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## Functional Government in 3-D

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### FUNCTIONAL GOVERNMENT IN 3-D

ALEJANDRO E. CAMACHO\* and ROBERT L. GLICKSMAN\*\*

#### ABSTRACT

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

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## INTRODUCTION

The creation of new programs and administrative agencies and the realignment of existing governmental authority are commonplace. Within just the past decade, high-profile reorganizations have followed the events of 9/11 (which led to the massive reshuffling that accompanied the creation of the Department of Homeland Security),<sup>1</sup> the Deepwater Horizon explosion (which prompted the reallocation of regulatory authority over offshore oil exploration and development),<sup>2</sup> and the late-2000s global recession (which led to the creation of the Financial Stability Oversight Council and the Consumer Financial Protection Bureau and the merging of the Office of Thrift Supervision into the Office of the Comptroller of the Currency).<sup>3</sup> As in these instances, these changes often occur in response to crisis,<sup>4</sup> though the prompt for program creation or

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

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

<sup>3</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). According to two observers, “it is the rare President that does not propose to reorganize some part of the federal government.” David A. Hyman & William E. Kovacic, *Government Organization/Reorganization: Why Who Does What Matters*, <http://ssrn.com/abstract=2110351>, at 2.

Other notable reorganization initiatives in just the past year include a 2013 Executive Order to coordinate agency efforts to reduce cyber risks to critical infrastructure, Improving Critical Infrastructure (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity>; a 2012 proposal to merge the Securities and Exchange Commission and the Commodity Futures Trading Commission into a new Securities and Derivatives Commission, H.R. 6613, 112<sup>th</sup> Cong. (2012); the creation in 2009 and rapid elimination in 2012 of a new Center on Climate Change and National Security within the Central Intelligence Agency, John M. Broder, *C.I.A. Closes Its Climate Change Office*, N.Y. TIMES, Nov. 20, 2012); a 2012 proposal to increase coordination among seven federal agencies responsible for conducting space weather research under the supervision of the National Science and Technology Council, Statement of Daniel N. Baker before the Subcommittee on Space and Aeronautics Committee on Science, Space, and Technology, U.S. House of Representatives (Nov. 28, 2012), <http://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-112-SY16-WState-DBaker-20121128.pdf>; and a 2011 proposal to create new regional information and response entities to increase coordination among federal and state agencies in addressing cancer clusters, S. 76, 112<sup>th</sup> Cong. (2011). See also *infra* notes 9-20 and accompanying text (describing another important recent reorganization proposal).

<sup>4</sup> See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1152 (2012) (“The most significant government reorganization

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government reorganization sometimes has been the gradual recognition of deficiencies in existing regulatory programs.<sup>5</sup>

Scholars and policymakers alike have devoted considerable attention to the proper allocation of governmental authority, traditionally focusing on the appropriate scale of government (and in particular on federalism).<sup>6</sup> Over the past decade, some scholars have analyzed the appropriateness of jurisdictional overlap.<sup>7</sup> More recently, others have sought to account for the value of coordination among agencies.<sup>8</sup> However, these debates over governmental configuration have insufficiently focused on the relationships among these different dimensions of authority. Additionally, such discussions typically ignore whether the fitness of a particular allocation should depend on the governmental function being exercised.

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of the last fifty years occurred after the September 11, 2001 terrorist attacks, when Congress opted to combine scores of agencies into a DHS, a new ‘mega-agency.’”).

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

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

<sup>7</sup> See, e.g., *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* (Cambridge U. Press 2009, William W. Buzbee ed.); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM* (Columbia U. Press 2009); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2007); Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59 (2010).

