

84 Before Congress established DHS, homeland security activities were divided across more than forty federal agencies. *See* U.S. DEP'T OF HOMELAND SEC., BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY: 2001–2008, at 3 (2008), *available at* http://www.dhs.gov/xlibrary/assets/brief_documentary_history_of_dhs_2001_2008.pdf. For an argument in favor of integrating regulatory functions in the context of energy and environmental regulation, see Huber, *supra* note 4, at 1054–55.

Second, while the President may have a stronger incentive than Congress does to consolidate and rationalize agencies, because of constitutional and statutory constraints, he cannot accomplish large-scale bureaucratic reorganization on his own.[85] Some Presidents have launched major bureaucratic reform efforts that call for a combination of structural and procedural changes to the federal bureaucracy, such as President Clinton with his National Performance Review.[86] In his second State of the Union speech, President Obama suggested that his administration too would propose an ambitious government reform agenda that would consolidate some agencies.[87] Such proposals have a long tradition, dating to the 1937 President's Committee on Administrative Management, known as the Brownlow Committee, which recommended sweeping changes to the executive branch, including providing cabinet agencies greater supervisory authority over independent agencies.[88] Yet the reality is that such far-reaching proposals typically cannot be implemented without congressional support.[89]

Third, beyond such political and legal obstacles, it is not clear that large-scale consolidation achieves its purported goals. It may, for example, simply relocate rather than eradicate bureaucratic redundancy and inefficiency. DHS now comprises what were previously over forty agencies scattered throughout the government,[90] yet whether this con-

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[85] The President possesses some flexibility to create and rearrange agencies, but it is limited. For example, in 1970 President Nixon created EPA through an internal executive reorganization, without direction from Congress — but Congress was responsible for defining the new agency's statutory authority.

[86] *See generally* GORE, *supra* note 76. The National Performance Review included 1200 specific proposals to improve government performance, many of which were accomplished through the exercise of executive authority. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., RL33441, EXECUTIVE BRANCH REORGANIZATION AND MANAGEMENT INITIATIVES: A BRIEF OVERVIEW 5–7 (2008), *available at* http://www.fas.org/sgp/crs/misc/RL33441.pdf.

[87] *See* Obama, *supra* note 1, at H461. Congress often has conferred reorganization authority on the President, but since the invalidation of the legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983), this authority has been conferred indirectly through a fast-track congressional approval process. *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 746–47 (2007).

[88] *See* PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 39–42 (1937). The Brownlow Committee decried the fact that governmental powers of great importance were being exercised by independent commissions and argued that cabinet agencies should have the authority to supervise independent agencies. *See id.*; James W. Fesler, *The Brownlow Committee Fifty Years Later*, 47 PUB. ADMIN. REV. 291, 292 (1987).

[89] Many of the Brownlow Committee's recommendations were endorsed by Congress in the Reorganization Act of 1939, Pub. L. No. 76-19, §§ 1–12, 53 Stat. 561, 561–64, *superseded by* Act of Sept. 6, 1966, Pub. L. No. 554, §§ 901–906, 80 Stat. 378, 394–96. Both the Reorganization Act and its successor allowed the executive branch to make organizational changes subject to congressional veto. *See* Act of Sept. 6, 1966, §§ 901–906, 80 Stat. at 394–96; Reorganization Act §§ 1–12, 53 Stat. at 561–64.

[90] *See supra* note 84.

solidation improved efficiency or effectiveness is highly debatable.[91] The Homeland Security Act of 2002[92] created a number of agencies while merging some existing ones, but it did not eliminate overlapping and potentially conflicting functions in the new organizational structure.[93] For example, although Congress made an effort to delineate the jurisdiction of drug trafficking and immigration control agencies and to integrate them with the authority of preexisting agencies, jurisdictional disputes persist.[94] This has had real consequences for drug trafficking, a context where GAO has concluded that current arrangements create the potential not only for duplicating investigative efforts but also for compromising officer safety.[95]

The same argument applies to proposals to consolidate the numerous federal financial regulators: they simply would convert an *inter*agency coordination problem into an *intra*-agency problem. Thus the choice of organizational form — a single regulator versus multiple regulators — may be less important for effectiveness than are coordination and information sharing.[96] Finally, there are potential downsides to consolidation, including the loss of the benefits of functional fragmentation,[97] like interagency competition and accountability, which shared jurisdiction is thought to provide and which targeted coordination efforts might preserve.[98]

Some commentators have suggested that the answer lies in drastically reducing government by eliminating numerous agencies.[99] Still,

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91 *See* POSNER, *supra* note 32, at 10 ("[I]f [DHS] has not been an unalloyed disaster, as some believe, it has, at the least, experienced severe birth and growing pains." (footnote omitted)).

92 Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of the U.S. Code).

93 *See id.*

94 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-63, DRUG CONTROL: BETTER COORDINATION WITH THE DEPARTMENT OF HOMELAND SECURITY AND AN UPDATED ACCOUNTABILITY FRAMEWORK CAN FURTHER ENHANCE DEA'S EFFORTS TO MEET POST-9/11 RESPONSIBILITIES 7, 27 (2009).

95 *Id.* at 7, 27 n.33.

96 *See* Pan, *supra* note 56, at 819 ("The single regulator model shifts the decision of setting regulatory priorities and allocating regulatory resources from an external debate . . . to an internal debate . . . .").

97 *See* section I.B, pp. 1145–51.

98 *See* O'Connell, *supra* note 25, at 1657 (highlighting how mega-agency unification can have negative effects such as "destroying needed safeguards and eliminating beneficial agency or committee competition").

99 For example, the Cato Institute has recommended the complete abolishment of, among many others, "the Departments of Agriculture, Interior, Transportation, and Veterans Affairs." CATO INST., CATO HANDBOOK FOR CONGRESS: COSTLY AGENCIES 179 (1997), *available at* http://www.cato.org/pubs/handbook/hb105-15.html. Not every approach is quite as bold. In 2011, four members of Congress introduced the Federal Program Sunset Commission Act, H.R. 606, 112th Cong. (2011), to establish a commission to recommend the elimination and consolidation of federal agencies under a sunsetting process, which would require reauthorization for some agencies to continue. *Id.*

even if many agencies disappeared, there would be a need for coordination among the remaining agencies.[100] It is hard to imagine the government simply abandoning core functions that American society has come to expect — border security or food safety, for example, or basic oversight of the economy. Such functions are increasingly complex, especially in a globally interdependent, high-technology, twenty-first-century world. If the government will not discontinue these functions, then the agencies must find ways to execute their functions compatibly and effectively.

II. COORDINATION TOOLS

In this Part, we describe a variety of instruments that can promote interagency coordination and thus may help to maximize the benefits and minimize the costs of shared regulatory space. Most of these tools are available to both Congress and the President, although certain mechanisms are unique to each. Interagency coordination efforts have a long history, dating to the early years of the Republic.[101] Nevertheless, they have proliferated in recent years in response to a number of factors, including the increasing scope of government and the complexity of its tasks.[102]

There are a number of ways to group these tools conceptually,[103] each of which might be analytically useful. We divide coordination instruments into four distinct categories: consultation provisions, interagency agreements, joint policymaking, and centralized White House review.[104] The first three categories are functional and describe common modes of agency interaction. The fourth category focuses on the President as a potential coordinator in chief. It encompasses a variety of instruments and offices that the President might deploy, some of which Congress creates but all of which, we believe, ultimately fall largely under presidential control. To highlight important similarities

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100 For example, after Congress consolidated a large amount of budgetary and personnel authority over intelligence agencies in the new cabinet-level Director of National Intelligence, the Director still had to coordinate with the intelligence units of the Department of Defense. *See* O'Connell, *supra* note 25, at 1666–71.

101 *See* KAISER, *supra* note 38, at 12 (noting that "[a]n early example" of federal interagency coordination was the "response to the Whiskey Rebellion or Insurrection in 1794").

102 *See id.* at 14–15 (citing these among other reasons for the increase in collaborative interagency mechanisms).

103 *See* Biber, *supra* note 9, at 5–6 (differentiating the "agency as lobbyist" from the "agency as regulator"); Bradley, *supra* note 9, at 755–56 (dividing interagency interactions into lobbying, de facto veto, and express veto powers); DeShazo & Freeman, *supra* note 9, at 2221 (describing mandatory interagency consultation provisions as enabling agencies to "lobby" each other).

104 These different groupings are not mutually exclusive and, no doubt, there are others. *See* KAISER, *supra* note 38, at 2 (categorizing interagency collaboration into six types: collaboration among peer agencies, coordination, mergers, integration, networking, and partnerships).

and differences, we also compare the instruments along other dimensions, including their source (Congress versus the executive branch), the extent to which they are voluntary ("bottom up") as opposed to mandatory ("top down"), the degree of agency entanglement they envision, their durability over time, and whether there is a lead agency.

When considering the relative strengths and weaknesses of these instruments, it is important to keep in mind that a considerable amount of informal coordination occurs as a matter of course in the federal bureaucracy. Informal coordination regularly occurs without any explicit communication between agencies, as where one agency observes what another agency is doing or anticipates another agency's decisions and adjusts its decisions accordingly to avoid tension or friction. Frequently, though, informal coordination is explicit and involves conversations, shared practices, and unwritten agreements between officials in different agencies.[105] Agency officials no doubt routinely exchange information and intelligence, manage jurisdictional conflicts, and work cooperatively on policy issues in ways that can be largely invisible and hard to track.[106] Much of this interaction might well occur even in the absence of highly active oversight by the relevant political principals, as a matter of comity or necessity. We suspect that agency officials who wish to get things done can accomplish a great deal through such informal channels. It also seems likely that informal approaches supplement more formal coordination processes, so the two should not be viewed as mutually exclusive.

Still, because of its ad hoc nature, informal coordination can also prove somewhat limited and transitory. And even if stable, such arrangements, as a Congressional Research Service report points out,

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[105] *See* GAO REPORT ON DODD-FRANK, *supra* note 62, at 25 (describing informal means of coordinating among financial regulators, including conference calls and sharing portions of draft rules).

[106] Over time, certain interagency practices may become institutionalized while still remaining informal. For example, for twenty-five years, a group of career officials from across the government, including representatives from the Department of Energy, EPA, the Department of Corrections, and DOT, have met regularly over lunch to exchange information and expertise and develop common approaches to shared problems. The success of the so-called Brown Bag Lunch Group is a function of its relative informality and its longevity, which has allowed participants to benefit from shared institutional memory. Email from Neil Eisner, Assistant Gen. Counsel for Regulation & Enforcement, Dep't of Transp., to Jody Freeman (Mar. 2, 2011, 16:01:55 EST) (on file with the Harvard Law School Library); *see also* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About e-Rulemaking*, 62 ADMIN. L. REV. 451, 458 n.25 (2010); Jeffrey Lubbers, Professor, Washington College of Law, American University, Remarks at the Center for the Study of Rulemaking, American University: Policy Direction and the Management of Control 14 (Mar. 16, 2005), http://www1.american.edu/rulemaking/panel3_05.pdf (praising this informal lunch group that "bring[s] together people in the agencies and departments who have the same kind of role . . . to sort of oversee the regulatory clearance process in their agencies and to talk about some of the common problems that they have in dealing with implementing the various laws and executive orders that have to be followed").

"still lack officially fixed memberships and responsibilities,"[107] making them hard to identify and evaluate, and potentially suspect from a transparency and accountability perspective. We note this caveat here simply to acknowledge that the informal interactions that already characterize many agency decisions — not the absence of any coordination at all — set the appropriate baseline against which to compare the additional coordination instruments discussed below.

A. Interagency Consultation

Agencies may engage in more formal or structured consultations at the behest of Congress or the President. It is quite common for Congress to create situations where an agency with the exclusive authority to regulate or manage a problem cannot proceed without first consulting, or taking comment from, another agency whose mission is implicated in the action agency's decisionmaking.[108] These agency interaction requirements can themselves create coordination challenges, but in many instances they also can help to solve coordination problems. We present several examples below, along a single spectrum from least to most burdensome for the action agency.

1. Discretionary Consultation. — Congress sometimes merely authorizes interagency consultation without requiring it. For example, section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act[109] (FIFRA) provides that when considering any application for pesticide registration, the EPA Administrator "may consult" with any other federal agency.[110] On its face, this language leaves to the action agency's discretion the question of whether to involve any other potentially interested agency in its decisionmaking process. As a general matter, absent a statutory prohibition on agencies' consulting each other,[111] there appears to be no legal bar to such interactions, so such permissive consultation provisions seem to do little to facilitate interagency coordination that would not have occurred anyway. Still, some agencies might take the view that explicit congressional authorization is required in order to consult or enter agreements with other agencies. Provisions that grant this authority at least signal that Congress does not oppose this kind of interaction and prevent other parties from arguing to the contrary, whether to the agency during the policymaking process or to a court afterward.

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107 *See* KAISER, *supra* note 38, at 1 n.1.

108 *See* Biber, *supra* note 9, at 41–60 (providing examples of congressionally mandated interagency interaction requirements); Bradley, *supra* note 9, at 750–56 (same).

109 7 U.S.C. §§ 136–136y (2006).

110 *Id.* § 136a(f)(3).

111 An example is the separation-of-functions limitations that apply in formal adjudications under the APA. *See* 5 U.S.C. § 554(d) (2006).

2. Mandatory Consultation. — Some statutes require consultation before an agency can take certain actions, even though how an agency should treat the substance of the interaction remains highly discretionary.

One of the strongest mandatory consultation provisions is section 7 of the ESA, which requires federal agencies to consult with the federal fish and wildlife agencies responsible for administering the Act to ensure that their proposed major actions are "not likely to jeopardize" protected species.[112] Although the action agency retains considerable discretion, in practice this provision can function as a veto because disregarding recommendations can expose an agency to civil and criminal penalties and because deviation may render a decision arbitrary and capricious on judicial review.[113] For this reason, commentators view ESA section 7 as a powerful interagency lever, even if it is technically procedural.[114]

Congress might accomplish the same thing through generic analytic or disclosure requirements, which in practice require an action agency to engage in interagency consultation. A good example is the National Environmental Policy Act[115] (NEPA), which requires federal agencies to produce a detailed environmental impact statement for major federal actions "significantly affecting the quality of the human environment."[116] NEPA has been interpreted over time, in regulations promulgated by the Council on Environmental Quality and in judicial decisions, to require far more than a cursory disclosure of environmental impacts.[117] In practice, the disclosure process serves as a vehicle for soliciting input from numerous agencies.[118]

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112 16 U.S.C. § 1536(a)(2) (2006).

113 *See* Bennett v. Spear, 520 U.S. 154, 169 (1997) ("[W]hile the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency . . . ." (citation omitted)).

114 *See, e.g.*, Biber, *supra* note 9, at 52–57 (categorizing the ESA provision as an example of the "agency as regulator" model and contrasting it to the weaker "agency as lobbyist" model exemplified by the consultation provision of the National Environmental Policy Act, 42 U.S.C. § 4332 (2006)).

115 42 U.S.C. §§ 4321–4370f.

116 *Id.* § 4332(c).

117 *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (holding that agencies are "not only permitted, but compelled, to take environmental values into account" under NEPA). Later cases suggest NEPA primarily requires disclosure of environmental impacts and is procedural, not substantive, in nature, but a failure to consider environmental impacts can still give rise to reversal under NEPA. *See, e.g.*, Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 483, 511–40 (2009).

118 Both the ESA and NEPA are somewhat difficult to classify along a spectrum of relative burdensomeness for the action agency. While both of these statutes impose substantial demands, their requirements are ultimately procedural. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed — rather than unwise — agency action."). Nevertheless, an especially burdensome procedural requirement may provide de facto veto power for the interested agencies, making it closer to a substantive than a procedural re-

3. Public Response Requirements. — Some consultation provisions explicitly require the action agency to publicly respond to the interested agency's suggestions. For example, section 21 of FIFRA requires EPA to solicit opinions from the Secretary of Agriculture and the Secretary of Health and Human Services before promulgating regulations to administer the Act.[119] If these agencies respond in writing within thirty days to EPA's solicitation, EPA must publish those comments, and its own response, along with its final rule in the *Federal Register*.[120] Without dictating the outcome, this kind of consultation provision requires the action agency at least to engage with the consulting agencies' views and provide a credible discussion of their merits, putting on the record reasoning that could later be subject to arbitrary and capricious review by courts.[121]

4. Default Position Requirements. — Congress might go one step further by making adherence to the interested agency's suggestions the default position from which the action agency may deviate only by showing that adherence to such suggestions would interfere with the action agency's legal duties. The scheme for hydropower licensing in the Federal Power Act[122] (FPA) embodies this approach. Section 10(j) of the FPA requires the Federal Energy Regulatory Commission (FERC) to solicit recommendations from interested federal agencies before issuing hydropower licenses.[123] FERC may decline to adopt a recommendation only if it believes that following it would conflict with the agency's legal duties under the FPA or another applicable law.[124] When making such a determination, FERC must publish findings supporting the agency's conclusion along with a "statement of the basis for each of the findings."[125] This structure shifts the evidentiary burden of rejecting the outside input to the action agency, which in

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quirement. Thus, whether a consultation provision on its face is technically procedural or substantive can be misleading; what matters is how it operates in practice.

119 7 U.S.C. § 136s(a)–(b) (2006).

120 *Id.* § 136w(a)(2)(A)–(B).

121 The Toxic Substances Control Act (TSCA), for example, establishes an interagency committee, which makes recommendations to EPA regarding the substances the agency should target for regulation. 15 U.S.C. § 2603(e)(1)(A) (2006). The EPA Administrator either must act on those recommendations or publish reasons for not doing so in the *Federal Register*. *Id.* § 2603(e)(1)(B). There are further variations on this theme. A consultation provision can provide additional leverage to an interested agency by requiring the action agency not only to consult with the interested agency and respond to comments generically, but also to provide specific reasons if it wishes to deviate from the interested agency's suggestions. *See* Outer Continental Shelf Lands Act, 43 U.S.C. § 1344(c) (2006) ("The Secretary shall communicate . . . in writing[] the reasons for his determination to accept or reject" the recommendations.).

122 16 U.S.C. §§ 791a–823d (2006).

123 *See id.* § 803(j)(2) (requiring FERC to give "due weight to the recommendations, expertise, and statutory responsibilities" of other agencies).

124 *Id.* § 803(j)(2)(A)–(B).