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

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

A recent reorganization proposal concerning small business regulation serves as a useful introduction to the Article's multi-dimensional and functional analysis. In 2012, President Obama proposed to consolidate six agencies into a single new Department that would more efficiently promote competitiveness, exports, and American business.<sup>9</sup> The six agencies – the business and trade functions of the U.S. Department of Commerce, the Small Business Administration, the Office of the U.S. Trade Representative, the Export-Import Bank, the Overseas Private Investment Corporation, and the U.S. Trade and Development Agency – all focus primarily on business and trade. The White House and others<sup>10</sup> explained that overlapping responsibilities among these agencies had made it hard for small businesses to interact with the government and contributed to “unnecessary waste and duplication.”<sup>11</sup> To address these concerns, the Obama proposal would centralize authority by integrating the programs of the six eliminated agencies into four divisions of the new Department. The Administration and congressional allies asserted that this consolidation would create a more efficient and effective structure for promoting American business by eliminating duplication and overlap<sup>12</sup>

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<sup>9</sup> The White House, Office of the Press Secretary, *President Obama Announces Proposal to Reform, Reorganize and Consolidate Government* (Jan. 13, 2012) [hereinafter *Consolidate Government*], available at <http://www.whitehouse.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov>. The proposal was introduced in different forms in the Senate and the House of Representatives in 2012. See S. 2129, 112<sup>th</sup> Cong. (2012); H.R. 4409, 112<sup>th</sup> Cong. (2012). Though the bill has yet to advance to a vote, the Obama Administration intends to support the proposals in the 113<sup>th</sup> Congress. See Al Kamen, *The secretary of what, now?*, WASH. POST, Dec. 20, 2012.

<sup>10</sup> See Statement of Sen. Tom Carper at hearings on “Retooling Government for the 21st Century: The President's Reorganization Plan and Reducing Duplication” (Mar. 21, 2012), at 2, <http://www.hsgac.senate.gov/hearings/retooling-government-for-the-21st-century-the-presidents-reorganization-plan-and-reducing-duplication> (describing undesirable duplication created by the existence of multiple agencies “that produce statistical output as a part of their programmatic responsibilities”).

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

<sup>12</sup> See, e.g., *Consolidate Government*, *supra* note 9; Testimony of Daniel Werfel, Controller, Office of Management and Budget, Before the Committee on Homeland

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and increasing coordination.<sup>13</sup> The Department would also create “a one-stop shop for everything from financing and export promotion to patent protection and help commercializing innovative discoveries,” allowing small business owners to work with one agency in receiving “the core Government services that will help them compete, grow, and hire.”<sup>14</sup>

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

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Security and Government Affairs, U.S. Senate, March 21, 2012, at hearings on “Retooling Government for the 21st Century: The President’s Reorganization Plan and Reducing Duplication” (Mar. 21, 2012), at 4, <http://www.hsgac.senate.gov/hearings/retooling-government-for-the-21st-century-the-presidents-reorganization-plan-and-reducing-duplication>; *Reorganization Fact Sheet*, *supra* note 11.

<sup>13</sup> *See, e.g.*, Statement of Sen. Tom Carper at hearings on “Retooling Government for the 21st Century: The President’s Reorganization Plan and Reducing Duplication” (Mar. 21, 2012), at 2, <http://www.hsgac.senate.gov/hearings/retooling-government-for-the-21st-century-the-presidents-reorganization-plan-and-reducing-duplication>.

<sup>14</sup> Testimony of Daniel Werfel, *supra* note 12, at 4.

<sup>15</sup> For example, the small business and statistics divisions may have overlapping authority over statistics pertaining to small businesses, and the small business and trade and investment divisions may have overlapping jurisdiction over trade and investment issues pertaining to small businesses.

<sup>16</sup> *See infra* Part IV.B.1.

coordinated or independent.<sup>17</sup> It is possible to require increased coordination among multiple agencies without centralization of authority or reduction in the number of agencies with relevant jurisdiction. By conflating coordinated and distinct authority with centralization, the Administration's proposal missed an opportunity to tailor its reorganization to actually fix the perceived flaws of the existing government structure.

In addition to these dimensions of governmental authority, the Obama reorganization proposal highlights another feature of governmental organization that is often overlooked—functional jurisdiction. Regulatory authority is organized not only substantively but also on the basis of different governmental functions.<sup>18</sup> Three of the divisions proposed for the new Department would be organized around substantive authority—the small business, trade and investment, and technology and innovation divisions—while the remaining one would be organized around an information-gathering function—the production and analysis of statistics. As this Article explains, focusing on functional jurisdiction provides a number of key insights. For one, two government agencies with substantive authority over the same issue—for example, small businesses—will not have overlapping authority if their functions are distinct. The small business division, for instance, may be charged with planning, standard-setting, and implementation functions regarding small businesses, while the statistics division may be charged with information gathering on those small businesses. Functional division among multiple agencies with jurisdiction over the same subject therefore can reduce duplication even without centralization of agency authority.

Focusing on the largely neglected functional aspect of organization and clearly delineating the differences among the three dimensions of authority provides further valuable insights. In particular, this Article demonstrates that the optimal organizational structure along the three dimensions is likely to differ depending on the particular governmental function at issue.<sup>19</sup> It may make sense, for example, to centralize information gathering authority (such as in the proposed small business division for production and analysis of statistics) but create a decentralized but coordinated structure for program implementation (such as by retaining separate agencies for facilitating trade by and investment in small businesses). As with many prior regulatory design reforms, the Obama reorganization proposal's conflation of the dimensions of authority and inattention to functional jurisdiction obscured the tradeoffs that different reorganization options entail. Organizational choices along each

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<sup>17</sup> See *infra* Part IV.B.2.

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See *infra* Part IV.A.



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of the three dimensions will involve (and be informed by) a different set of policy tradeoffs that are impossible to disaggregate if the existence of three different dimensions and the availability of different configurations based on function are not appreciated.

Analysis of the structures, jurisdictions, and relationships among governmental institutions is vital to understanding and promoting their efficacy at advancing public goals.<sup>20</sup> Yet institutional design questions such as these are regularly overlooked, misanalyzed, or oversimplified.<sup>21</sup> Given the recurrence of government reorganization efforts and the high-stakes consequences they may entail, this Article provides an analytical framework for assessing when realignment of agency authority is likely to be beneficial and how it ought to proceed when circumstances warrant it. Using examples from a range of regulatory areas, it demonstrates how differentiating the choices of when to centralize, create overlap, and require coordination among governmental institutions illuminates the advantages and disadvantages of competing reorganization options. The Article also explains how focusing on the particular governmental function at issue further clarifies the advantages and disadvantages of movement along the three dimensions of centralization, overlap, and coordination.

The Article proceeds in four Parts. Part I briefly describes the principal values that tend to be implicated in government reorganization efforts and that may be useful in assessing the merits of a particular

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<sup>20</sup> As Professor Magill has succinctly put it, “institutions matter.” Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 903 (2009). See also Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. (forthcoming 2013), <http://ssrn.com/abstract=2137151>, at 2 (arguing that “agency interconnectedness will become even more rooted in the bureaucracy over time, as regulatory problems show no sign of becoming simpler and more amenable to single-agency solutions”).

<sup>21</sup> As stated by Dean Phil Weiser:

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

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

Philip J. Weiser, *Towards an International Dialogue on the Institutional Side of Antitrust*, 66 N.Y.U. ANN. SURV. AM. L. 445, 447-48 (2011) (citations omitted). See also Hyman & Kovacic, *supra* note 3, at 5 (noting that legal scholars have largely ignored issues concerning “what an agency is assigned to do and where it is located”).

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

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

Undoubtedly, the appropriate choices along each of the dimensions, and decisions on whether to differentiate structure based on function, will necessarily be context-specific. We nonetheless conclude by providing a set of preliminary observations about the relative merits of different dimensional allocations of authority for each governmental function. We assert that arguments for centralization and coordination are likely to be more persuasive for certain kinds of agency research, information distribution, and financing functions. We also posit that, in general, arguments for decentralized authority usually will be strongest for implementation and enforcement functions, and to a lesser extent planning. Likewise, though the considerable calls for increased coordination among regulatory authorities may often be persuasive for

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functions such as financing, information distribution, planning, and even standard setting, we assert that the benefits from maintaining regulator independence and even competition will typically be stronger for agencies performing implementation and enforcement functions. Finally, although we largely concur with the growing literature promoting the value of shared substantive jurisdiction, we postulate that providing for distinct functional jurisdiction will often provide opportunities to maintain the advantages of redundancy while minimizing its disadvantages.