125 *Id.* § 803(j)(2).

practice gives the interested agencies considerable influence.[126] Such provisions can convert a formerly unilateral decisional process into something that resembles a multilateral negotiation.[127]

5. Concurrence Requirements. — Congress may also impose concurrence requirements, which come in at least three forms. First, Congress may authorize one agency to set baseline regulatory standards from which another agency must not deviate, essentially constraining the scope of that agency's decisions in certain domains.[128] While such a requirement is a potentially significant substantive limit on what an agency might otherwise do, it falls short of a roving veto power. Second, certain statutory provisions require an action agency to garner the explicit approval of another agency before its policy decision can be final. An illustrative statute is the Solid Waste Disposal Act[129] (SWDA), which requires the Secretary of the Interior to obtain EPA's concurrence before promulgating regulations dealing with disposal of coal mining wastes.[130] Finally, Congress might assign joint responsibility for a decision to more than one agency, effectively requiring those agencies to agree by enabling them to veto each other. An example is the Coastal Zone Management Act's[131] assignment of authority to approve state coastal protection plans to both EPA and the Department of Commerce.[132] These concurrence requirements can create collective action problems, as we noted in Part I, by conferring veto power.

Interagency interaction requirements serve the interests of Congress by, among other things, establishing a monitoring mechanism that can supplement congressional oversight. Yet they also may bolster the President's power by creating an avenue through which agencies

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126 The statute also requires that FERC "shall attempt to resolve" its disagreements with other agencies' recommendations. *Id.*

127 *See* David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 439 (1999) (noting that the Electric Consumers Protection Act "increased the transaction costs of making a decision"); *see also* DeShazo & Freeman, *supra* note 9, at 2263 (arguing that these increased transaction costs implicitly raised the cost of disregarding other agencies).

128 For example, the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101–10270 (2006), confers authority on EPA to promulgate environmental standards for releases of radioactive materials in nuclear waste repositories and requires that the Nuclear Regulatory Commission's repository licensing decisions "shall not be inconsistent" with those standards. 42 U.S.C. § 10141(a), (b)(1)(C).

129 42 U.S.C. §§ 6901–6992k (2006 & Supp. IV 2011).

130 *Id.* § 6905(c)(2). *See also* Natural Gas Act, 15 U.S.C. §§ 717–717z (2006) (requiring FERC to obtain the concurrence of the Secretary of Defense before authorizing liquefied natural gas facilities that would affect military training activities, *id.* § 717b(f)(3)).

131 16 U.S.C. §§ 1451–1466 (2006).

132 *See id.* § 1455b(c)(1) (requiring the Secretary of Commerce and the Administrator of EPA to "jointly review" state coastal protection plans). The agency heads must concur on any decision to approve a state program. *See id.*

might "lobby" each other to advance the President's prerogatives.[133] In addition, these tools are not restricted to Congress. The President himself may demand interagency consultation, at least from executive branch agencies, even where Congress does not require it. Thus, barring a statutory prohibition on interagency consultation, such consultation should be available to the agencies to use voluntarily, and to the President to deploy as a management tool.

B. Interagency Agreements

Perhaps the most pervasive instrument of coordination in the federal government is the memorandum of understanding (MOU).[134] A typical MOU assigns responsibility for specific tasks, establishes procedures, and binds the agencies to fulfill mutual commitments. These agreements resemble contracts, yet they are generally unenforceable and unreviewable by courts. Most appear to be negotiated by agencies voluntarily, in furtherance of their statutory duties, though Congress could explicitly require them, and the President presumably could request or direct that executive agencies sign such agreements if he wished. Nevertheless, there appears to be no generally applicable statutory or executive branch policy regarding the use of MOUs, leaving their content largely to the discretion of the agencies. Nor is there a single interagency database where these agreements are collected, making them hard to track and compare.[135]

Agencies sign MOUs for a variety of purposes, including (1) delineating jurisdictional lines, (2) establishing procedures for information sharing or information production, (3) agreeing to collaborate in a common mission, (4) coordinating reviews or approvals where more than one agency has authority to act in a particular substantive area, and (5) in rarer cases (and potentially subject to additional procedures under the Administrative Procedure Act[136] (APA)) agreeing on substantive policy. Their content varies widely. Some MOUs are quite detailed, although they tend to be short documents, often less than ten pages. MOUs may specify goals, assign responsibilities, establish me-

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133 *See* Bradley, *supra* note 9, at 765–72; DeShazo & Freeman, *supra* note 9, at 2243–46.

134 Such an instrument is also referred to as a "memorandum of agreement." For the purposes of this Article, these terms are interchangeable.

135 Some agencies publish at least some of their MOUs in the *Federal Register*. Under certain circumstances, publication might be required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006 & Supp. IV 2011). *See infra* note 275 (application of FOIA to MOUs). Some agencies compile and publish at least some of their interagency MOUs on their websites. One particularly comprehensive example is the FDA, which houses a searchable collection of its domestic, academic, and international MOUs. *See FDA Memoranda of Understanding*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/default.htm (last visited Jan. 29, 2012).

136 5 U.S.C. §§ 551–559.

trics, commit personnel and funding, and establish responsibility for oversight.[137] Some include deadlines for revisiting and updating the agreement.[138] Others are more like framework documents that outline principles and leave more detailed elaboration to subsequent agreements or "implementing arrangements."[139]

Among MOUs in the first category, some seek to clarify how agencies that share jurisdiction will exercise enforcement authority to limit duplication. For example, a 1954 MOU between FDA and FTC states that only one of the agencies, but not both, will initiate enforcement actions against a party regarding prescription drug advertising, unless the public interest otherwise dictates.[140] Other MOUs clarify jurisdictional lines for purposes of program administration. For example, EPA and the Department of Energy (DOE) signed an agreement in 2009 delineating their respective roles in administering two energy efficiency programs over which they share authority.[141] The agreement gives the lead to EPA for the Energy Star rating and labeling program for appliances and to DOE for a comparable program for buildings.[142] The MOU establishes a joint oversight board composed of senior officials from both agencies, who are tasked with ensuring the two programs are complementary and not duplicative.[143] The Energy Star MOU also addresses matters of substance (of the sort the fifth category of agreement above envisions) to the extent that it proposes changes to both programs, including, among other things, expanding the number of products covered, raising existing eligibility standards, and developing a new system for rating and labeling buildings.[144]

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137 *See infra* notes 148–151 and accompanying text (discussing an MOU between the Department of Defense and DHS).

138 *See infra* notes 152–156 and accompanying text (discussing MOUs concerning the siting of electric transmission lines on federal land).

139 *See, e.g.*, Memorandum of Understanding on Weather-Dependent and Oceanic Renewable Energy Resources Between the U.S. Department of Energy Office of Energy Efficiency and Renewable Energy and the U.S. Department of Commerce, National Oceanic and Atmospheric Administration 3 (Jan. 24, 2011) [hereinafter DOE-NOAA MOU], *available at* http://www.noaanews.noaa.gov/stories2011/images/28812.pdf (referring to roles and responsibilities for specific research tasks or initiatives to be specified in separate "implementing arrangements").

140 Working Agreement Between FTC and Food and Drug Administration, 4 Trade Reg. Rep. (CCH) ¶¶ 9850.01–9850.03, at 17,351–53 (13th ed. 1988).

141 Memorandum of Understanding on Improving the Energy Efficiency of Products and Buildings Between the U.S. Environmental Protection Agency and the U.S. Department of Energy [hereinafter Energy Star MOU], *available at* http://www1.eere.energy.gov/office_eere/pdfs/epa_doe_agreement.pdf (last updated Jan. 29, 2012).

142 *Id.* at 1; *see also Summary of EPA-DOE Partnership*, ENERGY STAR, http://www.energystar.gov/ia/partners/downloads/mou/Summary_of_EPA-DOE_Partnership.pdf (last visited Jan. 29, 2012).

143 Energy Star MOU, *supra* note 141, at 1.

144 The agreement calls for extending Energy Star's coverage to new products that are highly energy efficient; establishing an "Energy Super Star" labeling category for the top tier of energy-

A good example of the second category of MOU noted above is a 2005 agreement between FERC and CFTC regarding the sharing of proprietary information.[145] The MOU establishes procedures by which FERC can request futures and options data from CFTC to fulfill its own regulatory responsibilities, and it designates to whom FERC may disclose the information.[146] Agencies may also sign agreements regarding the joint production of information and research, as exemplified by an MOU between DOE and the National Oceanic and Atmospheric Administration (NOAA) to support the deployment of wind, solar, and other weather-dependent sources of energy.[147]

The third category above is nicely illustrated by a 2010 MOU between the Department of Defense (DOD) and DHS, under which the two agencies agree to collaborate on cybersecurity.[148] The MOU commits the agencies to cooperate on interdepartmental strategic planning, support the development of mutual security-related capabilities, and synchronize operational missions.[149] Among other things, the MOU provides for the appointment of senior personnel from each agency to work on cybersecurity activities under the auspices of the National Security Agency, as part of a "Joint Coordination Element,"[150] and requires the agencies to "[s]ynchronize the roles and relationships" of a proposed DOD Integrated Cyber Center with the similar DHS National Cybersecurity and Communications Center.[151]

The fourth category of MOU listed above describes agreements that typically involve multiple agencies. A good example is a 2009 MOU among nine federal agencies regarding the siting of electric transmission lines on federal lands.[152] The example merits detailed

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efficient products; developing a tool for rating building-wide energy efficiency; and establishing a labeling scheme for buildings. *See id.* at 2–3.

145 *See* Memorandum of Understanding Between the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC) Regarding Information Sharing and Treatment of Proprietary Trading and Other Information (Oct. 12, 2005), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-33.pdf.

146 *Id.* at 3–5.

147 *See* DOE-NOAA MOU, *supra* note 139, at 1 (noting that the purpose of the MOU is "to enhance the accuracy, precision, and completeness of resource information for the effective deployment, the safe, reliable and sustainable operation and maintenance, and the efficient use of weather-dependent and oceanic renewable energy technologies and infrastructure").

148 *See* Memorandum of Agreement Between the Department of Homeland Security and the Department of Defense Regarding Cybersecurity (Sept. 27, 2010) [hereinafter DOD-DHS MOU], *available at* http://www.dhs.gov/xlibrary/assets/20101013-dod-dhs-cyber-moa.pdf.

149 *Id.* at 1.

150 *Id.* at 2–3.

151 *Id.* at 4.

152 *See* Memorandum of Understanding Among the U.S. Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Environmental Protection Agency, the Council on Environmental Quality, the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the Department of the Interior, Regarding Coor-

discussion because it suggests how Congress sometimes recognizes coordination problems and how challenging they can be to address. In 2005, frustrated with long delays in siting large transmission projects, Congress instructed DOE to coordinate the federal permitting process.[153] DOE and eight other federal agencies signed an MOU in 2006 to clarify their respective roles, with DOE retaining lead authority.[154] Yet the collective action problem persisted. The initial MOU had little effect, and permit applicants continued to proceed sequentially, agency by agency, resulting in considerable delays. The Obama Administration revisited this state of affairs out of concern that transmission projects on federal lands were still proceeding too slowly. After months of negotiation, the nine key agencies signed a new agreement in which they established a process for integrated rather than sequential review. The new MOU does not retain DOE as the lead coordinator but rather specifies that the major land managers — the Department of the Interior (DOI) and USDA — will be the lead agencies for projects on federal lands.[155] For all other applications, the MOU provides that the lead agency will be the primary regulator, FERC. The agreement also establishes clear timelines for agency review and coordination and provides for a single administrative record.[156]

This example illustrates both the benefits and challenges presented by MOUs. By simplifying a multiagency approval process and eliminating needless duplication, interagency agreements can reduce transaction costs for both applicants and agencies.[157] And by converting a

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dination in Federal Agency Review of Electric Transmission Facilities on Federal Land (Oct. 23, 2009) [hereinafter 2010 DOE Electric Transmission MOU], *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-transmission-siting.pdf (created "to expedite the siting and construction of qualified electric transmission infrastructure" on qualified federal lands, *id.* at 1).

153 *See* Energy Policy Act of 2005 § 1221(a), 16 U.S.C. § 824p(h) (2006). By way of background, large transmission projects that cross federal land or water are typically subject to numerous federal legal requirements because Congress has divided among several agencies land management authority for the federal lands on which these projects might be sited. Historically, this fragmentation has resulted in a lengthy, expensive, and frustrating process for applicants seeking to build new transmission facilities.

154 Memorandum of Understanding on Early Coordination of Federal Authorizations and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities (Aug. 8, 2006) [hereinafter 2006 DOE Electric Transmission MOU], *available at* http://www.ferc.gov/legal/fed-sta/epact-mou.pdf. The agreement reiterated that DOE would be the central coordinator and required the other agencies to contact DOE early in the application process. *Id.* at 2, 6.

155 2010 DOE Electric Transmission MOU, *supra* note 152, at 3.

156 *Id.* at 6.

157 Of some note, the transmission agreement was produced through an interagency negotiation that included the Council on Environmental Quality, an agency within the Executive Office of the President. This suggests a strong White House interest in its production, which may also increase the chances of its successful implementation. *See* section II.D, pp. 1173–81 (discussing presidential management of coordination).

sequential decisionmaking process into an integrated one with a single record, the agencies can improve the expertise on which their decisions are based. Still, the fact that a new agreement was necessary at all shows that even when Congress recognizes a collective action problem and instructs agencies to coordinate, agencies sometimes fail to do so. Agencies may negotiate MOUs but then let them languish, sometimes for years.[158] Moreover, despite their often being quite detailed and substantive, these agreements are generally not legally enforceable.[159] And they may prove unstable across administrations, or even throughout the life of a single administration, since disgruntled agencies can block implementation simply by refusing to cooperate. Thus, while MOUs may be promising instruments, their successful implementation may require a central coordinator, especially where agencies are reluctant to agree.

C. *Joint Policymaking*

Agencies may also coordinate through a variety of other policymaking instruments, including jointly issued policy statements and guidelines. For example, in 2010, DOJ and FTC released new "horizontal merger" guidelines, which outline how the two agencies will evaluate the likely competitive impact of mergers under federal antitrust law.[160] The main advantage to the regulated community of such joint guidance is that it signals the agencies' current thinking regarding enforcement policy and alerts the regulated community to what types of mergers will attract the most scrutiny. Alternatively, agencies may use a number of more formal techniques to coordinate their rulemakings. These strategies typically go beyond consultation provisions by binding the agencies together, and they tend to be more visible and legally enforceable than interagency agreements are. Such joint policymaking techniques include incorporating another agency's rules by reference, following model rules, and adopting "interlocking" rules and "parallel" rules.[161] Perhaps the best example of such an instrument is joint

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158 *See, e.g.*, GAO REPORT ON BORDER SECURITY, *supra* note 63, at 4 (noting that an MOU among the agencies is outdated).

159 Courts have hinted that MOUs can create substantive obligations for agencies even when they are not promulgated through notice-and-comment rulemaking, but such suggestions seem fairly rare. *See* High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235, 1249–50 (D. Colo. 2006) (finding MOU obligation to reallocate water to maintain critical habitat and accompanying loss to farmland reviewable under NEPA and the APA).

160 *See* News Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), *available at* http://www.ftc.gov/opa/2009/09/mgr.shtm.

161 A "model rule" allows for consistency with some variation — one agency adopts a rule that other agencies then closely follow in subsequent rulemakings, while adapting their rules in modest ways to account for differences among agency programs. For example, DOJ issued model rules for Title VI of the Civil Rights Act of 1964 and § 504 of the Rehabilitation Act of 1973. Other

rulemaking, which typically involves two or more agencies agreeing to adopt a single regulatory preamble and text.[162]

1. Joint Rulemaking. — Joint rulemaking might best be described as something like an interagency regulatory negotiation.[163] Agencies have used the process on numerous occasions, notably in the areas of financial regulation[164] and environmental protec-

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agencies then issued rules based on the DOJ model. The DOJ Civil Rights Division's Office of Coordination of Review oversaw all the other agencies' rules to ensure consistency. Alternatively, one agency may issue a rule that other agencies then incorporate by reference in their own regulations. *See* DOT Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 49 C.F.R. § 40.5 (2011) (providing for incorporation of DOT rule governing drug and alcohol testing into subagency operating administrations). There are further variations on this theme. Several agencies might agree to authorize a single agency to promulgate a rule, which they then subsequently enforce in the context of their own programs. For example, within DOT, the Pipeline and Hazardous Materials Safety Administration (PHMSA) writes and owns all the hazardous materials rules, which are enforced by the Federal Aviation Administration, Federal Motor Carrier Safety Administration, and other DOT component agencies in the context of their safety programs. In addition, two or more agencies may write parallel rules concerning an area of joint interest and jurisdiction. Through the rulemakings, each agency relies on the other to carry out those parts of the joint mission within its area of expertise. For example, the Federal Railroad Administration (FRA) and the Surface Transportation Board (STB) issued interlocking rules concerning safety implementation plans in mergers. We are indebted to Neil Eisner, Assistant General Counsel at DOT, for providing us with an overview of these techniques and the above examples. Email from Neil Eisner, Assistant Gen. Counsel for Regulation & Enforcement, Dep't of Transp., to Jody Freeman (Dec. 22, 2010, 1:25 PM EST) (on file with the Harvard Law School Library).

162 The agencies might produce either a single rule with a series of signature pages from the participating agencies, which is codified in one place in the Code of Federal Regulations (a "joint" rule), or individual, virtually identical rules issued by each participating agency in its own portion of the CFR (a "common" rule).

163 *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 62–63 (2000) (describing regulatory negotiation as a multi-stakeholder public-private negotiation to achieve consensus on regulatory or implementation issues).

164 *See, e.g.*, Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51,429, 51,429 (Aug. 20, 2010) (to be codified at 17 C.F.R. pts. 1, 240). The numerous agencies responsible for regulating the financial sector, including the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the Federal Reserve Board (FRB), regularly have worked together to promulgate rules. *See, e.g.*, Community Reinvestment Act Regulations, 74 Fed. Reg. 31,209, 31,209 (June 30, 2009) (to be codified at 12 C.F.R. pts. 25, 228, 345, 563e) (issuing a notice of proposed rulemaking for the joint revision of rules by the OCC, FRB, FDIC, and OTS to implement the Community Reinvestment Act); Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,405 (Nov. 18, 2008) (to be codified at 12 C.F.R. pt. 233; 31 C.F.R. pt. 132) (promulgating joint rules of the FRB and the Department of the Treasury to implement the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367 (2006)); Risk-Based Capital Standards: Recourse and Direct Credit Substitutes, 62 Fed. Reg. 59,944, 59,944 (Nov. 5, 1997) (to be codified at 12 C.F.R. pts. 3, 208, 225, 325, 567). The regulated community in the financial sector has tended to support joint rulemaking because of its potential to increase uniformity. *See, e.g.*, Letter from Am. Bankers Ass'n to Barney Frank, Chairman, H. Comm. on Fin. Servs., and Spencer Bachus, Ranking Member, H. Comm. on Fin. Servs. (Sept. 18, 2007), *available at* http://www.aba.com/NR/rdonlyres/76DCD307-2D7E-48A6-A10F-623175F0AEAD/49397/UDAPABALetter091807.pdf ("Joint rulemaking is important to ensure uniformity of regulation for all insured depository institutions.").

tion.[165] For example, the SEC often conducts joint rulemaking with other agencies, including the Federal Reserve Board and the CFTC.[166] Yet the limited data available suggest that as a percentage of total annual rules, joint rules constitute a small share: 3.9% for 2010.[167] And joint rulemaking as a coordination tool is not well understood.[168]

Agencies appear to use joint rulemaking on an ad hoc basis to promote uniformity primarily where they perform closely related regulatory missions and where Congress has allocated each of them a role implementing one or a set of related statutes. In some instances, Congress mandates joint rulemaking.[169] In others, agencies within the same regulatory sphere voluntarily use the process to remedy inconsistencies that have resulted from regulations they initially issued separately or to address conflicts that arise from newly adopted legislation.[170] Finally, in certain cases, the agencies jointly promulgating

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[165] *See, e.g.*, Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,670, 19,688 (Apr. 10, 2008) (to be codified at 33 C.F.R. pts. 325, 332; 40 C.F.R. pt. 230).

[166] *See, e.g.*, Eric J. Pan, *Single Stock Futures and Cross-Border Access for U.S. Investors*, 14 STAN. J.L. BUS. & FIN. 221, 248 (2008) (discussing joint rulemaking authority of the SEC and CFTC under the Commodity Futures Modernization Act).

[167] An estimate provided by the National Archives and Records Administration (NARA) found that from 2008 to 2010, joint rulemakings climbed from 98 to 139. *See* Email from Michael White, Managing Editor, Fed. Register, NARA, to Jody Freeman (Feb. 17, 2011, 9:18 PM EST) (on file with the Harvard Law School Library). NARA counts total joint rulemakings for 2008 at 98, for 2009 at 137, and for 2010 at 139. *Id.* Total rulemakings for 2008 were 3578, for 2009 were 3453, and for 2010 were 3572. *Id.* However, joint rules may be a somewhat higher share of total rules than these numbers suggest, depending on how one calculates the denominator.

[168] Academic articles on joint rulemaking are few. *See* Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343 (2011). Based on a search of JSTOR, Academic Search Premier, Social Science Research Network, Westlaw, Lexis, Google Books, Google Scholar, Web of Knowledge, and HeinOnline, there appears to be no in-depth analysis of joint rulemaking in the academic literature. Nor is there any substantive discussion of it in three comprehensive treatises on administrative law or in Congressional Research Service reports. *See also* Iver P. Cooper, *The FDA, the BATF, and Liquor Labeling: A Case Study of Interagency Jurisdictional Conflict*, 34 FOOD DRUG COSM. L.J. 370, 370, 383–84 (1979) (discussing how two agencies with overlapping jurisdictions may reconcile competing mandates in the absence of statutory consent for joint rulemaking); Richard D. Marsico, *The 2004–2005 Amendments to the Community Reinvestment Act Regulations: For Communities, One Step Forward and Three Steps Back*, 2006 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 534, 534 n.2 (2006) (noting several instances of proposed joint rulemaking by the regulatory agencies involved).

[169] *See, e.g.*, 12 U.S.C. § 1831m(g)(4)(B) (2006) ("Joint rulemaking[. —] The appropriate Federal banking agencies shall jointly issue rules of practice to implement this paragraph."); 15 U.S.C. § 78c(a)(4)(F) (2006) ("Joint rulemaking required. — The Commission and the Board of Governors of the Federal Reserve System shall jointly adopt a single set of rules or regulations to implement the exceptions in subparagraph (B).").

[170] *See, e.g.*, Group Health Plans and Health Insurance Issuers Providing Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 27,141, 27,141 (May 13, 2010) (to be codified at 26 C.F.R. pt. 54) (promulgating IRS interim final regulations substantially similar to those issued by the Department of Labor and Department of Health and Human Services); Manufactured Home Tires, Parts and Accessories Necessary for Safe Operation; and Manufactured Home Construction and Safety Standards, 61 Fed. Reg. 18,014, 18,014 (Apr. 23, 1996) (to be codified at 24 C.F.R. pt. 3280; 49 C.F.R. pt. 393) (adopting identical regula-

rules do not generally work on related issues, yet they share an interest in implementing one particular law.[171]

There are signs, however, that joint rulemakings may increase. The Dodd-Frank Act, which calls for numerous new and revised financial regulations, requires joint rulemaking in many provisions[172] and mandates interagency consultation prior to rule promulgation in several others.[173] These provisions clearly are designed to minimize potentially inconsistent regulations and manage the numerous overlaps in this sector, which we alluded to earlier. Coordination is necessary in part because Congress chose not to consolidate or eliminate existing agencies. For example, Congress divided regulatory authority over derivatives between the SEC (for securities-based swaps) and the CFTC (for almost every other swap and related products). Although the Act authorizes both agencies to define any term in the statute,[174] it calls on them to consult and cooperate, and it contemplates, without mandating, joint rulemaking.[175]

Even where Congress does not mandate joint rulemaking, however, agencies may opt to use it as a "bottom-up" instrument to advance their regulatory goals. The President may also request or direct executive branch agencies to issue rules jointly. Indeed, the most prominent example of joint rulemaking to date was undertaken by executive

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tions to correct inconsistent rules related to the transportation of manufactured housing by the Department of Housing and Urban Development and the Federal Highway Administration).

171 *See, e.g.*, Documents Required for Travelers Departing from or Arriving in the United States at Sea and Land Ports-of-Entry from Within the Western Hemisphere, 72 Fed. Reg. 35,088, 35,088 (June 26, 2007) (to be codified at 8 C.F.R. pts. 212, 235; 22 C.F.R. pts. 41, 53) (proposing joint rules by DHS and the Department of State to implement document requirements for persons entering the United States); Americans with Disabilities Act Accessibility Guidelines; Detectable Warnings, 61 Fed. Reg. 39,323, 39,323 (July 29, 1996) (to be codified at 28 C.F.R. pt. 36; 36 C.F.R. pt. 1191; 49 C.F.R. pt. 37) (the Architectural and Transportation Barriers Compliance Board, DOJ, and DOT extending the suspension of certain requirements in the Americans with Disabilities Act Accessibility Guidelines).

172 CURTIS W. COPELAND, CONG. RESEARCH SERV., R41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 6–7 (2010) [hereinafter COPELAND, CRS DODD-FRANK RULEMAKING REPORT], *available at* http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf (noting that Dodd-Frank requires joint rulemaking in many circumstances and authorizes it in others); *see also* CURTIS W. COPELAND, CONG. RESEARCH SERV., R41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU 28, 29, 36 (2010), *available at* http://www.llsdc.org/attachments/files/236/CRS-R41380.pdf (including a chart listing Dodd-Frank provisions that involve joint rulemaking).

173 COPELAND, CRS DODD-FRANK RULEMAKING REPORT, *supra* note 172, at 7–8 (providing several examples of consultation requirements in the Act).

174 Dodd-Frank Act § 712(d)(1), 15 U.S.C. § 8302(d)(1) (2006 & Supp. IV 2011).

175 15 U.S.C. § 780-11(h) (2006 & Supp. IV 2011). This section clearly contemplates joint rulemaking. *See id.* ("The Chairperson of the Financial Stability Oversight Council shall coordinate all joint rulemaking required under this section.").

branch agencies at the urging of the President, and not in response to a congressional mandate. We provide a detailed description because it nicely illustrates the extent to which joint policymaking can provide a forum for harmonizing potentially inconsistent regulations where regulators share overlapping authority.

2. EPA-NHTSA Joint Rule.[176] — In May 2009, President Obama announced a national auto policy that would set the first-ever greenhouse gas (GHG) emissions standards and the strictest fuel efficiency standards for new cars and trucks in American history.[177] EPA and the National Highway Traffic Safety Administration (NHTSA) proposed to set these standards jointly.[178] Once final, the joint rule would effectively create a uniform federal system for regulating fuel efficiency and controlling GHG pollution in a significant part of the U.S. transportation sector.[179] This would amount to a significant feat of regulatory harmonization. At the time, the auto industry faced three different sets of vehicle standards: federal fuel economy standards set by NHTSA in miles per gallon, federal GHG standards set by EPA in grams per mile, and separate GHG standards set by California, which thirteen other states had adopted.[180] The agreement to proceed via joint rulemaking provided a forum for resolving a number of potential inconsistencies and conflicts among the federal agencies.

For example, each agency easily might have adopted different levels of stringency using different standard-setting methodologies, on the basis of a vehicle's weight or other attributes, causing considerable

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176 This section draws on Freeman, *supra* note 168.

177 *See* Press Release, White House, Office of the Press Sec'y, President Obama Announces National Fuel Efficiency Policy (May 19, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy.

178 Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007, 24,008 (May 22, 2009). The standards apply to passenger cars and light trucks and consist of estimated combined average emissions levels and fuel economy levels. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,329–30 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536, 537, 538) [hereinafter GHG Emission Standards]. The joint rule increases Corporate Average Fuel Economy (CAFE) standards to achieve an estimated fleetwide average of 35.5 miles per gallon or 250 grams per mile of carbon dioxide by 2016. *See id.* at 25,330, 25,669.

179 Manufacturers would produce a single, national fleet that would satisfy all applicable regulations. GHG Emission Standards, *supra* note 178, at 25,328. As part of a negotiated agreement to support this program, all the major foreign and domestic auto companies signed letters of commitment promising not to challenge the new standards in court. *See id.*; *see also Transportation and Climate: Regulations and Standards*, EPA, http://www.epa.gov/oms/climate/regulations.htm (last visited Jan. 29, 2012). The State of California also agreed to support the new national program by treating compliance with the joint federal standards as compliance with California's separate GHG standards for cars and trucks. Letter from Mary D. Nichols, Chairman, Cal. Air Res. Bd., to Lisa P. Jackson, Adm'r, EPA, and Ray LaHood, Sec'y, U.S. Dep't of Transp. (May 18, 2009), *available at* http://www.epa.gov/oms/climate/regulations/air-resources-board.pdf.

180 *See generally* Freeman, *supra* note 168.

confusion and raising compliance costs for manufacturers.[181] The agencies were also poised to use different models for estimating the cost and pace of technology innovation,[182] which is critical because these estimates drive the ultimate decision about precisely where to set standards.[183]

Had the agencies set standards independently, moreover, they might also have designed quite different, and potentially inconsistent, substantive regulatory programs. This possibility stems in large part from the agencies' different statutory authorities. For example, the Clean Air Act[184] (CAA) allows EPA to provide certain flexibilities to manufacturers to reduce the overall cost of compliance. These consist primarily of a variety of credits for things like air conditioning improvements, which can be banked, borrowed, and traded on an unlimited basis.[185] By contrast, such credits are not as freely available to NHTSA under the Corporate Average Fuel Economy program.[186] The same challenges arose regarding enforcement. Whereas NHTSA may allow manufacturers to pay fines in lieu of compliance, the CAA

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[181] Both agencies have significant discretion when setting standards. Under the Energy Policy and Conservation Act (EPCA), NHTSA must set CAFE standards at the "maximum feasible . . . level." 49 U.S.C. § 32902(a) (2006 & Supp. IV 2011). NHTSA must use a four-factor balancing test that weighs economic practicability, technological feasibility, the effect of other government standards on fuel economy, and the need for energy conservation. *See id.* § 32902(f). NHTSA has discretion to balance the factors. *See* Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1195–97 (9th Cir. 2008) (holding that EPCA permits, but does not require, the use of a marginal cost-benefit analysis and that NHTSA has discretion to decide how to balance the statutory factors as long as that balancing does not undermine the fundamental statutory purpose of energy conservation). EPA sets emissions standards for new motor vehicles under § 202(a) of the Clean Air Act. *See* Natural Res. Def. Council, Inc. v. EPA, 655 F.2d 318, 322, 328 (D.C. Cir. 1981) (affording wide discretion to balance the statutory factors subject to reasonableness).

[182] The agencies use computer models to estimate the costs and benefits to manufacturers, consumers, and society of alternative standards of stringency. The models estimate the cost and effectiveness of technologies available to manufacturers, project how they might be adopted by manufacturers, and calculate costs and benefits of compliance with alternative levels of stringency using assumptions about various economic inputs such as the cost of fuel, the social cost of carbon, and the "rebound" effect. *See* GHG Emission Standards, *supra* note 178, at 25,329–30, 25,343–48.

[183] *See id.* at 25,329 (describing the joint technical work done by the agencies to reconcile inputs and assumptions for the "Volpe" and "Omega" models); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-336, VEHICLE FUEL ECONOMY: NHTSA AND EPA'S PARTNERSHIP FOR SETTING FUEL ECONOMY AND GREENHOUSE GAS EMISSIONS STANDARDS IMPROVED ANALYSIS AND SHOULD BE MAINTAINED 20–21 (2010) [hereinafter GAO FUEL ECONOMY REPORT] (noting structural differences between models).

[184] 42 U.S.C. §§ 7401–7671q (2006 & Supp. IV 2011).

[185] GHG Emission Standards, *supra* note 178, at 25,338–42 (describing variety of program flexibilities and relevant legal authorities, including credits for air conditioning improvements, flex-fuel vehicles, and alternative vehicles, as well as a temporary lead-time allowance for small-volume manufacturers of high-fuel-economy vehicles).

[186] Because of its governing statute, it is structurally more difficult for NHTSA to consider air conditioning improvements when setting and enforcing standards. *See* GAO FUEL ECONOMY REPORT, *supra* note 183, at 16.

does not authorize EPA to accept fines as an intentional compliance strategy.[187]

The agencies might have sought to align their standards by issuing compatible rules, without going through the time-consuming and intensive process of joint promulgation. Yet in practice, working through the details together made the prospect of successful harmonization much more likely. Better integration of their approaches not only would reduce transaction costs and overall compliance costs for the auto industry but also would offer the prospect of a more robust, defensible, and manageable program for the agencies.

Among its most important effects, the joint rulemaking allowed EPA and NHTSA to move beyond their traditional arm's-length relationship.[188] According to a GAO report reviewing the process, the agencies worked much more closely together than ever before, sharing responsibility for the rule from preamble to conclusion.[189] As evidence of this close cooperation, the report notes that staff from both agencies met regularly and "collaborated on major tasks."[190] They formed joint technical teams, whose work is reflected in the comprehensive Joint

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[187] *See* EPCA § 525, 42 U.S.C. § 6395 (2006 & Supp. IV 2011). *See generally* GHG Emission Standards, *supra* note 178, at 25,342–43. This raised an important issue for the European manufacturers in particular, since small volume manufacturers of high performance vehicles (for example, Mercedes, BMW, Jaguar, and Porsche), had historically paid fines in lieu of complying with CAFE standards. GAO FUEL ECONOMY REPORT, *supra* note 183, at 17; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-921, VEHICLE FUEL ECONOMY: REFORMING FUEL ECONOMY STANDARDS COULD HELP REDUCE OIL CONSUMPTION BY CARS AND LIGHT TRUCKS, AND OTHER OPTIONS COULD COMPLEMENT THESE STANDARDS 9–10 (2007) (listing CAFE penalties paid by European automobile manufacturers in lieu of compliance). The agencies faced other discrepancies as well. For example, NHTSA may set CAFE standards only for periods of five years or less. 49 U.S.C. § 32902(b)(3)(B) (2006 & Supp. IV 2011). Yet EPA faces no such constraint. Clean Air Act § 202(a)(2), 42 U.S.C. § 7521(a)(2) (2006). In addition, NHTSA must provide at least eighteen months of lead time for a new CAFE standard. 49 U.S.C. § 32902(g)(2). There is no prescribed lead-time requirement in the CAA. The Administrator is authorized to determine the lead time "necessary to permit the development . . . of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Clean Air Act § 202(a)(2), 42 U.S.C. § 7521(a)(2).

[188] The two agencies have very different missions and cultures. EPA's core mission is environmental and public health protection, whereas NHTSA must balance its vehicle energy conservation mandate with its duty to ensure auto safety. *See* GAO FUEL ECONOMY REPORT, *supra* note 183, at 24. Although EPA has always played a role in the CAFE program, that role has been limited to compliance testing. *See* EPCA, Pub. L. No. 94-163, § 301, 89 Stat. 871, 907 (1975) (current version at 26 U.S.C. § 4064(c) (2006)). EPCA requires NHTSA to use EPA testing and calculation procedures to measure fuel economy for each manufacturer for each model year. *Id.* (current version at 26 U.S.C. § 4064(c)(1) (2006)). The agencies had collaborated to a greater extent for the Model Year 2011 CAFE proposal, yet this interaction fell well short of producing a rule. GAO FUEL ECONOMY REPORT, *supra* note 183, at 23.

[189] *See generally* GAO FUEL ECONOMY REPORT, *supra* note 183, at 19–20.

[190] *Id.* at 19 (noting in addition that "[o]fficials of both agencies told us that staff from both agencies met on a regular basis, often daily, to coordinate their efforts throughout the rulemaking process").

Technical Support Document that describes the harmonization of their standard-setting methodologies and models.[191] As a result of this close cooperation, GAO concluded that "each agency had significant input into the development of both sets of standards."[192]

In addition, the joint rulemaking led the agencies to pool resources and share expertise, and it provided a forum for designing workable program elements and settling important legal questions. To resolve the discrepancy between the agencies on whether manufacturers could pay fines in lieu of compliance, the agencies proposed an alternative compliance path for small-volume manufacturers.[193] The agencies also harmonized their credit trading systems by allowing the same number of years for carrying credits forward and back[194] and taking advantage of the additional flexibilities provided by the CAA by offering unlimited credit trading. The combined effect provided flexibilities that would improve the overall cost-effectiveness of the program.[195] Moreover, the agencies aligned their compliance programs by instituting a single set of reporting requirements, using the same testing procedures, and specifying their expectations about how penalties would be administered and reconciled — producing a simplified, uniform compliance program.[196] In addition, sustained engagement during rule development required staff to broaden their perspectives. Among other things, NHTSA needed to grapple with EPA's views about the pressing need for emissions reduction strategies in light of global climate change,[197] and EPA needed to respond to NHTSA's concerns about the potential safety implications of different strategies for tightening standards.[198]

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191 *See generally* EPA & U.S. DEP'T OF TRANSP., FINAL RULEMAKING TO ESTABLISH LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS: JOINT TECHNICAL SUPPORT DOCUMENT (2010), *available at* http://www.epa.gov/oms/climate/regulations/420r10901.pdf.

192 GAO FUEL ECONOMY REPORT, *supra* note 183, at 19.

193 Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,483 (Sept. 28, 2009) (to be codified at 40 C.F.R. pt. 86, 600; 49 C.F.R. pts. 531, 533, 537, 538) (describing "Temporary Lead-Time Allowance Alternative Standards").