#### I. NORMATIVE CONSIDERATIONS FOR ALLOCATION OF AUTHORITY

Determining how best to allocate the authority to design and implement government programs requires a comparative assessment of the extent to which alternative allocations promote desired normative values or considerations. We use four such evaluative yardsticks in the discussion below: effectiveness, efficiency, equity, and legitimacy.<sup>22</sup> When these measures point in different directions, determining the optimal balance requires choosing among allocations that promote some but not other values better than the available alternatives.

##### A. *Effectiveness*

An effective regulatory design is one that achieves the identified regulatory goals.<sup>23</sup> A regulatory program that fails to achieve its goals cannot be deemed a success even if it operates efficiently and fairly and is administered by accountable officials.<sup>24</sup> The effectiveness of a government program may depend not only on how governmental authority is allocated, but also on whether it is feasible to achieve the identified goals and whether sufficient resources are available to government officials to implement the program.<sup>25</sup> Our focus is on the impact of government structure on program effectiveness.

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<sup>22</sup> Administrative law scholars have used similar metrics to evaluate regulatory programs. See, e.g., Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 111-12 (1964) (offering accuracy, efficiency, and acceptability to agency, participants, and the public as metrics).

<sup>23</sup> Freeman & Rossi, *supra* note 4, at 1150.

<sup>24</sup> Cf. Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 107 (1996) (referring to effectiveness as an administrative process value).

<sup>25</sup> See, e.g., Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 460 (1999) (discussing relevance of resource adequacy to effectiveness of regulation); Sidney A. Shapiro, *Agency Priority Setting and the Review of Existing Agency Rules*, 48 ADMIN. L. REV. 370, 374 (1996).

### B. Efficiency

Assuming multiple options of equal efficacy exist, some may operate more efficiently than others. Efficiency is relevant to the assessment of institutional design, and involves comparing the administrative costs a program imposes on government and the compliance costs imposed on the private sector.<sup>26</sup> For example, the costs of administering redundant structures “represent lost funds for other tasks. In other words, if resources are fixed, redundant structures impose additional opportunity costs.”<sup>27</sup>

### C. Equity

Although the concept of equity involves distributional considerations, there are different ways to determine whether a particular allocation of societal benefits and burdens is fair.<sup>28</sup> Policy analysts of regulatory issues sometimes use equity to refer to everything other than efficiency.<sup>29</sup> Dan Farber has used the term to include “any standard for determining the just distribution of resources.”<sup>30</sup> One widely used distinction is between distributive and corrective justice. The former deals with the allocation of desirable resources in proportion to the “possession of some morally relevant characteristic” such as humanity (which supports an egalitarian distribution) or virtue (which favors some more than others).<sup>31</sup> Corrective (or compensatory) justice “seeks to correct transactional wrongs” by requiring wrongdoers to compensate those whom they harm,<sup>32</sup> and may turn on whether mere causation is sufficient to trigger a compensatory obligation or whether fault is also required.<sup>33</sup> Making matters even more

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<sup>26</sup> Freeman & Rossi, *supra* note 4, at 1181-82. Efforts to improve efficiency seek to “minimize the administrative costs of enforcement.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972).

<sup>27</sup> O’Connell, *supra* note 1, at 1680.

<sup>28</sup> See CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA* 252 (1993) (discussing the “difficulties of sorting through . . . competing standards of ‘fairness’ to find the morally right one”).

<sup>29</sup> See, e.g., Wallace Wen-Yeu Wang, *Financial Institutions in Taiwan: An Analysis of the Regulatory Scheme*, 4 J. CHINESE L. 3, 33 (1990); Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1192 (1977). *But cf.* Douglas Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2160 (2005) (discussing market liberalism’s “view that efficiency, equity, and sustainability are separable goals”).

<sup>30</sup> Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791, 1794 (2003).

<sup>31</sup> Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 38 (2011). See also STONE, *supra* note 28, at 247-48 (describing distributive justice as dealing with “situational disparities,” not actions).

<sup>32</sup> Oman, *supra* note 31, at 38.