194 EPA adopted NHTSA's three-year carry-back and five-year carry-forward limitation on banking. *See* GHG Emission Standards, *supra* note 178, at 25,339.

195 *See id.* at 25,338–41.

196 *See id.* at 25,341–42.

197 GAO FUEL ECONOMY REPORT, *supra* note 183, at 6–7.

198 NHTSA's safety analysis relied on a study by Charles Kahane that suggested stricter CAFE standards would lead to downsizing, which would have negative safety implications. *See* CHARLES J. KAHANE, DEP'T OF TRANSP., DOT-HS-809-662, VEHICLE WEIGHT, FATALITY RISK AND CRASH COMPATIBILITY OF MODEL YEAR 1991–99 PASSENGER CARS AND LIGHT TRUCKS, at vii (2003). Some experts have criticized NHTSA's reliance on the Kahane study because it used crash statistics from cars that lacked the latest safety technology and did not consider material substitution as an alternative compliance strategy. *See* GAO FUEL ECONOMY RE-

This example clearly shows the potential benefits of joint rulemaking in situations where agency authorities overlap, or where agency missions are closely related and achieving consensus on a variety of matters has distinct benefits. Yet joint rulemaking and other similar strategies may be useful even where the goal is *not* consensus on the substance of the rule. Agencies might use these techniques to address the timing and order of regulation but not its content, or to clarify how different program elements — for which each agency may be independently responsible — will interact. Such coordination is possible to achieve without strong centralized authority, where the agencies themselves perceive joint gains and face few obstacles, cultural or otherwise, to working together. But where conflict is high or disputes arise, successful joint policymaking will require a dispute resolution process, with a designated ultimate arbiter.[199]

D. Presidential Management of Coordination

In this section, we describe some of the well-established coordination instruments that are uniquely available to the President, including centralized White House review. Of course, Congress possesses certain tools that the President lacks — the power of appropriations and oversight hearings, for example — but we focus on the President for two reasons. First, the President is arguably better positioned than Congress to promote coordination: while it may not be easy for him to act, it is often easier for him than for Congress.[200] Second, the President may have the strongest incentive to ensure a well-functioning bureaucracy. Once Congress assigns authority to multiple agencies, the burden of managing the ensuing fragmentation and overlap falls most heavily on the President, whose constitutional duty is to "take Care that the Laws be faithfully executed."[201] As the only leading official in the U.S. government with the endorsement of the national electorate,

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PORT, *supra* note 183, at 36–38 (noting controversy over NHTSA's reliance on the Kahane study). For the agencies' joint discussion of "contentious" safety issues, see GHG Emission Standards, *supra* note 178, at 25,382–95 (discussing NHTSA's use of the Kahane study, noting EPA's support of an alternative study by Dynamic Research Inc., and concluding that the agencies believe safety effects will be lower than the Kahane study anticipated).

[199] In the Dodd-Frank Act, Congress established just such an arbiter in the Financial Stability Oversight Council. *See* 12 U.S.C. § 5322(a)(2)(E) (2006 & Supp. IV 2011) (imposing broad responsibility on the Council to facilitate interagency coordination); *id.* § 5322(a)(2)(M)(ii) (requiring the Council to provide a forum for the resolution of jurisdictional disputes); *id.* § 5329(a) (authorizing the Council to resolve a dispute among agencies where the Council determines they cannot resolve the dispute on their own).

[200] *See* Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 856–57, 862 (1999) (discussing the President's advantage over Congress in the ability to act unilaterally).

[201] U.S. CONST. art. II, § 3.

he, more than individual members of Congress, will be held accountable for significant government failures.[202]

At the same time, agency delegations cumulatively add to the President's total discretion.[203] Shared regulatory space presents an opportunity as much as a burden for the President by enabling him to put his stamp on policy. Overlapping delegations may allow the President two bites at a policy apple — if one agency is less able or willing to execute his priorities, he might turn to the other. The President may be able to mediate among agencies faced with related and interacting delegations to steer the policy course he prefers, in some cases even exerting influence over independent agencies, which otherwise tend to elude his control. And he may help agencies to overcome collective action problems, including vetoes, by forcing dispute resolution. Thus, what motivates our focus on presidential coordination tools is this combination of the President's special burden, heightened incentive, and unique capacity to spur coordination specifically through centralized supervision.

As a preliminary matter, it is important to note that agency officials can and often do coordinate with the White House, either voluntarily or at the President's informal request.[204] This cooperation is both legal and legitimate. The Constitution recognizes the President's right to consult with agency officials to whom Congress has delegated authority.[205] The heads of executive branch agencies serve at the President's pleasure and are subject to removal without cause. To the extent that Congress has delegated authority to agencies rather than to the President, and especially where Congress has insulated agencies from political control, there may be some limits on the President's legal authority to compel coordination, but agency officials resist the entreaties of the President at their political peril.[206]

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202 Congress as a whole may get blamed for such failures, but it is easier for individual members to escape blame than for the President to do so. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 94–96 (1985) (describing presidential delegation of policy choices as promoting "responsiveness . . . to the desires of the electorate," *id.* at 95).

203 Moe & Howell, *supra* note 200, at 860 (arguing that the sheer number of statutes passed over time increases the President's responsibilities and, therefore, his power).

204 *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 405–06 (D.C. Cir. 1981).

205 The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. CONST. art. II, § 2, cl. 1.

206 Although the President presumably exerts some control over agency heads, such control is admittedly imperfect. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 903–04 (2010) (book review) (arguing that it is easier for the President to control the Director of OIRA than numerous agency heads, including cabinet officials, with whom he has little contact).

The President may use any of the instruments discussed above to informally request that agencies coordinate, or he may do so more formally and directly by signing executive orders or presidential memoranda. For example, President Obama issued a variety of presidential memoranda directing several agencies to work together, including an order to EPA, DOE, DOI, and other agencies to develop a strategy of carbon capture and sequestration,[207] and an order to several agencies to recommend a new oceans policy.[208] These instruments typically specify deliverables and include deadlines to spur agency action.[209] They use presidential capital to demand coordination in a highly visible way, although responsibility for their implementation still lies with the agencies. Alternatively, the President can deputize a White House office to oversee a specific interagency effort, providing an additional measure of centralized control.[210] Of course, Presidents are typically less able to direct action by independent agencies than action by executive agencies because of constraints on their appointment and removal powers.[211]

In addition, the President relies in the normal course on the Office of Legal Counsel (OLC) in DOJ to help resolve jurisdictional disputes among agencies. Among the duties of OLC, as delegated by the Attorney General, is the provision of controlling advice to the President and executive branch agencies on matters of legal importance, including responding to agency requests for assistance.[212] The Office's role is essentially reactive by design — when approached by its "clients," OLC provides advice.[213] As a result, OLC may wind up "coordinating" the resolution of a conflict among dueling executive branch law-

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207 *See* A Comprehensive Federal Strategy on Carbon Capture and Storage, 75 Fed. Reg. 6087 (Feb. 5, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-a-comprehensive-federal-strategy-carbon-capture-and-storage.

208 *See* Stewardship of the Ocean, Our Coasts, and the Great Lakes, Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 22, 2010).

209 For examples of agencies that met such directives and deadlines, see GHG Emission Standards, *supra* note 178; REPORT OF THE INTERAGENCY TASK FORCE ON CARBON CAPTURE AND STORAGE (2010), *available at* http://www.epa.gov/climatechange/downloads/CCS-Task-Force-Report-2010.pdf; WHITE HOUSE COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE (2010), *available at* http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

210 The President may also issue directives instigating agency action that effectively position a White House policy office to play a coordinating role, as President Clinton did on numerous occasions. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2297 (2001).

211 For discussion of these constraints, see generally Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010).

212 *See* 28 C.F.R. § 0.25(a) (2011) (defining OLC's functions as including "rendering . . . legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet").

213 *Id.*

yers by helping to manage a legal dispute. Yet if the lawyers cannot be persuaded to agree, OLC's opinion is decisive. In this way, OLC likely helps to resolve interagency conflicts on a regular basis by providing opinions, both formally and informally.[214] Still, the office has no mandate to perform an ongoing role coordinating the agencies' execution of law or policy, nor does it possess the institutional characteristics or resources necessary to do so. Thus, if the President wishes to promote coordination in more enduring ways, he must exert his influence via the policy offices, councils, and task forces he controls.[215] Congress creates some of these vehicles by statute and equips them with explicit coordinating authority, while the President establishes others.

1. Policy Offices and Councils. — In 2011, the Congressional Research Service (CRS) issued a report noting the proliferation in recent years of councils, task forces, and high-level offices within the Executive Office of the President (EOP) aimed at promoting interagency "collaboration."[216] Many of these are in the domain of national security. One prominent such office is the National Security Council, which Congress created in the National Security Act of 1947,[217] and which oversees a multilevel interagency process designed to harmonize policy and resolve disputes among the national security and defense agencies.[218] Another example is the Office of the Director of National Intelligence, which Congress created in 2004. The Director of National Intelligence is a cabinet-level official who serves as the principal advisor to the President on intelligence matters. The Director possesses "certain budgetary, spending, and personnel powers that give him authority and leverage over the collective intelligence community as well as over individual components,"[219] and he has statutory authority to "direct and coordinate" agency activity — powers that CRS describes

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214 It is hard to assess the frequency with which this happens because OLC publishes only selected opinions and does not always publish formal opinions in response to requests for advice. *See* Memorandum from David J. Barron, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Att'ys of the Office, Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf (discussing considerations for publishing opinions).

215 The President may also exercise his prerogative to reorganize executive agencies, but as discussed above, this will be limited to a significant extent by statutory constraints.

216 *See generally* KAISER, *supra* note 38. The report defines coordination as an activity led or directed by one agency or official. *Id.* at 6. This definition is narrower than the more inclusive one we use in this Article.

217 Pub. L. No. 80-253, 61 Stat. 495 (codified in scattered sections of 5 and 50 U.S.C.).

218 *See* NAT'L SEC. COUNCIL, INTELLIGENCE DIRECTIVE NO. 1 (1950), *available at* http://fas.org/irp/offdocs/nscid01.htm; *see also* DAVID ROTHKOPF, RUNNING THE WORLD: THE INSIDE STORY OF THE NATIONAL SECURITY COUNCIL AND THE ARCHITECTS OF AMERICAN POWER (2011); DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR (2011).

219 KAISER, *supra* note 38, at 10.

as "arguably unrivaled by any current or past interagency coordinative arrangement."[220]

In addition, Congress and the President have at times created new White House offices for the express purpose of coordinating the government's response to a particular policy problem. Examples include the Office of National Drug Control Policy[221] and the Office of National AIDS Policy.[222] Presidents have also traditionally appointed special advisors for particular purposes, whether to coordinate "faith-based" initiatives,[223] to assist with policy in complex regulatory areas such as energy and climate change,[224] or to advise on health care policy.[225] Advisors such as these, who may occupy offices established by executive order or who may simply join the White House staff, not only are unconfirmed by the Senate but also lack the statutory authority to direct or coordinate policy that their congressionally created counterparts typically possess.[226] Still, as members of the President's senior staff, these officials can, in practice, play a powerful role in helping to align agency action. Their real or perceived proximity to the President provides them with significant influence and equips them with an impressive inventory of both formal and informal tools of persuasion.[227]

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220 *Id.*

221 *See* Anti–Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of the U.S. Code).

222 This office, created by President Clinton, *White House Office of National AIDS Policy*, NATIONAL ARCHIVES, http://clinton2.nara.gov/ONAP (last visited Jan. 29, 2012), is tasked with coordinating with the National Security Council and the Office of the Global AIDS Coordinator, as well as international bodies regarding the care and treatment of citizens with HIV/AIDS. *About ONAP*, THE WHITE HOUSE, http://www.whitehouse.gov/administration/eop/onap/about (last visited Jan. 29, 2012).

223 *See* Establishment of the White House Office of Faith-Based and Community Initiatives, Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

224 President Obama announced the appointment of former EPA Administrator Carol Browner as Assistant to the President for Energy and Climate Change, a new position within the White House, during his presidential transition. *See* Press Release, Office of the President-Elect, President-Elect Barack Obama Announces Key Members of Energy and Environment Team (Dec. 15, 2008), *available at* http://change.gov/newsroom/entry/president_elect_barack_obama_announces_key_members_of_energy_and_environmen.

225 *See* Exec. Order No. 13,507, 3 C.F.R. 233 (2010) (establishing the White House Office of Health Reform).

226 The appointment of so-called "czars" is often criticized in the media as presidential aggrandizement, but the practice of hiring specialized advisors is common across administrations, and many of the officials typically cited are in fact confirmed by the Senate. *See generally* Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2614–15 (2011) (discussing the potential legal issues presented by policy "czars" and concluding that such appointments raise legitimate accountability concerns but are ultimately constitutional).

227 These include informal political rewards and incentives, including sought-after meetings in the Roosevelt Room, lunches at the White House Mess, and face time with the Chief of Staff or even the President himself.

While special advisors for particular subject areas may come and go, the President's primary vehicle for policy coordination is the Office of White House Policy, which contains the Domestic Policy Council[228] and the National Economic Council,[229] both of which were established by executive order.[230] In addition, the Council on Environmental Quality, created by statute, advises the President on environmental policy.[231] Finally, the Office of Management and Budget (OMB), with a staff of hundreds, in the largest office in the EOP, plays an important role in coordinating agency action.[232] OMB's primary roles are to advise the President in the preparation of the federal budget and to oversee the operation of the executive branch to ensure consistency with the President's spending priorities.[233] OMB contains several "resource management offices" with responsibility for evaluating the performance of agency programs and reviewing agency budget requests.[234] It also contains the Office of Information and Regulatory Affairs (OIRA), which oversees a regulatory review process to ensure that agency regulations are consistent with the President's priorities and economically justified.[235] Several senior OMB officials, including the Director, Deputy Director, and OIRA Administrator, are confirmed by the Senate.[236]

2. Regulatory Review. — Probably the most institutionalized process for centralized White House supervision of executive agency policymaking is Executive Order 12,866's planning and regulatory re-

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[228] The Domestic Policy Council is responsible for coordinating domestic policymaking processes in the White House. *See Domestic Policy Council*, THE WHITE HOUSE, http://www.whitehouse.gov/administration/eop/dpc (last visited Jan. 29, 2012).

[229] The National Economic Council is responsible for coordinating the President's economic agenda. *See National Economic Council*, THE WHITE HOUSE, http://www.whitehouse.gov/administration/eop/nec (last visited Jan. 29, 2012).

[230] *See* Exec. Order No. 12,859, 3 C.F.R. 628 (1994) (establishing the Domestic Policy Council); Exec. Order No. 12,835, 3 C.F.R. 586 (1994) (establishing the National Economic Council). Both offices have in the past played powerful roles in policy development generally. *See* Kagan, *supra* note 210, at 2297. The President also receives professional economic advice from the Council of Economic Advisors, established by Congress in the Employment Act of 1946. *See About CEA*, THE WHITE HOUSE, http://www.whitehouse.gov/administration/eop/cea/about (last visited Jan. 29, 2012).

[231] *See* 42 U.S.C. §§ 4342, 4344 (2006) (establishing the Council on Environmental Quality and describing its structure and functions).

[232] *The Mission and Structure of the Office of Management and Budget*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission (last visited Jan. 29, 2012).

[233] *See id.*

[234] *See id.*

[235] *See id.*

[236] *See OMB Leadership Bios*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/organization_office (last visited Jan. 29, 2012); *About OIRA*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/inforeg_administrator (last visited Jan. 29, 2012).

view requirement for federal agencies.[237] Executive Order 12,866 authorizes OIRA to review agency regulatory actions for consistency with presidential priorities, statutory mandates, and, notably, other agencies' rules.[238] The order requires both executive and independent agencies to submit annual plans of their anticipated regulatory actions prior to proposing them in the *Federal Register*.[239] The order also explicitly encourages agencies to plan their regulatory activities "to maximize consultation and the resolution of potential conflicts at an early stage."[240] This planning process affords OIRA several opportunities to identify regulations that might implicate the jurisdiction or interests of other agencies, and to intervene to help ensure that such actions are consistent and coordinated.[241] It is not clear, however, whether in practice OIRA spends significant resources on such tasks.

Executive Order 12,866 also empowers OIRA to review certain agency regulatory actions to ensure that their benefits justify their costs.[242] Under the order, executive branch agencies must submit "significant" regulatory actions to OIRA before publishing them in the *Federal Register*.[243] The order defines significant regulatory actions as

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237 Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 83–87 (2006). Independent agencies are not covered by the regulatory review provisions of the order and normally do not participate in the interagency review process. *Id.* § 3(b).

238 *Id.* § 6(b).

239 *See id.* § 4. These plans are published in the Unified Regulatory Agenda each year. *Id.* § 4(c)(F)(7).

240 *Id.* § 4.

241 Executive Order 12,866 states: "Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors [a set of regulatory policy advisors to the President] and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year." *Id.* § 4(a). The order also provides that OIRA shall circulate agency regulatory plans to the White House offices and affected agencies, and that an agency head who believes that a planned regulatory action of another agency may conflict with its planned or existing policies and actions shall notify OIRA. *Id.* § 4(c)(3)–(4). Additionally, if the OIRA Administrator believes that an agency's planned regulatory action will result in inter-agency policy conflicts, the Administrator must notify the agency, the Advisors, and the Vice President, *id.* § 4(c)(5), and the Vice President, with the assistance of the Advisors, is authorized to consult with the heads of agencies and to "request further consideration or inter-agency coordination," *id.* § 4(c)(6). The order also establishes a Regulatory Working Group to "serve as a forum to assist agencies in identifying and analyzing important regulatory issues." *Id.* § 4(d).

242 *See id.* § 6(a)(3)(B)(ii). Agencies must also produce detailed cost-benefit analyses justifying major economically significant rules as defined by section 3(f)(1). *See id.* § 6(a)(3)(C). OMB has elaborated on the requirements for regulatory review in detail in OMB Circular A-4. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003) [hereinafter OMB CIRCULAR A-4], *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4. The executive order and OMB Circular A-4 explain that the monetized benefits of a rule are not required to exceed its monetized costs; the costs of the rule must only be "justified" by the benefits, including quantitative and qualitative benefits. *See* Exec. Order No. 12,866, § 1(b)(6), 3 C.F.R. at 639, *supra* note 237; OMB CIRCULAR A-4, *supra*.