<sup>33</sup> *Id.*

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complex, distributional concerns may arise in several guises, including vertical,<sup>34</sup> horizontal,<sup>35</sup> geographical,<sup>36</sup> and temporal.<sup>37</sup>

*D. Legitimacy*

Although there is broad consensus that legitimacy is a core administrative law concern, and thus bears on the structure of government,<sup>38</sup> legitimacy encompasses multiple considerations, which scholars define and assess differently.<sup>39</sup> We focus here on the aspects of legitimacy most relevant to assessing alternative ways to organize government. Legitimacy may be defined as “the acceptability of [a]

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<sup>34</sup> Vertical equity implicates “the fairness of the distribution of wealth among different income groups.” Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 415 (1977). A disaster preparedness plan that facilitated evacuation of affected wealthy but not poor neighborhoods would raise vertical equity concerns. Vertical equity concerns are the focus of the environmental justice movement, which posits that all persons are equally entitled to protection from environmental harm. ROBERT R.M. VERCHICK, *FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD* 118 (2010).

<sup>35</sup> “Horizontal equity requires government to treat like persons alike.” Ellickson, *supra* note 34, at 415. A plan that required individuals of similar income levels to pay different amounts to finance protection measures, on the basis of some characteristic unrelated to the degree of benefit individuals would accrue from the plan, would invoke horizontal equity concerns.

<sup>36</sup> Geographic concerns may arise from a regime that concentrates health and safety risks in a particular location, such as the area surrounding a waste disposal facility or a high-volume pollution source.

<sup>37</sup> Temporal equity deals with “the preservation or defeat of expectation interests.” RICHARD B. STEWART & JAMES B. KRIER, *ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS AND NOTES* 168 (1978). Temporal concerns, for example, may arise when a government program foists costs on future generations that will not be able to enjoy the benefits of the resource allocations that produce those costs. *See generally* Neil H. Buchanan, *What Kind of Environment Do We Owe Future Generations?*, 5 LEWIS & CLARK L. REV. 339 (2011). These concerns would be implicated, for example, if the government chose to indefinitely forestall taking steps to avoid damage caused by the activities of the present generation, even though it would be far more expensive to resolve the issue on a deferred basis.

<sup>38</sup> *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) (“From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.”); Sidney A. Shapiro, et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 463 (2012) (“The history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.”).

<sup>39</sup> *See* Shapiro, et al., *supra* note 38, at 466 (“Legitimacy is a notoriously treacherous concept.”).

regulation to those involved in its development,”<sup>40</sup> which may be enhanced through the availability of opportunities for public participation.<sup>41</sup> Social psychologists contend that participation enhances perceptions of legitimacy “independently of whether outcomes ultimately favor . . . participants.”<sup>42</sup> In addition, opportunities to participate are consistent with democratic government.<sup>43</sup>

The legitimacy of a regulatory system also turns on the degree to which it protects against deviation from legislative goals due to capture of regulators by special interests.<sup>44</sup> Regulators with conflicts of interest are especially vulnerable to capture.<sup>45</sup> Procedural mechanisms such as transparency and opportunities to participate can combat capture.<sup>46</sup> So, too, can the availability of judicial review, which may be invoked by stakeholders to prevent those implementing regulatory programs from straying beyond legislative bounds.

Similarly, perceptions that decision makers are honest, unbiased<sup>47</sup> and competent promote legitimacy.<sup>48</sup> In addition, assigning tasks to those with

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<sup>40</sup> Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 63 (2000).

<sup>41</sup> Transparency also promotes legitimacy because it “tends both to improve the quality of decisions and to facilitate accountability to the electorate.” William H. Simon, *Democracy and Organization: The Further Reformation of American Administrative Law*, at 4, 7-8, <http://ssrn.com/abstract=2175121> (arguing that transparency fosters “openness to ongoing diffuse democratic pressures”).

<sup>42</sup> Freeman & Langbein, *supra* note 40, at 67 (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988)).

<sup>43</sup> *See id.* at 133 (noting that broad participation and inclusiveness are generally laudable goals and that, “all things being equal,” greater participation is more consistent with democratic values than less participation). Cynthia Farina has called government decision making that reflects the “will of the people” “the wellspring of legitimacy.” Cynthia R. Farina, *The Consent of the Governed: Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 990 (1997). Government processes that are fair enhance “identification with, and commitment to, the legal-political system.” *Id.* at 1035.

<sup>44</sup> Freeman & Rossi, *supra* note 4, at 1185-87 (addressing the risks of capture of agencies). A captured agency seeks to promote the agenda of those to which it is beholden, even if that agenda deviates from statutory goals.