243 *See* Exec. Order No. 12,866, § 6(a), 3 C.F.R. at 644–45, *supra* note 237. For more information on OIRA and its review process, see CURTIS W. COPELAND, CONG. RESEARCH SERV.,

those that include economically significant rules (that is, those that have an annual impact of $100 million or more on the economy or that "adversely affect" the economy in a "material way") and rules that OIRA determines may present issues of special legal or policy significance.[244] Because of the breadth of this definition, OIRA may deem any rule of interest to the President to be a significant regulatory action.[245] The most searching scrutiny applies to any economically significant rule, for which an agency must submit detailed cost-benefit analysis, including the underlying assumptions and data and an assessment of the costs and benefits of reasonable alternatives.[246] During the regulatory review process, OIRA circulates the proposed rule and the accompanying cost-benefit analysis to other EOP offices, as well as to other agencies, which are invited to comment and propose revisions.[247] Regulatory review therefore serves as a high-level forum for federal agencies to raise concerns about regulatory actions being contemplated by their sister agencies, often resulting in delicate internal negotiations about modifications to the rules.[248]

Thus, under Executive Order 12,866, OIRA already possesses the authority to promote the coordination of agency regulatory actions. One of the stated purposes of the order is to ensure that agencies act consistently with one another.[249] It is entirely congruent with OIRA's mission, for example, to request that agencies consider how coordination might reduce regulatory costs and thus make coordination a relevant consideration when reviewing agency cost-benefit analyses. Moreover, President Obama's new regulatory review order, which supplements but does not replace Executive Order 12,866, also emphasizes the importance of coordination to reduce regulatory burdens and to simplify and harmonize rules.[250]

RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2009), *available at* http://www.fas.org/sgp/crs/misc/RL32397.pdf.

244 *See* Exec. Order No. 12,866, § 3(f), 3 C.F.R. at 641–42, *supra* note 237.

245 Executive Order 12,866 defines a "regulation" as "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." *Id.* § 3(d).

246 *Id.* § 6(a)(3)(C).

247 *Id.* § 4(c).

248 *See generally* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006). Because the interagency review process occurs so late in a rule's development, an agency can be fairly entrenched in its views by the time it receives interagency feedback.

249 *See* Exec. Order No. 12,866, § 6(b), 3 C.F.R. at 646, *supra* note 237.

250 The new regulatory review order reads in part:

> Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate ap-

As a description of the EOP apparatus, this summary is incomplete.[251] Yet it does illustrate the primary mechanisms by which the President can seek to promote coordination across the executive branch and, to a limited extent, among independent agencies. We noted that many EOP offices and councils were created by statute and that their heads must be confirmed by the Senate; this shows that the President neither entirely controls the definition of his staff's duties nor installs them unilaterally. Nevertheless, because these officials are appointed by the President and charged with executing his policy prerogatives, they ultimately answer to him. And in the event the President wishes to establish even more bodies to carry out specific tasks, he may do so, subject to appropriations limits imposed by Congress.[252]

III. ASSESSING AGENCY COORDINATION INSTRUMENTS

In this Part, we evaluate the strengths and weaknesses of the coordination tools discussed above in terms of their impacts on efficiency, effectiveness, and accountability in administrative decisionmaking. We discuss the circumstances under which greater coordination has the potential to advance the strengths of functional fragmentation while minimizing its dysfunctions, as described in Part I. After this assessment, we propose some reforms aimed at institutionalizing coordination and improving the performance of coordination tools.

A. Efficiency, Effectiveness, and Accountability

We begin by assessing the impacts of coordination instruments on agency decision costs and transaction costs, both of which relate to *efficiency*. Subsequently, we assess the impacts the instruments can

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proaches, each agency shall attempt to promote such coordination, simplification, and harmonization.

Exec. Order No. 13,563, § 3, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011); *see also* Bagley & Revesz, *supra* note 248, at 1312–14 (arguing that OIRA should expand beyond its traditional cost-benefit analysis to "embrace its role as a harmonizing influence" among agencies, *id.* at 1312, particularly in areas amenable to centralization such as offering standardized guidelines for risk assessment and assessing distributional consequences of agency action).

[251] For example, it omits functionally important offices such as the Offices of White House Counsel, Legislative Affairs, and Communications.

[252] In addition, the President can create task forces. *See, e.g.*, Exec. Order No. 13,554, 75 Fed. Reg. 62,313 (Oct. 8, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/10/05/executive-order-gulf-coast-ecosystem-restoration-task-force (establishing the Gulf Coast Ecosystem Restoration Task Force); Memorandum of February 3, 2010: A Comprehensive Federal Strategy on Carbon Capture and Storage, 75 Fed. Reg. 6087 (Feb. 5, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-a-comprehensive-federal-strategy-carbon-capture-and-storage (creating the Interagency Task Force on Carbon Capture and Storage); Memorandum of February 9, 2010: Establishing a Task Force on Childhood Obesity, 75 Fed. Reg. 7197 (Feb. 18, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-establishing-a-task-force-childhood-obesity.

have on the quality of agency decisionmaking and on the production of expertise, as well as on private manipulation of the regulatory process, all of which relate primarily to regulatory *effectiveness*. Finally, we turn to *accountability* and address how coordination instruments can affect bureaucratic drift and transparency in the administrative process.

1. Impacts of Coordination on Agency Decision Costs. — At first glance, coordination appears to raise agency decision costs. This observation is certainly true compared to a baseline of agencies deciding policy matters independently. But where agencies share regulatory space, the appropriate baseline should include the cost, or at least the risk, of inconsistency, waste, confusion, and systemic failure to deliver on the putative statutory goals. The actual question is whether coordination reduces these cumulative costs, even if it requires a greater up-front investment of resources.

These up-front investments in fact might be substantial. For example, even the relatively mild procedural consultation requirements described in Part II require the agency to expend time and staff to process comments — resources that might otherwise be deployed elsewhere. And these costs tend to rise with the burdensomeness of the consultation provisions. At the extreme end, giving one agency veto power over another's decision has the potential to elevate costs considerably by sometimes requiring extensive negotiations. Thus, for example, the joint DOJ-FTC horizontal merger guidelines likely consumed significant staff time and resources.

Yet up-front investment in coordination can produce savings down the line. If agencies acquire useful information from their counterparts, they need not incur the expense of acquiring it themselves.[253] Streamlining redundant functions allows agencies to stop making unnecessary decisions and to piggyback on the work of other agencies.[254] At the same time, while costs may rise in the short term, greater coordination could lower net transaction costs over time by enabling agencies to deal early on with problems that could later become more costly or intractable, including conflicting interpretations of legal requirements, vaguely specified program elements, and incompatible compliance requirements. These types of problems might arise in all of the delegation categories described in section I.B — in cases of overlapping agency functions, related or interacting jurisdictional assignments, and delegations requiring concurrence.

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[253] *See* GAO FUEL ECONOMY REPORT, *supra* note 183, at 21–24 (describing EPA's investment of resources in production of information and NHTSA's reliance on the data to update its model in joint rulemaking).

[254] *See, e.g.*, *supra* notes 154–157 and accompanying text (discussing the transmission MOU and its requirements of integrated environmental review and a single administrative record).

In the case of the merger guidelines, by agreeing on the factors and evidence relevant to distinguishing anticompetitive mergers from benign ones, and by notifying the regulated community in advance, the FTC and DOJ very likely reduced costs for themselves and the regulated community, especially compared to the alternative of resolving matters through inconsistent enforcement actions in federal court. Likewise, the EPA-NHTSA joint rule established early on how both agencies would treat compliance instead of waiting for conflicts to arise later, when positions might be more entrenched and conflicts harder to resolve. The nine-agency transmission MOU prevented needless duplication of effort and integrated an inefficient and sequential decisionmaking process. In sum, increased decision costs are not the inevitable result of greater coordination, and in fact the opposite may be true.

2. Impacts of Coordination on Private Transaction Costs. — Coordination also has the potential to reduce the costs of participation in the regulatory process for interest groups and regulated firms. Private transaction costs can be reduced by harmonizing inconsistent regulatory approaches where agencies have overlapping jurisdiction, or by simplifying and integrating related jurisdictional assignments. The EPA-NHTSA joint rulemaking illustrates how coordination can create a harmonized national set of regulatory standards, lowering compliance costs and providing greater certainty for firms. The transmission MOU provides a good example of how coordination can save private parties both time and money by converting a set of sequential decisionmaking procedures into a more streamlined process with a designated lead agency. And the DOJ-FTC merger guidelines illustrate the benefits of early notice regarding enforcement policy, reducing uncertainty and enabling private firms to adjust their practices to avoid legal violations.

Generally, the regulated community should prefer coordinated policymaking to the alternative, since it tends to reduce the risk of wasteful duplication and inconsistency in the regulatory process, and it provides the community with more predictability and uniformity.[255] Conceivably, however, regulated entities might sometimes prefer fragmentation to coordination, to the extent that it allows firms to play one agency against another in an effort to weaken regulation overall, or to forum shop among regulators. We consider this possibility below, in the discussion of coordination's impact on regulatory arbitrage, but for now we simply observe that interagency coordination might help to

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[255] *Cf.* E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326 (1985) (discussing industry preference for federal regulation and preemption over heterogeneous state regulation).

control this risk by minimizing the opportunities for such arbitrage or, at least, making it more transparent.

3. Impacts of Coordination on Agency Expertise and Decision Quality. — Coordination tools can help agencies to manage overlapping agency functions or related jurisdictional assignments in ways that improve both cumulative expertise and the quality of the final agency decision. Both the joint policymaking example and the interagency consultation requirements discussed above illustrate how this might occur. In the EPA-NHTSA joint rulemaking, the agencies formed joint technical teams, pooled data and information, and closely scrutinized their respective modeling techniques for estimating regulatory costs and benefits. As GAO noted in its report, this was the first time the agencies had operated in such an integrated fashion, after decades of working together at arm's length. This interaction allowed the agencies to engage in a type of joint production that enabled each to make decisions based on better information and improved expertise: NHTSA revised several components of its model based on new research from EPA, and both agencies revised their approaches and used common inputs to minimize discrepancies. At the same time, neither agency abandoned its model, suggesting that the interaction did not lead to a loss of independence or a kind of merger. The joint rulemaking process also required the agencies to think carefully through every element of program design and implementation together, and to educate each other about their respective statutory constraints, in order to craft a workable and legally defensible regulatory program.

Interagency consultation requirements such as those embodied in the ESA and NEPA similarly provide vehicles for pooling expertise and data from different sources. Such processes can force agencies to consider valuable information they might otherwise overlook, would prefer to overlook, or lack the expertise to produce themselves.[256] The obligation to consult with other agencies, especially those with different missions, can also help pierce a closed decisionmaking culture and overcome group polarization effects by introducing viewpoints that do not identify with the dominant agency culture.[257] Coordination of this kind can help agencies to think more holistically and can help to mitigate systemic risk.

Interagency agreements could have the same effect. The MOU on cybersecurity specifically aims to enhance information sharing and to combine the different expertise and knowledge bases that officials at

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256 *See* section II.A, pp. 1157–61.

257 *See* Biber, *supra* note 9, at 49 (discussing how OMB's distinct mission of analyzing agency decisions can contribute expertise to those decisions); Bradley, *supra* note 9, at 766–70 (describing how interactions between agencies can help overcome the problem of limited expertise).

DOD and DHS possess.[258] The same is true of the agreement between DOE and NOAA to collaborate on research to support renewable energy development,[259] as well as of the nine-agency MOU on transmission, which required the agencies to produce a single, integrated environmental record.[260] These initiatives seek to draw on the specialized knowledge of different agencies to produce net gains, rather than to combine the agencies in a way that would destroy their unique capabilities.[261]

Thus, it appears that coordination mechanisms have the potential to further two of the claimed benefits of functional fragmentation — facilitating productive interagency "competitive[ness]" and encouraging agencies to be "laboratories" for policy ideas[262] — only in a structured process that requires agencies to account to each other. Whereas consolidating or eliminating agency functions might destroy this capacity, coordination mechanisms can preserve agency independence while channeling interagency competition in productive ways.

There is no guarantee that decision "quality" will improve simply as a result of such interactions, however. Quality is an elusive concept that exists somewhat in the eye of the beholder. In administrative law, courts assess decision quality largely based on procedural regularity and on evidence that the agency has considered the legally relevant factors, assessed relevant information, and exercised reason.[263] To the extent that coordination improves the analytic basis for decisionmaking by adding data and expertise, and also by diversifying the perspectives an agency takes into account, we think it is likely to make decisions better and more likely to survive judicial review.

4. Impacts of Coordination on Arbitrage and Capture. — Another important consideration is whether coordination tools might help to ameliorate the risk of regulatory "arbitrage" and agency "capture" by interest groups. Arbitrage refers to the possibility that regulated entities will seek to take advantage of situations of shared or overlapping authority to get the best deal possible, or play agencies against one another in an effort to drive regulatory standards downward.[264] In some accounts of the financial crisis of 2008, for example, commentators reported that financial institutions approached sympathetic regulators at one agency or department to counteract the more aggressive

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258 *See* DOD-DHS MOU, *supra* note 148, at 1.

259 *See* DOE-NOAA MOU, *supra* note 139, at 1.

260 *See* 2010 DOE Electric Transmission MOU, *supra* note 152, at 6.

261 *See* DeShazo & Freeman, *supra* note 9, at 2290 (noting that coordinating decisionmaking among separate agencies may allow them to generate more specialized expertise than if decisionmaking were unified); *see also* Pan, *supra* note 56, at 819–21 (discussing a dual-regulator model as a response to the shortcomings of a single-regulator model).

262 *See* Katyal, *supra* note 33, at 2325.

263 *See* McNollgast, *supra* note 25, at 432.

264 *See generally* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010).

posture of another regulator.[265] These kinds of opportunities seem most likely to arise where the delegation scheme allows a single agency to block, dominate, or neutralize others.

Where this risk exists, coordination can be an important tool to help mitigate any negative consequences. First, agencies are harder to isolate and neutralize to the extent that their approaches are publicly and formally aligned. Second, although policy disagreements among agencies can be healthy and productive and can drive agencies to generate or acquire ideas, information, and expertise, they can also lead to unproductive conflicts and destructive turf battles. Investing in greater coordination in cases of potential regulatory overlap, where the arbitrage risk is highest, may not *prevent* arbitrage or capture, but it can help to control it by making it more difficult for agencies to act unilaterally without consequences. At a minimum, interagency consultation, signed agreements, joint policymaking exercises, and similar instruments provide opportunities for the agencies to hold each other to account for such behavior.

In theory, dispersed authority should make capture more costly for interest groups by multiplying the number of agencies they must lobby to effectively influence policy.[266] In some instances, an agency that is better able to resist capture may be able to substitute or compensate for one that cannot. Still, it is conceivable that where collective action problems among the agencies are acute, as when each possesses veto power, capturing even one agency could disable a larger regulatory enterprise.

Again, however, greater coordination seems likely to ameliorate such problems. Coordination tools should help stronger agencies to bolster weaker ones by formally linking them in the regulatory enterprise and by conveying to interest groups that they will need to capture both to succeed. One might draw such an inference from the alliance between EPA and NHTSA in the joint rulemaking example — both the auto industry and environmental groups were put on notice that the agencies were, for the first time, aligned. One might draw a similar conclusion from the updated FTC-DOJ merger guidelines. Moreover, mechanisms that promote agency interaction, such as consultation requirements, can blunt the influence of any one interest group by introducing other perspectives into the agency decisionmaking process.

Of course, the risk of arbitrage and capture is perhaps highest where agencies simply refuse to coordinate for one reason or another,

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[265] For example, ongoing appeals by large banks to the Department of the Treasury and the Federal Reserve appear to have undermined the FDIC's ability to make large-scale mortgage modifications and to resolve failing banks, despite its statutory authority to regulate these activities. *See* Joe Nocera, *Sheila Bair's Bank Shot*, N.Y. TIMES MAG., July 10, 2011, at 24.

[266] *See supra* note 33 and accompanying text.

whether because of substantive disagreements, personality clashes, or cultural conflicts. In such cases, a process for dispute resolution, or strong oversight by a central decisionmaker, will be necessary to mitigate the problem. Congress appears to have recognized this necessity in establishing the Financial Stability Oversight Council as a peak-level arbiter in the Dodd-Frank Act.[267]

The discussion thus far has focused on coordination's impact on regulatory arbitrage and capture in terms of regulatory effectiveness. To the extent that coordination tools help to neutralize these private behaviors, they improve the administrative process. Additionally, arbitrage and capture both obviously raise accountability concerns, since they divert the putative public benefits of statutory programs to narrow private interests, often out of public view. Coordination tools that facilitate interagency bolstering and substitution, or dilute the strength of powerful constituencies by introducing the perspectives of others, thus should help to buttress accountability as well as effectiveness, making the tools doubly beneficial.

5. Impacts of Coordination on Drift. — Another key consideration when evaluating coordination is whether it exacerbates the risk of bureaucratic drift[268] or whether it may instead help principals to monitor agency decisions. 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.[269] To ensure that this does not happen, Congress relies not only on direct supervision but also on third-party oversight, such as judicial review, and other structures and processes designed to afford principals indirect ways of monitoring agency decisions.[270] On first glance, overlapping or fragmented delegations seem to exacerbate the risk of drift. For example, where responsibility is shared, agencies might be more inclined to shirk their duties, which is a type of drift. Agencies may also find it easier in shared regulatory space to deviate from congressional preferences and pursue their own policy prerogatives because they can blame other agencies for program failures. In this sense, diffusing responsibility can undermine accountability.[271]

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267 *See supra* note 199 and accompanying text.

268 *See* Pablo T. Spiller & John Ferejohn, *The Economics and Politics of Administrative Law and Procedures: An Introduction*, 8 J.L. ECON. & ORG. 1, 6–7 (1992) (explaining the risk that an agency might deviate from the interests of the coalition that created the agency).

269 *See id.*

270 *See* McNollgast, *supra* note 25, at 434–35.

271 *See* 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, 114–15 (2010) (showing that integrated institutional structures for water projects can obscure accountability); *see also* RENA STEINZOR & SHANA JONES, CTR. FOR PROGRESSIVE REFORM, AN ACCOUNTABILI-

Coordination instruments can help to control shirking (loosely defined to mean inaction), however, by facilitating interagency monitoring as a supplement to direct congressional oversight. For example, the more robust consultation provisions described in Part II allow agencies to "lobby" each other to make sure important statutory goals are not ignored.[272] They might be viewed as a form of "lateral legislative control"[273] by which Congress monitors agency fidelity to its enacted wishes. Likewise, interagency agreements can serve as proxy monitoring mechanisms for Congress.[274] While generally informal, MOUs still require agencies to make concrete commitments, culminating in a "quasi-contract" with which they can hold each other to account. And joint policymaking exercises, in which agencies share information and expertise, position the agencies to police each other quite closely. Generally, more formal and legally binding coordination instruments should make it relatively harder for agencies to shirk their duties, since they increase the agencies' accountability to each other and, by extension, to Congress.