<sup>45</sup> *See* Arthur E. Wilmarth, Jr., *The OCC’s Preemption Rules Exceed the Agency’s Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 232 (2004).

<sup>46</sup> Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INTL. L. 883, 946 (2009).

<sup>47</sup> Farina, *supra* note **Error! Bookmark not defined.**, at 1035.

<sup>48</sup> Legitimacy is the result of public confidence in the competence and trustworthiness of officials. Terence R. Mitchell & William G. Scott, *Leadership Failures, the Distrusting Public, and Prospects of the Administrative State*, 47 PUB. ADMIN. REV. 445, 446 (1987). Vesting decision-making authority in those with expertise on issues within their jurisdiction can enhance the perception of competence, and therefore foster legitimacy.

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expertise and providing them the tools to perform such tasks can also increase the likelihood that programs will operate effectively, illustrating that the four values we have identified are inter-related and may overlap.<sup>49</sup> Likewise, the requirement that agencies provide reasons for their decisions that are based on facts and rooted in the agencies' statutory authority provide constraints that promote legitimacy.<sup>50</sup>

*E. Balancing Values in Allocating Government Authority*

The four evaluative yardsticks discussed above are not meant to be an exclusive recitation of the values implicated by government organization or reorganization. They are among the most important measures for assessing an allocation of governmental authority, however. In rare instances, all four criteria may support a particular allocation. Most of the time, however, an initiative designed to promote one of the measures is likely to adversely affect one or more of the others.<sup>51</sup> The proper balance among the four criteria identified here will necessarily be context-specific.<sup>52</sup> For example, it may be preferable to sacrifice some degree of effectiveness if the most effective option among several that promise to achieve regulatory goals at least partially is also harshly inequitable or vests in decision-makers authority that threatens legitimacy. These kinds of tradeoffs of course are common under the American system of government.<sup>53</sup> As long as the yardsticks are clearly identified and the

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<sup>49</sup> See Freeman & Rossi, *supra* note 4, at 1185 (arguing that programs capable of improving analysis by adding data and expertise are “likely to make decisions better”). Another overlap involves consistent treatment of similarly situated entities, which promotes both a sense of non-arbitrariness (and therefore of legitimacy) and of fair treatment.

<sup>50</sup> This requirement of “deliberation” enhances accountability by guarding against arbitrariness. David L. Markell & Emily Hammond Meazell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, at 4, <http://ssrn.com/abstract=2127838>. The reasons requirement provides evidence of a commitment to rationality. *Id.* at 14.

<sup>51</sup> See, e.g., Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78 (2012), [http://www.harvardlawreview.org/issues/125/march12/forum\\_868.php#\\_ftnref](http://www.harvardlawreview.org/issues/125/march12/forum_868.php#_ftnref): (“So long as there are multiple things for the government to do, there will always be a question about what organizational structure will allow it to be most successful in dealing with the interactions among . . . different goals.”).

<sup>52</sup> Accountability, for example, “guarantees responsiveness, although not necessarily effectiveness.” *Id.* at 1719.

<sup>53</sup> See, e.g., *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (stating that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government . . . .”); *id.* at 958-59 (stating that “the Framers ranked other values higher than efficiency.”). The Court, in striking down the legislative

impact of a particular allocation on each is assessed, policymakers will be able to make informed decisions on the best way to achieve an appropriate balance among them. Parts III through V below illustrate in more detail the kinds of tradeoffs likely to be implicated in choosing among possible allocations of authority.

## II. SUBSTANTIVE AND FUNCTIONAL ALLOCATIONS OF AUTHORITY

Regulatory authority can be assigned in two different ways. First, an agency's jurisdiction can be determined on the basis of the subject matter it is authorized to regulate or manage (such as activities that result in air pollution or mineral extraction on public lands). Second, jurisdiction can be defined in terms of the functions an agency performs, such that different agencies may be responsible for performing discrete tasks (such as standard-setting, permitting, and enforcement) within the same substantive area. For example, as illustrated in Figure 1 below, although federal pollution control authority could be apportioned into substantive silos according to the particular type of resource (e.g., air, water, or solid waste), such authority could also be divided into functional categories according to the governmental activity at issue (e.g., standard setting, permitting, and enforcement). Alternatively (and more commonly), a legislature or administrative agency might adopt a hybrid of substantive and functional allocations in creating or reorganizing authority, in which agencies are only provided authority over certain regulatory functions for particular types of resources or regulatory problems.<sup>54</sup>

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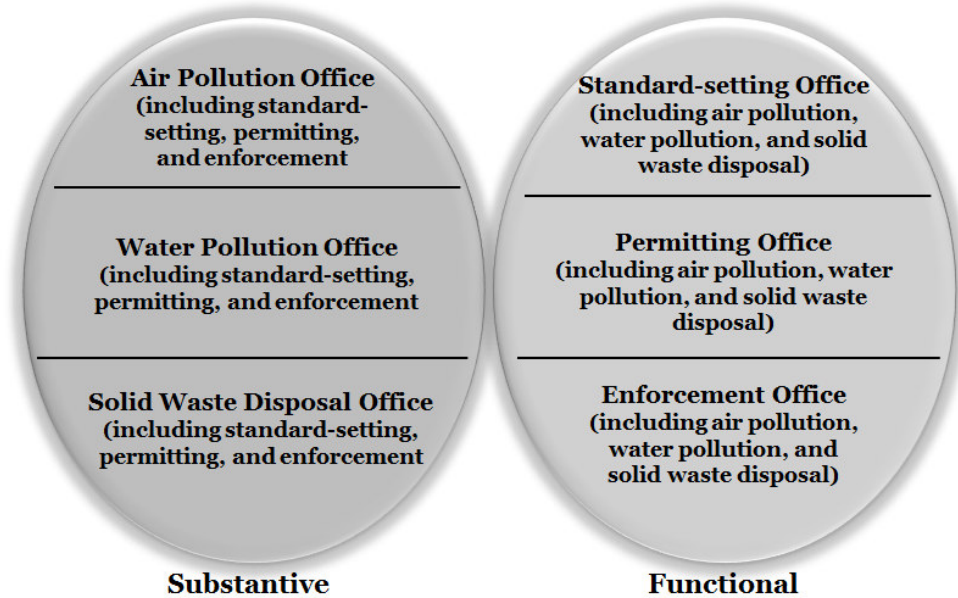
veto in *Chadha*, emphasized the Framers' choice to sacrifice efficient for accountable, democratic government through the imposition of requirements such as bicameralism and presentment. *Id.* at 959.

<sup>54</sup> See *infra* notes 69-74 and accompanying text (describing organization of EPA and the Internal Revenue Service).



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**Figure 1. Substantive and Functional Jurisdiction**



In characterizing governmental jurisdiction, primary attention tends to be given to evaluating agency management based on the scope of the substantive authority of the governmental entity. However, regulatory authority is also consistently apportioned based on the function or functions that a particular governmental institution may exercise. Though some scholars have noted the existence of division of authority along functional lines,<sup>55</sup> the significance of this component is considerably underappreciated in the regulatory design literature.<sup>56</sup>

*A. Substantive Jurisdiction*

Perhaps the most elementary component for assessing how authority is allocated in the management of environmental problems is substantive jurisdiction. Administrative agencies are allocated limited substantive authority to regulate or manage specific social issues or problems. Workplace health and safety falls within the purview of the Occupational Safety and Health Administration. The U.S. Department of Agriculture deals with the agriculture industry. Transportation infrastructure is

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<sup>55</sup> Scholars investigating government organization who do refer to agency functions frequently do so in a different sense than we are using that term. Rather than focusing on the different kinds of tasks agencies perform, these scholars use functions to describe the scope of an agency's substantive jurisdiction (such as the authority to regulate air pollution, but not water pollution). *See, e.g.*, Hyman & Kovacic, *supra* note 3, at 25 (discussing the allocation of authority among three agencies to provide services for veterans).

<sup>56</sup> *See infra* Part IV.A.1.

addressed by the Federal Highway Administration and the Department of Transportation. Immigration is an activity supervised by the U.S. Citizenship and Immigration Services. The Interstate Commerce Commission, before Congress abolished it, managed interstate commerce such as transportation of goods by rail. The Centers for Disease Control and Prevention conduct disease research and coordinate disease prevention measures. The Federal Emergency Management Agency is charged with conducting disaster planning and management.