Coordination may also reduce drift by enabling policy compromises of the sort Congress envisioned when delegating authority to multiple agencies in the first place. As we illustrated with our stylized model in Part I, lawmakers might create shared regulatory space because doing so more closely approximates their ideal preferences than does delegating to one or another agency alone. Delegating to two agencies is a structural decision that allows the principals to compromise to address a multifaceted problem. Once they have done so, coordination instruments can serve to facilitate agency compromise. One might view the EPA-NHTSA joint rulemaking as an instance of just such a compromise, in which the agencies had to agree on levels of stringency, compliance flexibilities, and enforcement policy after Congress delegated discretion to both agencies. Some political constituencies may be wary of such compromises out of concern that the agencies will concede on important matters of principle simply to achieve consensus. But if the compromise conforms to the legal requirements applicable to each agency, falls within their discretion, and can be defended on the record, then it seems lawful and consistent with the congressional design.

TY MECHANISM FOR THE CHESAPEAKE BAY 2–3 (2008), *available at* http://www.progressivereform.org/articles/Chesapeake_Bay_808.pdf (finding a "slow-moving collaborative structure" and a lack of accountability as obstacles to progress). For a more positive account of the collaborative structure, see Freeman & Farber, *supra* note 2, at 860–66.

272 *See, e.g.*, *supra* notes 122–127 and accompanying text.

273 DeShazo & Freeman, *supra* note 9, at 2261–63.

274 *Cf., e.g.*, McNollgast, *supra* note 25, at 442 (recognizing how "[a]dministrative procedures erect a barrier against an agency carrying out . . . a fait accompli by forcing the agency to move slowly and publicly, giving politicians (informed by their constituents) time to act before the status quo is changed").

Of course, coordination may not always improve the prospects for compromise. One agency might be more powerful than the others and dominate a shared decisionmaking process, producing a result comparable to what would have occurred had lawmakers delegated authority to a single agency. Nevertheless, it seems reasonable to say that coordination tools ought to increase the chances for compromise. And to the extent that coordination tools do enable such compromises, they help to deliver one of the purported aims of functional fragmentation.

Another concern might be collusion — that under the guise of coordination, one or both agencies will try to subvert clear congressional preferences. Imagine agencies deciding to "share resources" or "pool expertise" to circumvent an appropriations ban that bars one agency, but not the other, from using funding for a particular purpose. This possibility suggests that Congress will need to monitor the monitors to some extent to ensure agencies do not collude in bureaucratic drift. It is also plausible that coordination instruments might foster affinities among agency staff, which could dampen their enthusiasm to challenge and monitor each other. Yet while it is true that agency staff may become allies in promoting joint programs and may develop close working relationships, there is every reason to expect them to be vigilant about protecting their own jurisdictions and missions — and perhaps even more invested than usual in monitoring their counterparts — since they will share responsibility for any joint outcome.

Indeed, interagency monitoring may well thrive when agencies coordinate. The closer the coordination, the better positioned staff will be to monitor each other. In this respect, coordination instruments that allow agencies to remain at arm's length or to interact in only superficial, discrete ways may be less salutary for accountability than are those that require a greater degree of interaction, allowing each agency's staff considerable access to the other's domain. On balance, then, we see coordination instruments as helping to control drift by providing structured opportunities for agencies to account to each other, with spillover benefits for Congress. This suggests that coordination can help to promote one of the key goals of functional fragmentation, which is to improve the accountability of the agencies to their political principals.

6. Impacts of Coordination on Transparency. — Another important accountability consideration is whether greater interagency coordination might undermine the transparency of the administrative process. Certain coordination instruments are less visible than others and thus harder for both political principals and the public to monitor. For example, as noted earlier, many interagency agreements are unpublished

and not easily available on agency websites.[275] Agency MOUs need not undergo notice and comment if they are "procedur[al]"[276] rather than "substan[tive],"[277] and they are subject to judicial review only to the extent that they "announce[] a rule of law, impose[] obligations, determine[] rights or liabilities, or fix[] legal relationships."[278]

Interagency consultation mechanisms may also be hard to monitor unless they require a formal response from the action agency. Thus, the weaker consultation requirements reviewed in Part II, as well as "voluntary" consultation, are likely to be the least transparent. Where agencies are required to respond publicly to comments and to provide a reasoned explanation on the record, however, the process should be highly visible and easily monitored. And importantly, an agency's failure to comply with these statutory procedural requirements will expose it to legal challenge.

Joint rulemaking also generally satisfies the demands of transparency. Like rules promulgated by agencies acting independently, jointly promulgated rules must comply with the APA notice-and-comment process and with other applicable statutory provisions requiring procedures such as docketing of meetings.[279] Moreover, rules made through the notice-and-comment process generally are subject to judicial review.[280] Not all joint policymaking instruments are required to go through notice and comment, however. Policy statements and

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275 For example, FOIA requires agency agreements to be published in the *Federal Register* only if they are "statements of general policy," 5 U.S.C. § 552(a)(1)(D) (2006), or if they alter agency procedures, *id.* § 552(a)(1)(B). MOUs may fall under FOIA exemption 5, which allows an agency to withhold from any disclosure request "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Id.* § 552(b)(5). Interagency MOUs do not appear to be subject to different treatment than intra-agency memos under exemption 5. Rather, the test for interagency MOUs and intra-agency documents alike is whether the document is predecisional and "deliberative," such that its disclosure could hamstring candid discussion within the agency. *See* EPA v. Mink, 410 U.S. 73, 89–91 (1973). While many MOUs are unlikely to fit this description, drafts of MOUs may be exempt from disclosure requirements, making it difficult for the public to follow the interagency negotiation process. *See* Ctr. for Medicare Advocacy, Inc. v. U.S. Dep't of Health & Human Servs., 577 F. Supp. 2d 221, 236–37 (D.D.C. 2008) (exempting draft MOU submitted to general counsel for review from FOIA disclosure).

276 5 U.S.C. § 553(b)(3)(A).

277 *Id.* § 553(b)(3); *see* Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 904 (8th Cir. 1979).

278 High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235, 1249 (D. Colo. 2006) (finding that MOUs trading a "reserved water right" for an "instream flow right," *id.* at 1241–42, are "clearly the type of action for which review under the APA is intended," *id.* at 1249). In contrast, MOUs that merely state an intent to coordinate but do not contain specific commitments to share information or allocate resources probably are not reviewable. *Cf.* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasizing that agency action is only reviewable if it involves a failure to take "*discrete*" action that is legally "*required*").

279 *See* 5 U.S.C. § 553(b)–(c).

280 *See* Peter L. Strauss, *Overseers or "The Deciders" — The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 816–21 (2008).

guidance documents, whether issued jointly or by a single agency, need be published in the *Federal Register* only if they are intended to be legally binding.[281] Yet these instruments are still transparent in the sense that they are publicly available — indeed, their purpose is to advise the public on the agencies' current thinking — and they too are subject to judicial review.[282] Thus, provided that agencies adhere to the procedural requirements of the APA, the Freedom of Information Act,[283] and other applicable laws, joint policymaking should pose no greater transparency concerns than does policymaking conducted by a single agency.

In sum, transparency concerns are greatest with relatively informal coordination instruments such as interagency agreements, some of which can have important consequences for policy but may never be submitted to public comment or published in the *Federal Register* and often escape judicial review. Statutorily required consultation and joint policymaking, however, are relatively transparent, visible to principals, and subject to courts' normal oversight function.

B. Matching Coordination Tools to Collective Action Problems

As a result of their different features, certain coordination tools might be good "matches" for certain kinds of challenges that arise in shared regulatory space. For example, joint rulemaking has advantages over other instruments because it is fairly formal and transparent, reviewable by courts, and relatively easy for political principals to monitor.[284] Notice-and-comment rulemaking also allows each agency to make a durable commitment to a policy choice, because the result of joint rulemaking can be modified only through either a notice-and-comment process to amend or repeal it or by an act of Congress.[285] As a result, joint rulemaking may be especially useful for harmonizing policies that will be binding on regulated entities, where certainty and consistency are at a premium and where agencies anticipate joint gains — in terms of pooling expertise and limiting redundancy — from

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281 5 U.S.C. § 553(b)(3)(A).

282 They may be subject to review only in an enforcement action, however. *See* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 398 n.275 (2009).

283 5 U.S.C. § 552 (2006 & Supp. IV 2011).

284 *See, e.g.*, David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929–42 (1965) (focusing on the advantages of rulemaking in the classic choice between rulemaking and adjudication as a policy instrument for individual agencies).

285 Moreover, under the Congressional Review Act, 5 U.S.C. §§ 801–808 (2006), agency rulemaking, including joint rulemaking, is subject to congressional oversight independent of the committee oversight process — making joint rulemaking a particularly effective instrument with which Congress can manage bureaucratic drift.

setting standards together. Because these legislative regulations are durable and transparent, they are a good option when agencies want to clarify expectations and lock a regime in place. Indeed, it appears that joint rulemaking has had the most traction in contexts that conform to these features, such as in setting industry-wide environmental standards and in regulating financial markets. Especially where congressional delegations create overlapping or closely related agency functions, joint rulemaking and similar rulemaking strategies (interlocking, parallel, and model rules) can help to improve efficiency, effectiveness, and accountability.

By comparison, interaction requirements, such as consultation mandates, may be most beneficial in instances where new information or perspectives can help to overcome an otherwise insular agency culture or decisionmaking process. Such mechanisms may be especially constructive in situations where congressional delegations create related or interacting jurisdictional assignments and where, as a result, the potential for mission conflict is high, expertise is diffuse, and there is a risk of "silo" decisionmaking. These coordination instruments typically preserve the lead agency's role as the main decisionmaker, which helps to clarify accountability but requires the agency at least to consider the priorities and expertise of other agencies with related statutory missions. Interaction requirements can thus help to mitigate the problem of systemic risk in contexts where no single agency is charged with solving an overarching regulatory or administrative problem or with rationalizing a set of highly interdependent tasks. Because many of these interaction requirements are embodied in statutes, the threat of judicial review provides a helpful backstop against the risk they will be ignored.

Nonbinding agreements such as MOUs are highly valuable because of their relative informality, ease of enactment, and adaptability. MOUs can enable agencies to manage every delegation type identified in Part I — overlapping functions, related and interacting assignments, and delegations requiring concurrence. But they may be better for helping agencies to manage internal matters than for establishing policies that would impose burdens on the public.

As the examples in Part II show, MOUs can help agencies to clarify jurisdictional boundaries, share staff and information, and establish procedures for managing shared or closely related authority. Their flexibility is advantageous because it allows agencies to adapt to new circumstances over time without resorting to elaborate and time-consuming procedures. Like all of the tools discussed above, however, MOUs are easier to negotiate, and more likely to be implemented, in situations where the agencies recognize the need for coordination and possess the resources to devote to it, and where conflict among them is not high. Where conflict is high, or where other barriers to coordina-

tion are significant, an external prompt, and perhaps centralized supervision, will be necessary.

C. *Improving Coordination Tools*

To institutionalize and strengthen these tools, we propose the adoption of a comprehensive, government-wide policy to promote coordination, including a number of targeted reforms that should help agencies to use coordination instruments more effectively and study their effects. Such a program would include development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, and tracking of outcomes and costs. This effort might be led by either Congress or the President. If the President led the effort, he might place the initiative under the auspices of OMB's implementation of the new Government Performance and Results Act Modernization Act of 2010[286] (GPRAMA), which requires OMB to establish administration-wide priorities and appoint goal leaders in the agencies.[287] Alternatively, he might assign the task to OIRA, as part of an expanded and reimagined regulatory oversight function,[288] or to other White House policy offices with substantive expertise.

1. *Developing Agency Coordination Policies.* — As an initial matter, all federal agencies should be required to develop and adopt poli-

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286 Pub. L. No. 111-352, 124 Stat. 3866 (codified in scattered sections of 5 and 31 U.S.C.).

287 *Id.* § 3, 124 Stat. at 3867–71 (amending 31 U.S.C. § 1115). The statute updates a 1993 law that required agencies to engage in performance planning and to produce annual performance reports. *See* Government Performance and Results Act, Pub. L. No. 103-62, 107 Stat. 285 (1993). OMB has not yet fully defined this new institutional role, but it might be conceived of as a powerful new instrument for promoting coordination among agencies. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-617T, MANAGING FOR RESULTS: GPRA MODERNIZATION ACT IMPLEMENTATION PROVIDES IMPORTANT OPPORTUNITIES TO ADDRESS GOVERNMENT CHALLENGES 3–7 (2011) (statement of Comptroller General Gene L. Dodaro).

288 There is some precedent for White House efforts to promote interagency working groups. In the Carter Administration, the Office of Science & Technology Policy and several interagency committees worked together to develop carcinogen assessment guidelines and regulatory policies. *See* U.S. CONG., OFFICE OF TECH. ASSESSMENT, IDENTIFYING AND REGULATING CARCINOGENS 35 (1987), *available at* http://www.fas.org/ota/reports/8711.pdf. The Administration established the Interagency Regulatory Liaison Group (IRLG), which initially included representatives from EPA, FDA, the Consumer Product Safety Commission, and the Occupational Safety and Health Administration, and later USDA. *Id.* After the IRLG created a successful forum, President Carter in 1978 created the United States Regulatory Council to "ensure that regulations are well coordinated [and] do not conflict." Memorandum for the Heads of Executive Departments and Agencies, Subject: Strengthening Regulatory Management, 2 PUB. PAPERS 1905 (Oct. 31, 1978). An IRLG working group consisting of scientists from multiple agencies published a report in 1979. *See* INTERAGENCY REGULATORY LIAISON GRP., WORK GRP. ON RISK ASSESSMENT, SCIENTIFIC BASES FOR IDENTIFICATION OF POTENTIAL CARCINOGENS AND ESTIMATION OF RISKS (1979). The Council was disbanded after President Reagan took office. *See* Thomas O. McGarity & Karl O. Bayer, *Federal Regulation of Emerging Genetic Technologies*, 36 VAND. L. REV. 461, 520 (1983).

cies and procedures for facilitating coordination with other agencies. Some agencies already have such policies, but many do not. A recent GAO report on the implementation of the Dodd-Frank Act faulted the financial regulatory agencies for not pursuing coordination more systematically and noted that the majority of agencies reviewed had not developed internal policies on coordination.[289] A coordination policy might address matters of both process and substance, including how to resolve disagreements over jurisdiction, how to develop standards jointly, how to solicit and address conflicting views, and how to share or divide information-production responsibilities. Documented policies can help to formalize ad hoc approaches and provide helpful road maps for staff. Compatible policies can help to simplify and sustain interagency coordination over time.[290]

Beyond the question of which EOP offices might lead such an effort is the matter of how best to institutionalize this new focus on coordination. Below we recommend initial and relatively modest measures to help the government better track and evaluate existing coordination initiatives. We also identify a number of targeted improvements to make coordination tools more transparent and effective.

2. Sharing Best Practices. — A government policy on coordination should establish a mechanism through which the agencies can share best practices and provide for ex post evaluation. For MOUs, best practices might include suggestions that agencies include progress metrics and sunset provisions, which might help to ensure that agencies revisit MOUs regularly. In several of the examples reviewed in Part II, the agencies were negotiating new MOUs to replace outdated ones (often negotiated by previous administrations) — a clear sign that ineffective MOUs can be left to languish for too long. And as noted in the food safety and border security examples in Part I, there are many outdated MOUs still on the books.

The policy should also include best practices for joint rulemaking and recommend when agencies should consider using it even when not statutorily required to do so. Among other things, best practices might include establishing joint technical teams for developing the analytic underpinnings of the rule, requiring early consultation among agency legal staff and lawyers at DOJ who may need to defend the rule, and requiring early consultation with OIRA regarding joint production of cost-benefit analyses.

3. Supporting and Funding Interagency Consultation. — As noted earlier, discretionary interagency consultation provisions can be fairly

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[289] *See* GAO REPORT ON DODD-FRANK, *supra* note 62, at 25 (noting that seven of nine regulators reviewed "did not have written policies and procedures to facilitate coordination on rulemaking").

[290] *Id.* at 26.

easy for an agency to ignore or to comply with only pro forma. Agency officials may be tempted to treat these obligations as hoops to jump through, rather than as important vehicles for feeding valuable information into their decisionmaking processes.[291] Recall that under NEPA, the onus is on the interested agencies to comment on the action agency's impact statement, and yet the action agencies typically have no obligation to respond directly to those comments. This practice weakens the potential for agency interactions to produce significant benefits. A duty to respond publicly and in writing to comments by other agencies would raise the costs of dismissing other agencies' input without sufficient consideration and would signal the importance of taking that input seriously. Where Congress does not explicitly require written responses with reasons, the executive branch could adopt such a requirement as a matter of good governance.

In addition, interagency input often comes too late to be of maximum benefit — such as comments on analyses that have already been substantially designed or completed.[292] To ameliorate this problem, it is important to ensure that consultations occur early in a decisionmaking process, before initial positions are locked in, and that the consultations be ongoing and integrated rather than periodic and reactive. This can be accomplished, for example, by establishing cross-cutting agency teams to produce and analyze data together over the course of the decisionmaking process. Finally, consulting agencies require sufficient resources to participate effectively in interagency processes. The need to provide specifically for such cross-cutting resources should be taken into account by the agencies and OMB in the budgetary process. Further, action agencies, on whom the duty to consult falls, should be obligated to contribute a share of resources to support joint technical and analytic teams, even if those resources will be consumed in part by other agencies.

4. Increasing the Visibility of MOUs. — The relative informality that makes MOUs so appealing and easy to deploy also makes them generally unenforceable and, in most cases, entirely insulated from

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[291] Statutes like NEPA that impose analytic requirements on agencies are limited to the extent that they are only "procedural." For example, NEPA requires only that action agencies disclose environmental impacts, not that they alter their plans in light of what they learn. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed — rather than unwise — agency action.").

[292] *See* Memorandum from Jody Freeman, Dir., Envtl. Law & Policy Program, Harvard Law Sch., to Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Oil Drilling 3 (Oct. 13, 2010), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/JodyFreeman Presentation.pdf. For example, in approving offshore drilling in the Gulf of Mexico, the Minerals Management Service had apparently already made its decisions by the time NOAA weighed in with its concerns about adverse environmental impacts. *See* Ian Urbina, *U.S. Said to Allow Drilling Without Needed Permits*, N.Y. TIMES, May 13, 2010, at A1, *available at* http://www.nytimes.com/2010/05/14/us/14agency.html.

judicial review. While it seems unnecessary to publish or catalog MOUs that address internal matters of agency organization and resource deployment, agreements that have broad policy implications or that may affect the rights and interests of the general public ought to be more visible and easier for both Congress and the public to track. This additional transparency will be not only valuable to the public but also useful to agencies wishing to learn from each other and to executive branch officials who currently lack a central mechanism for overseeing MOU implementation. It would also be beneficial to establish a government-wide mechanism for periodically revisiting a subset of highly significant MOUs to assess the extent of their implementation.

5. Tracking Total Resources. — To better evaluate the costs of coordination, it would be helpful to develop methods for monitoring total resources spent on interagency consultations, MOUs, joint rules, and other similar instruments. At the outset, this effort might be limited to high-priority, high-visibility interagency coordination efforts, such as important joint rulemakings. Given that the volume of joint rulemakings will likely increase as a result of the Dodd-Frank Act,[293] it would be worthwhile to begin tracking and gathering data about these efforts soon. Without creating an enormous burden, it might be possible to compare the average cost of major rules that are jointly produced to that of major rules that are produced by agencies acting independently. GAO, CRS, and various agency inspectors general already evaluate certain interagency efforts, largely on a piecemeal basis. A more comprehensive set of studies, perhaps with the assistance of the Administrative Conference of the United States,[294] could help to integrate and augment this work.

IV. IMPLICATIONS OF COORDINATION FOR POLITICAL AND LEGAL OVERSIGHT OF AGENCIES

In this Part, we explore the implications of increasing interagency coordination for political and judicial oversight of agency decisionmaking. Coordination can have implications for the balance of power between the President and Congress, but we argue that this effect does not undermine the case for the executive branch's playing a primary role in coordinating agencies where shared regulatory space exists. Indeed, we think the President could and should do even more to

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293 *See* COPELAND, CRS DODD-FRANK RULEMAKING REPORT, *supra* note 172, at 5–7.

294 The Administrative Conference is an independent federal agency that is devoted to improving the administrative process and that sponsors research into administrative reforms. *See The Conference*, ADMIN. CONFERENCE OF THE U.S., http://www.acus.gov/about/the-conference (last visited Jan. 29, 2012).

promote coordination. We also address the role of the courts in reviewing agency action involving coordination.

A. Centralized Supervision by the President

The analysis above suggests that coordination can improve efficiency, effectiveness, and accountability, overcoming the dysfunctions created by shared regulatory space and often furthering, or at least not frustrating, the purported benefits of functional fragmentation. Coordination often is superior to consolidating agency functions, which runs a greater risk of resulting in a net loss of expertise and accountability or simply relocating interagency conflicts without meaningfully addressing them. Systematic efforts to institutionalize coordination (as opposed to relying on ad hoc coordination that occurs as a matter of course among agencies) also will tend to be more stable, visible, and durable than informal networks for promoting interagency interactions are. Yet the prospect of achieving these benefits is subject to the important caveat that the agencies themselves must be motivated to pursue coordination, by either internal or external incentives. In cases of high conflict, recalcitrance, or incapacity, a central coordinator will be necessary.

As an institutional matter, the President is amply equipped to promote coordination through various tools already described, including a number of White House policy offices, councils, and special advisors through which he might exert strong, centralized oversight of agency policymaking and implementation. The White House can play a crucial role in fostering coordination by establishing priorities, convening the relevant agencies, and managing a process that is conducive to producing agreement. For example, the White House Office of Energy and Climate Change Policy has been credited with spearheading the joint rulemaking effort of EPA and the Department of Transportation,[295] and the White House played a role convening and coordinating the nine-agency transmission MOU.[296] There are many other examples from prior administrations, involving policy initiatives large and small.[297]

Also, as a legal matter, OIRA appears to possess all the authority it needs to play this role. Promoting consistency in agency rulemaking is explicitly within the agency's mandate under Executive Order 12,866

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[295] Jim Tankersley, *Emissions Deal Nearly Stalled at the Finish*, L.A. TIMES, May 20, 2009, at A1, A20.

[296] *See* Press Release, Advisory Council on Historic Pres., Nine Federal Agencies Enter into a Memorandum of Understanding Regarding Transmission Siting on Federal Lands (Oct. 28, 2009), http://www.achp.gov/docs/pressrelease10282009.pdf.

[297] *See, e.g.*, Kagan, *supra* note 210, at 2306.

and was reiterated by President Obama's recent executive order.[298] Moreover, because of the potential breadth of "regulatory action" as defined by this order, OIRA's reach could extend to procedures that do not, strictly speaking, result in the promulgation of notice-and-comment rules.[299] Where agency programs (including permitting, management, and other non-"regulatory" functions) seem clearly beyond OIRA's existing authority, the President could of course easily expand it. In addition, while it might be controversial, the President could seek to extend such an enhanced regulatory review function to independent agencies as well.

One way to pursue this role, at least for rulemaking, is for OIRA to involve itself in the early stages of rule development, which sometimes begins years before a rule is noticed under the APA. This is when much of the important foundational work is done to lay the analytic basis for the rule and when agencies become invested in their chosen course of action.[300] As former OIRA Administrator John Graham has noted, efforts to make substantial revisions once a rule is proposed are likely to "make waves and bruise egos, which means that they will be resisted, sometimes fiercely and effectively."[301]

Beyond early engagement in rule development, OIRA has successfully conducted other policy harmonization efforts. For example, in 2009–2010, OIRA and the Council of Economic Advisers led the Ob-

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[298] *See* Exec. Order No. 12,866, *supra* note 237, at § 6(b), 3 C.F.R. at 646; Exec. Order No. 13,563, *supra* note 250.

[299] Executive Order 12,866 defines "regulatory actions" as including actions "expected to lead to the promulgation of a final rule or regulation." Exec. Order 12,866, *supra* note 237, §3(e), 3 C.F.R. at 641. OMB circulars, bulletins, and memoranda assert expansive discretion to review a broad category of agency actions. *See, e.g.*, Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to Heads & Acting Heads of Exec. Dep'ts & Agencies (Mar. 4, 2009) (on file with the Harvard Law School Library) (stating that notwithstanding President Obama's revocation of Executive Order 13,422, under which President George W. Bush had required agencies to submit significant guidance documents to OIRA for regulatory review, *see* 72 Fed. Reg. 2763, 2764, OIRA would still require such submissions, and noting that OIRA would continue to review significant actions *generally*, not just significant "*regulatory* actions"). In addition, several agency actions, such as mineral and resource planning, at first glance appear not to fall within OIRA's purview, but might also be subject to review.

[300] *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION 5 (2009), *available at* http://www.fas.org/sgp/crs/secrecy/R40713.pdf (observing that "comments and suggestions from the public may arguably be most effective while proposed rules are still under development at the agencies"); *see also id.* (quoting Sally Katzen, OIRA Administrator during most of the Clinton Administration, as stating that by the time a notice of proposed rulemaking is published, "the agency is invested. By that time, the agency has its own strongly held view of how it wants this thing to look. And OMB changes at that point are, I think, really at the margin rather than going to the heart of the matter." (internal quotation marks omitted)).

[301] *Id.* (internal quotation mark omitted); *see also* Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (repealed 1993) (requiring agencies to submit to OMB drafts and overviews of planned agency actions that have not yet reached the stage of a proposed rule).

ama Administration's interagency working group, which sought to develop a government-wide social cost of carbon to be incorporated by the agencies into their regulatory impact analyses.[302] In many ways, this process was effective and exemplary — the range of estimates agreed upon improved the government's past practice by harmonizing inconsistent values used by different agencies;[303] settled a disagreement over whether to adopt a "global" value to reflect damages worldwide, instead of limiting the analysis to domestic impacts;[304] and incorporated an upper estimate that attempts to account for the possibility of catastrophe.[305] Still, the process was limited to achieving consensus for a fairly narrow purpose — determining how to quantify an input for agency regulatory impact analyses, the review of which is of course OIRA's central mission. Traditionally, OIRA has devoted considerable focus to establishing the requirements for cost-benefit analyses and reviewing agencies' analyses.[306] Yet its efforts to actively coordinate agency policymaking to overcome problems created by fragmentation and overlap seem less numerous.[307] Any serious effort to promote coordination as distinct from minimizing regulatory burdens would require a significant reorientation of OIRA's focus on economic efficiency and an expansion of its current role.[308]

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302 The interagency working group ultimately settled on a range of four estimates, with a central point estimate of $21 per ton. *See* INTERAGENCY WORKING GRP. ON SOCIAL COST OF CARBON, APPENDIX 15A: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866, at 34 (2010), *available at* http://www1.eere.energy.gov/buildings/appliance_standards/commercial/pdfs/sem_finalrule_appendix15a.pdf.

303 The report cites a proposed DOT regulation from 2008 that assumed a domestic social cost of carbon (SCC) value of $7 per ton of carbon dioxide (in 2006 dollars) for 2011 emission reductions; a DOE regulation from 2008 that adopted a domestic SCC range of $0 to $20 per ton of carbon dioxide (in 2007 dollars) for 2007 emission reductions; and EPA's 2008 Advance Notice of Proposed Rulemaking for Greenhouse Gases with preliminary global SCC estimates of $68 and $40 per ton of carbon dioxide (in 2006 dollars) for 2007 emissions, using discount rates of approximately 2 percent and 3 percent, respectively. *Id.* at 4.

304 *Id.*

305 *Id.* at 26–27.

306 Under Executive Order 12,866, agencies must produce a detailed cost-benefit analysis justifying significant regulatory actions. *See* Exec. Order No. 12,866, *supra* note 237, § 6(a)(3)(C), 3 C.F.R. at 645–46. OMB has elaborated the requirements for regulatory review in detail. *See* OMB CIRCULAR A-4, *supra* note 242 (stipulating the requirements for cost-benefit and alternatives analyses and specifying appropriate methodologies).

307 At times, the centralized review of an agency's regulatory plans appears to serve more as a notification device and less as an affirmative coordination opportunity. *See* DeMuth & Ginsburg, *supra* note 206, at 907–08 (noting that OIRA merely circulates the plans to White House offices and relevant agencies for comment without making formal recommendations).

308 Centralized review of agency agenda-setting through the regulatory planning process has been tried to a greater or lesser extent by different Presidents. President Reagan required agencies to submit a regulatory program to the OMB director, which allowed the director to make recommendations on both regulatory and deregulatory actions to achieve consistency with Administration policy. *See id.* at 907. Subsequent administrations have experimented with early intervention into agency regulatory planning, including through "prompt letters." *See Regulatory*

Yet it is not clear that OIRA, as currently constituted, is optimally positioned to sponsor coordination efforts that depend heavily on matters of legal interpretation or on substantive policy considerations beyond economic efficiency.[309] Other White House offices and councils with relevant policy expertise may be better equipped to do so.[310] Still, OIRA might play an important role in this effort. Its resource management offices, which possess programmatic and budgetary expertise, could provide essential support. And on the budgetary side, OMB might propose cross-cutting budget allocations to help incentivize the agencies to work together.

In addition, there are advantages to not framing such an effort in terms of "regulatory review" — which positions the White House to be reactive and sets an oppositional tone. Instead, a broad coordination initiative might be framed as a proactive opportunity to help the agencies accomplish some of their own priorities and overcome some of the barriers they themselves have identified, drawing heavily on their expertise. To the extent that such efforts provide agency officials unique rewards and offer them a voice in White House deliberations, those officials will be motivated to participate. This is not just a matter of messaging. To have any chance of success, a concerted effort to promote coordination across the government will require the White House to develop strong allegiances, and maintain close working relationships, with the agencies.

Of course, regardless of how it is framed, any effort to centralize White House control over agency policymaking will be recognized as such and inevitably will be met by the agencies, and by Congress, with

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Accounting: Costs and Benefits of Federal Regulations: Hearing Before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs of the H. Comm. on Gov't Reform, 107th Cong. 11, 12–14 (2002) (statement of John D. Graham, Adm'r, Office of Info. & Regulatory Affairs) (noting the historically "reactive" nature of OIRA and describing the use of prompt letters to suggest regulatory or deregulatory initiatives). These efforts have been criticized as ideologically motivated and aimed largely at deregulation, but they illustrate how an administration can seek to exercise greater centralized control over agency policymaking. For a summary of these criticisms, see Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 46, 74–76 (2006).

309 This may be what Professors Richard Revesz and Michael Livermore envision when they call for a new Executive Order that emphasizes "agenda-setting" and "prioritize[s] the non-cost-benefit analysis function of OIRA, including interagency coordination and harmonization, and distributional analysis." RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 171 (2008). For a critique of such a proactive approach, see DeMuth & Ginsburg, *supra* note 206, at 906–11. The history of regulatory review has also been highly contentious. For better or worse, the process is seen primarily as a mechanism for weakening regulation in an effort to control costs. *See* Bagley & Revesz, *supra* note 248, at 1263–82 (describing the history of OIRA review's exerting a primarily deregulatory effect).

310 *See* Kagan, *supra* note 210, at 2285 (describing OMB review as the "least significant" instrument of presidential directive authority over agencies during the Clinton administration).

a certain amount of suspicion. The President clearly has more than an "objective" interest in coordination and can be expected to use coordination tools to put his imprimatur on policy.[311] For example, the President can request that agencies use joint rulemaking to harmonize policy or sign MOUs to clarify responsibilities, even when Congress has not required them to do so. And he may assign White House officials to steward these efforts, in order to influence their outcomes. In situations where one agency proves reluctant to support administration policy, the President may be able to offset that agency's influence by mobilizing another agency, or several, willing to go along. By seizing control of the interagency process, the President and his staff can play the role of negotiator in chief, helping to broker outcomes that more closely align with his preferences than would the results of an unmediated process.[312] And, notably, a certain amount of this activity will be out of public view and hard for Congress to track.

There is no doubt that the normative desirability of taking advantage of such opportunities is predicated on a fairly broad view of presidential power. Scholars disagree over the extent of the President's legal authority to mandate administrative approaches and outcomes when Congress has delegated power to agencies.[313] The question is whether the President may dictate the goal from the outset, override agency judgments, or decide outcomes where agencies cannot agree. Some scholars argue that the President must have the authority to resolve interagency disputes, "even if it means giving him the power to elevate one agency's goals over another's."[314] Others have expressed

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311 This perspective builds on Professors Terry Moe and William Howell's more general insight that the sheer number of congressional delegations over time strengthens the President vis-à-vis Congress because of his ability to interpret his powers broadly and act unilaterally. *See* Moe & Howell, *supra* note 200, at 860.

312 Interagency coordination facilitates the President's ability to arbitrate interagency disputes and can help him extend his reach to independent agencies that he may otherwise not be in a position to control. *See* DeShazo & Freeman, *supra* note 9, at 2233; *see also* Bradley, *supra* note 9, at 787–94 (arguing that interagency consultation provisions tend to unify and enhance the President's power). Thus, by creating such agency interaction requirements, Congress may yield more control to the President than it intends. *See* DeShazo & Freeman, *supra* note 9, at 2300.

313 On the one hand are those, such as then-Professor Elena Kagan, who advance a strong view of the President's authority to legally bind the discretion of agency officials. *See* Kagan, *supra* note 210, at 2246; *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 546–47, 550 (1994); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991–92 (1993). Others, however, take a more modest view of executive power and maintain that the President may claim statutory powers only where Congress has expressly granted him, rather than agencies, authority — an approach that could limit the authority of the President to require agencies to work together where they are not inclined to do so. *See, e.g.*, Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

314 Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 448 (1987); *see also* Kagan, *supra* note 210, at 2343–45, 2383–85; McGarity, *supra*,

reservations about presidential overreach, especially where statutes direct discretionary power to the agencies specifically.[315] In practice, however, this legal debate imposes few constraints. Presidents have policy agendas, which they seek to advance not only through legislation but also through regulation, administration, budgeting, and litigation.[316] Coordination instruments are simply an additional set of tools at the President's disposal, which he can deploy to advance his priorities.

In any event, whatever the ultimate legal limits on the President's power, he is highly constrained politically. Even with the benefit of specialized offices, high-level councils, and powerful presidential advisors, strong central direction is never absolute. Agency officials answer to numerous constituencies, of which the President is just one.[317] Senior agency officials can avail themselves of a variety of techniques to resist centralized control, including seeking the support of Congress.[318] And of course, in reaction, Congress seeks to thwart presidential efforts to dictate policy with its own tools, which are substantial. This push and pull — between Congress and the President, and between the President and executive branch agencies — provides substantial political checks on the President.

Indeed, the prospects for successful presidential coordination likely will vary depending on the reason why Congress structured delegations of authority as it did, and whether the President's efforts frustrate an intentional design. That is, in cases where the delegation scheme is meant to help lawmakers deliver benefits to constituent groups, and presidential coordination would frustrate that goal, we can expect congressional resistance. Yet where Congress has delegated authority to more than one agency as a compromise, coordination efforts that achieve a compromise between the agencies (within the stylized "zone of agreement" envisioned by Congress) should be consistent, or at least not inconsistent, with congressional intent. Likewise, if Congress has separated certain functions specifically to enhance agency independence, presidential efforts to undermine that indepen-

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at 447–48 (describing the views of some regulatory reformers that the President should exercise a broad coordination function and manage agency priorities).

315 *See* Stack, *supra* note 313, at 276–99.

316 *See* DeMuth & Ginsburg, *supra* note 206, at 911 ("[N]o politician who has mastered the system sufficiently to have gained the White House is going to be content to act as a neutral optimizer and coordinator of the regulations of dozens of agencies administering hundreds of statutes.").

317 *Id.* at 906.

318 *See, e.g.*, RICHARD W. WATERMAN ET AL., BUREAUCRATS, POLITICS, AND THE ENVIRONMENT 38 (2004) ("[T]he EPA resisted Reagan's appointees with media leaks and appeals to Congress."); *see also* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611, 647 (2010). Agency officials can leak, stall, defy, and make end runs around the White House. Such efforts are sometimes successful and sometimes not, but deputized senior "coordinators" must work hard to achieve the level of coordination the President wants.

dence may face congressional opposition. And where delegations are largely accidental, or have resulted in unintended consequences that frustrate statutory goals, presidential coordination efforts to restore coherence may be met with little opposition, or even with assent.

In sum, it seems to us clear, and mostly salutary, that the President is uniquely positioned and motivated to tackle coordination problems. To the extent that there are risks of overreach, they should be checked by existing legal and political constraints. Some of the reforms we have suggested above seek to improve the transparency of the interagency process, making it easier for both Congress and the public to track. And to the extent that the existing legal and political checks are insufficient, judicial review provides a bulwark against presidential overreach.[319]

B. Implications for Judicial Review of Agency Action

As a general matter, judicial review can help to ensure that decisions produced through interagency coordination stay within legal bounds. By reviewing agency legal interpretations and policy decisions, courts can help to guard against the risk that agencies will "coordinate" their way to statutory violations, or that the President will overstep legal limits in an effort to aggrandize his power. In addition, judicial review should help to control any potential for shirking in situations where agencies share regulatory space.[320] Both of these functions help to serve the interests of Congress. At the same time, however, courts can be expected to protect the President from illegal congressional attempts to interfere with coordination between agencies and the White House.[321] This requires only that courts perform their traditional role of policing the separation of powers.

Yet, for courts reviewing agency actions, the discussion above raises two important doctrinal questions: whether coordination should be factored into arbitrary and capricious review of agency policy decisions and whether it should elicit greater *Chevron*[322] deference for agency interpretations of law. We address each of these in turn.

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319 *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (reversing, at step one of *Chevron*, FDA's effort to regulate tobacco).

320 *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1691–93 (2004) (suggesting that courts might be able to solve the problem of inaction through judicial review). Of course, courts are not the only institution that can manage shirking. *See, e.g.*, Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 400–01 (2009) (suggesting that Congress's creation of an independent administrative agency to address inaction across multiple administrative agencies would better reduce agency inaction by adding political competition).

321 *See* Sierra Club v. Costle, 657 F.2d 298, 405–06 (D.C. Cir. 1981).

322 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (establishing a two-step inquiry for review of agency legal interpretations).

First, as a predictive matter, we expect policy decisions produced through coordination to be subject to standard arbitrary and capricious review, through which courts evaluate the quality of an agency's explanation of its decision and its consistency with a statutory program. As a general proposition, reviewing courts seem not to adjust standards of review to acknowledge agency coordination. This was made clear most recently in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,[323] in which the Supreme Court reviewed a rule promulgated jointly by EPA and the U.S. Army Corps of Engineers under the Clean Water Act.[324] Although the Court noted numerous times that the agencies had acted jointly[325] and that the agencies were aligned in all of their interpretive positions, the majority appeared to apply the relevant standards of review precisely as it would have done had the case involved a single agency acting independently.[326] It accorded no weight to the mere fact that the agencies had cooperated in producing the regulation.

One might argue as a normative matter that courts applying arbitrary and capricious review *should* consider agency coordination as evidence of a decision's rationality. The extent of an agency's investment in coordination might serve as a signal to courts about how important an agency regards the issue,[327] giving judges some confidence that decisionmakers have closely examined the evidence and relevant statutory factors. Indeed, if an agency was legally required to (and did) consult other agencies before settling on a policy decision, is a reviewing court not entitled to presume that those agencies performed a vetting function for the policy? Perhaps evidence of interagency coordination in the record should earn an agency "points" in favor of deference, though this raises the question of how much this one factor ought to count relative to others. One could go still further and argue that the mere fact of achieving an interagency consensus merits deference

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323 129 S. Ct. 2458 (2009).

324 33 U.S.C. §§ 1251–1387 (2006).

325 *See Coeur Alaska*, 129 S. Ct. at 2464 ("The Corps and the EPA have together defined 'fill material' to mean any 'material [that] has the effect of . . . [c]hanging the bottom elevation' of water. The agencies have further defined the 'discharge of fill material' . . . . [T]he Corps and the EPA agree that the slurry meets their regulatory definition of 'fill material.'" (citation omitted) (first, second, and third alterations in original)).

326 *See id.* at 2468 (noting that the agencies interpreted the regulation consistently, and accepting EPA's interpretation as correct using a traditional test).

327 Stephenson has emphasized how hard look review increases enactment costs for agency regulation and thus can improve expertise in situations where an uninformed regulator would promulgate regulations. *See* Stephenson, *Bureaucratic Decision Costs*, *supra* note 19, at 477. *See generally* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753 (2006).

and that, as long as the consensus falls within the statutory range of permissible outcomes, further inquiry into rationality is superfluous.[328]

We have some sympathy for these views but are reluctant to endorse them to the extent that they envision courts' reviewing the rationality of coordinated policy decisions any differently than they review decisions made by a single agency. It is not clear that the mere achievement of consensus among agencies should substitute for other evidence of a decision's reasonableness and the agencies' thoroughness in considering relevant information in light of statutory standards. The sheer number of agencies that support a particular outcome should not determine whether a decision receives deference. Affording greater deference where interagency consensus is achieved yields too much leeway to the agencies and, potentially, to the President. Agreement among the agencies may in some cases reflect an extraordinarily strong President or particularly weak agency administrators, rather than a better ultimate decision.

Yet even if courts apply existing standards of review, other things being equal, we expect strong agency coordination to produce decisions that will tend to attract greater judicial deference. This expectation is based on efforts like the joint rulemaking described in Part II, in which two or more agencies have undergone an extensive process to produce a unified regulatory program. Under these circumstances, there is a good chance that the process will improve the quality of the resulting decision and thus will be more likely to survive arbitrary and capricious review, including "hard look" review.[329] This strikes us as intuitive: a policy choice that harmonizes potential inconsistencies, reduces duplication, and reflects a careful consideration of multiple agency perspectives should have a better chance of being upheld. Of course, the agencies will need to develop a record to support their deci-

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[328] *Cf.* Philip J. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 489 (1983) ("[A] consensual rule derives its validity from the fact of consensus — within the contours of authorizing legislation defined by the body politic — whereas rules outside that consensus derive their validity through the traditional means of testing the rationality of the process."); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 164 (1985) (arguing that judicial deference to negotiated regulation is appropriate where a regulatory negotiation process meets certain transparency conditions).

[329] The arbitrary and capricious standard in § 706 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006), requires a court to assess the quality of the reasons for the agency's decision. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983). Although *State Farm* did not use the term, the case is widely considered to have elaborated on and entrenched "hard look" review. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron's *Two Steps*, 95 VA. L. REV. 611, 612 (2009) (discussing Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 602–03 (2009)). Yet it is well established that not all agency decisions are automatically subject to hard look review, which can "var[y] greatly depending on the issues raised by the relevant context." *Id.* at 622.

sion, but this requirement is no different from the usual burden they face.[330] Where, however, agencies reach compromises that are not within their respective zones of legal discretion or for which they cannot provide support, courts will not hesitate to strike down their decisions, regardless of whether one, two, or ten other agencies agree.

Turning to the question of how coordination might impact the *Chevron* inquiry, we take each step of the analysis in turn, beginning with the initial determination of whether *Chevron* review is warranted under *Mead*[331] ("*Chevron* Step Zero"[332]). At first glance, coordination seems unlikely to influence a court's decision at this step, where the question is whether Congress intended to delegate to the agency the power to speak with the force of law.[333] A reviewing court will likely answer this by reading the statutory text itself, quite apart from whether one or several agencies were involved in generating the interpretation. Yet it is true that when a court is unable to discern an explicit congressional authorization, it looks for "indicators" that turn largely on the format and procedure used by the agency.[334] So, to the extent that agency coordination takes the form of joint notice-and-comment rulemaking or other, similar decisionmaking modes characterized by relative transparency and formality, it will merit *Chevron* deference more often.[335] This possibility suggests that agencies might

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330 *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419–20 (1971). Professor Peter Strauss's insightful critique of *Overton Park* highlights how, by the time the Secretary of Transportation made his decision approving the specific route for I-40, multiple regulatory bodies, including the state of Tennessee and the city of Nashville, had approved the highway. *See* Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1273–80 (1992). However, because nothing in the record showed that the Secretary had ascribed special value to parkland preservation, as required by statute, the *Overton Park* Court reversed the agency's decision. *Overton Park*, 401 U.S. at 404–05, 417–20.

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

332 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

333 If yes, the Court applies the *Chevron* two-step test; otherwise, the agency action is reviewed under the less deferential standard the Court developed in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). *See Mead*, 533 U.S. at 227–28.

334 *Mead*, 533 U.S. at 236–37. Thus, *Mead* recognized a practical "safe harbor" for agencies that use notice-and-comment rulemaking. 533 U.S. at 229–30. Consistent with this interpretation of *Mead*, Professor David Barron and then-Professor Elena Kagan have argued that *Chevron*-eligible interpretations should come from an agency head or high-level official, ensuring that legal interpretations would only be issued by those who are the most visible and accountable within the agency. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 239.

335 It is possible that greater collaboration will increase the use of such durable decisionmaking formats, elevate decisions to more senior officials, and reflect more extensive deliberation of issues that go to the heart of a complex statutory regime. For example, a collaborative agency interpretation could evidence an especially strong case for *Chevron* deference where it is evaluated against the considerations the Court articulated in *Barnhart v. Walton*, 535 U.S. 212 (2002), including "the related expertise of the Agency, the importance of the question to administration of the statute, the

want to adopt such procedural formats to earn a "safe harbor" under the *Mead* inquiry, but coordination per se is not likely to affect a reviewing court's analysis.

Continuing to the first step of the *Chevron* analysis itself, here again the presence or absence of agency coordination seems, at first glance, irrelevant. The issue at step one is whether Congress has addressed "the precise question at issue."[336] If the court's inquiry into statutory meaning — through an analysis of text, structure, legislative history, and purpose — reveals that the interpretation embraced by the agencies is *precluded*, that ends the matter. Nothing the agencies can do via coordination is likely to change that conclusion.

At step two of *Chevron*, where the question is whether the agency interpretation is "permissible,"[337] there are two possibilities. Many courts essentially apply arbitrary and capricious review at this stage, and if this is the appropriate test, then, as noted above, strong coordination should militate toward deference insofar as agency coordination produces a better basis to support the agencies' decision.[338] Some commentators have argued, however, that step two of the Chevron inquiry is mutually interchangeable with step one — that, as Professors Matthew Stephenson and Adrian Vermeule put it, "*Chevron* . . . has only one step."[339] And certain D.C. Circuit cases support this view.[340] If the latter approach is correct, the presence or absence of coordina-

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complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222.

336 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

337 *Id.* at 843.

338 Many scholars, and arguably some courts, have come to equate *Chevron*'s step two permissibility inquiry with arbitrary and capricious review or argue that it should be so equated. *See, e.g.*, M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 99 (John F. Duffy & Michael Herz eds., 2005); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128–29 (1994); Peter L. Strauss, *Overseers or "The Deciders" — The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 826 (2008); *see also* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1263–66 (1997) (summarizing the D.C. Circuit's judicial incorporation of arbitrary and capricious review into *Chevron*'s step two). Indeed, *Chevron* itself left open this possibility, to the extent that Justice Stevens recognized that at step two an agency's regulations should control "unless they are arbitrary, capricious, or manifestly contrary to the statute" or unless the interpretation is unreasonable. *Chevron*, 467 U.S. at 844.

339 Stephenson & Vermeule, *supra* note 329, at 597; *see also id.* at 600 (arguing that *Chevron*'s two steps are "mutually convertible"). *But see* Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (observing that, "under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance'" (quoting Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711 (2011))).

340 *See, e.g.*, Cont'l Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444, 1452 (D.C. Cir. 1988) (highlighting how "reasonableness" at step two of *Chevron* means only "the compatibility of the agency's interpretation with the policy goals . . . or objectives of Congress"). For criticism of the D.C. Circuit's approach in *Continental Air Lines*, see Levin, *supra* note 338, at 1272–74.

tion would seem to be irrelevant to the validity of the interpretation, as we noted in the discussion of step one above.

In sum, under current doctrine, greater efforts at agency coordination, especially where agencies work together to build strong records supporting their decisions, are likely to lead to greater deference at least under arbitrary and capricious review (and perhaps also under *Chevron* step two). Yet courts will not hesitate to invalidate agency decisions that contravene clear statutory commands (at step one of *Chevron*) or to deny certain agency decisions *Chevron* review in the first instance (at step zero), if the agency has not used a procedural format that merits it or otherwise demonstrated that Congress wishes the agencies to speak "with the force of law." We think this doctrinal outcome is sound.

As a normative matter, however, two aspects of existing *Chevron* doctrine seem ripe for reconsideration given our discussion of coordination in shared regulatory space. The first observation flows from our model in Part I: if Congress sometimes delegates authority to address the same issues to more than one agency with an expectation that agencies will compromise over substance, it seems appropriate for courts to presumptively favor an interpretation of the statute shared by both agencies. Notably, this observation provides some support for the argument that *Chevron* should be viewed as entailing a single step, at least in the context where multiple agencies share interpretive authority. A presumption in favor of the agencies' shared interpretation would be consistent with congressional intent as long as it was "permissible," in the sense of falling within the zone of discretion delegated to both agencies under the statute, and there is little to be gained from a court's assessment of whether the agencies' interpretation was arbitrary and capricious. This presumption would incentivize agencies in shared space to align their legal interpretations but would still leave them discretion about how to do so, and even whether to do so at all.[341]

Our second suggestion builds on the first and calls into question any rule against granting *Chevron* deference when more than one agency has been charged by Congress with administering the same statute.[342] If the agencies concerned happen to agree on the statute's meaning, courts should not refuse to defer simply because Congress has delegated interpretive authority to more than one agency. Since

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[341] *Cf., e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 148–50 (1991) (discussing an example of agencies in a split enforcement regime disagreeing over the correct interpretation of their shared organic statute).

[342] *See, e.g.*, Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1252–53 (D.C. Cir. 2003) (rejecting general denial of *Chevron* deference for agency interpretations of statutes whose enforcement is shared by multiple agencies).

rulings to this effect appear to be motivated by a concern that granting deference to more than one agency will create inconsistent interpretations of the same statute, and since coordination eliminates this concern, coordination obviates the need for such a rule.

Of course, if courts wished to further incentivize agency coordination, they could adjust the existing standards of review. As we noted above, this adjustment might be achieved by accepting evidence of interagency coordination as a proxy for a policy's reasonableness or simply by counting evidence of coordination as a factor weighing in the agency's favor. Of course, courts could accomplish the same thing by increasing the stringency of judicial review across the board: assuming that agency coordination will tend to produce, on average, a stronger basis of support for an agency decision, a higher standard of review raises the relative burden for agencies acting alone.[343] An even stronger incentive would be for courts to require as a condition of deference that agencies consult in every instance with other agencies that possess relevant expertise and authority. Absent statutory requirements to consult, however, the Supreme Court has never required agencies to work together in formulating policies or legal interpretations.[344] Indeed, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*'s[345] prohibition on judicially imposed procedures appears to forbid this option unless courts can anchor the requirement in statutory text.[346] Doctrinal changes of this sort might well encourage agencies to work together, but we think that specially structuring judicial review to favor agency coordination is unnecessary for coordination to flourish.

CONCLUSION

In this Article, we have argued that lawmakers frequently create overlapping, fragmented, and duplicative delegations that ultimately require agencies to share regulatory space, and we have showed that these delegations present serious management challenges for agencies and for the President. We have explained why, once created, these delegations can be so difficult to dislodge and why interagency coordination is thus imperative. We have explored a variety of coordination

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343 We thank Matthew Stephenson for helpful discussions on this point.

344 Indeed, absent statutory requirements, the Supreme Court has not even required an agency to explicitly consider the statutory policies of related agencies. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646 (1990) (noting that "[i]f agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation").

345 435 U.S. 519 (1978).

346 *See id.* at 524 (holding that courts cannot "overturn[] agency action because of a failure to employ procedures beyond those required by the statute" except in "extremely rare" circumstances).

tools that Congress, the President, or agencies might use more deliberately and effectively to try to manage shared regulatory space, including interagency consultation, interagency agreements, and joint policymaking instruments.

The strengths of these tools on net are substantial, across a range of regulatory problems: coordination can improve efficiency, effectiveness, and accountability, overcoming the dysfunctions created by shared regulatory space and often furthering the purported benefits of functional fragmentation. Contrary to what one might think at first glance, enhanced coordination may reduce rather than raise agency decision costs. Greater coordination is also likely to improve the overall quality of decisionmaking by introducing multiple perspectives and specialized knowledge and structuring opportunities for agencies to test their information and ideas. Coordination instruments can incentivize and equip agencies to monitor each other, which should help to control shirking and drift and, at least when used in the manner we suggest, ease the monitoring burden for Congress. In addition, coordination can produce policy compromises that are consistent, or at least not inconsistent, with at least one of Congress's rationales for dispersing authority in the first place. It is plausible, too, that greater coordination will make it harder for interest groups to capture the administrative process or to play agencies against each other. Finally, coordination often will be superior to consolidation and will be an improvement on the informal coordination that occurs as a matter of course in the administrative state. While no single procedural device will be suitable for every circumstance, both Congress and the President have toolboxes of versatile procedural devices at their disposal with which they can address coordination challenges.

We have also argued that the President is uniquely positioned and motivated to manage the problems of shared regulatory space and that coordination tools afford him the chance to put his stamp on policy. Thus, shared regulatory space, while burdensome, should also be viewed as an important opportunity for the President. We recommend that the President embrace and promote coordination more systematically, either by adapting the existing OIRA regulatory review process (which we suggest will be challenging) or by using other White House offices and OMB in a more deliberate way for this purpose. While this exercise in centralized supervision will often be politically contentious and must operate within legal bounds, on balance we believe that presidential leadership will be crucial to managing the serious coordination challenges presented by modern governance and that existing political and legal checks on potential overreach are sufficient.

Finally, we have explored the implications of enhanced interagency coordination for judicial review. We have discussed ways that courts might adjust standards of review to promote coordination but have argued that even under existing standards of review, policy decisions ar-

rived at through strong interagency coordination likely will attract greater deference. We have also showed that greater coordination is relatively unlikely to impact the outcome of the *Chevron* inquiry for reviewing agency legal interpretations, but we have suggested minor doctrinal adjustments that would lead to greater deference to shared agency legal interpretations as a way of promoting interagency coordination.

The larger conceptual purpose of the Article has been twofold: First, the Article has aimed to focus attention on shared regulatory space, which, we have argued, is inevitable, pervasive, and sticky. Second, the Article has underscored the urgency of promoting interagency coordination as a necessary response. Indeed, given their benefits, coordination tools merit a place alongside other, more conventionally studied administrative procedures, such as the choice between rulemaking and adjudication as the key modal decision an agency makes[347] and the various ways that an agency adjudicates or adopts rules.[348] But as the discussion above reveals, there is a much bigger storehouse of procedural instruments at the disposal of the agencies — instruments that are especially important to managing shared regulatory space. Given their pervasiveness and their potential to improve administrative decisionmaking across a variety of contexts, coordination instruments warrant at least as much consideration and scrutiny as the more conventional procedures that agencies use when acting alone. Grappling with this challenge, intellectually and practically, requires a renewed emphasis on interagency dynamics and a departure from the single-agency focus that has traditionally been central to administrative law.

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347 *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (describing and evaluating the modern "menu of procedural tools," *id.* at 1383, that individual agencies face); Shapiro, *supra* note 284 (focusing on the classic choice between rulemaking and adjudication as policy instruments for individual agencies).

348 *See generally* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004) (discussing various procedural forms of formal and informal adjudication); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992) (describing the many types of procedures that are included within APA rulemaking).