In environmental regulation, administrative authority is typically restricted to regulation or management of a particular environmental medium or waste. Federally designated wetlands are regulated by the United States Army Corps of Engineers; air quality and non-nuclear hazardous and solid waste are regulated by the U.S. Environmental Protection Agency (EPA) and state air agencies; the Nuclear Regulatory Commission and Department of Energy control nuclear power generation and waste management.

Regularly, substantive authority is divided based on particular features or components of a medium. For example, surface water quality is regulated by EPA and designated state water quality agencies (such as California's State Water Resources Control Board), while the allocation of water supply falls within the domains of different state and local water resources agencies (such as the California Department of Water Resources and Metropolitan Water District of Southern California). Similarly, management of terrestrial or freshwater (including endangered or threatened) species is under the jurisdiction of the Interior Department's United States Fish and Wildlife Service (FWS), while marine (including endangered or threatened) species are managed by the Commerce Department's National Marine Fisheries Service. Public land management is divided based on particular land management goals. At the federal level alone, the national forests are managed by the United States Forest Service (USFS), the national parks by the National Park Service (NPS), wildlife refuges by the FWS, and federal lands not otherwise specified by the Bureau of Land Management (BLM). Each of these land management agencies is guided by a different management standard, with the NPS and the FWS being charged primarily with the duty to preserve natural resources and provide recreational opportunities, while the USFS and the BLM are required to promote a broader range of multiple uses of the lands under their jurisdiction.<sup>57</sup>

Such division, of course, is not unique to pollution control or natural resources law. Drugs, cosmetics, and some food products are generally

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<sup>57</sup> See 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 6:14-6:17 (West 2d ed. 2007).

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regulated by the Food and Drug Administration, while other foods (meat, poultry, and processed egg products) are under the jurisdiction of the United States Department of Agriculture's Food Safety and Inspection Service.<sup>58</sup> General product safety is regulated by the Federal Consumer Product Safety Commission, while pesticide licensing is administered by EPA.<sup>59</sup> The Dodd-Frank Act<sup>60</sup> vested authority to regulate providers of consumer financial products and services, including insured banks, savings and loans, and large credit unions, in one agency, but delegated to a different agency regulatory control over smaller depository institutions, and retained authority in still other agencies to regulate transactions in securities and commodities futures.<sup>61</sup> In addition, "informational privacy is governed by a variety of different laws, administered by different agencies . . . setting forth divergent requirements governing the treatment of information by type and business sector."<sup>62</sup>

Relatedly, substantive authority may be delegated to a particular authority in recognition of that agency's technical expertise that may be brought to bear on the regulatory problem. For example, an expertise in atmospheric chemistry is useful for understanding and regulating air quality, an ecology background for managing biological resources, a public health or medical background for disease prevention, or forestry expertise for forest management.<sup>63</sup> California has vested multiple agencies with authority to regulate different aspects of the electric utility industry to reflect the expertise of each agency.<sup>64</sup> Similarly, scholars have

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<sup>58</sup> See <http://www.fda.gov/Drugs/default.htm>, <http://www.fda.gov/Cosmetics/default.htm>; <http://www.fda.gov/Food/default.htm> (FDA authorities); [http://www.fsis.usda.gov/About\\_Fsis/index.asp](http://www.fsis.usda.gov/About_Fsis/index.asp) (FSIC authorities).

<sup>59</sup> Compare <http://www.cpsc.gov/about/about.html> (describing CPSC jurisdiction) with <http://www.epa.gov/pesticides/> (linking to EPA pesticide regulatory initiatives).

<sup>60</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>61</sup> Elizabeth R. Schiltz, *The Paradox of the Global and the Local in the Financial Crisis of 2008: Applying the Lessons of Caritas in Veritate to the Regulation of Consumer Credit in the United States and the European Union*, 26 J.L. & RELIGION 173, 183-84 (2010-2011).

<sup>62</sup> Kenneth A. Bamberger, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 257 (2011).

<sup>63</sup> For discussion of how different scientific disciplines affect the design and management of natural resource regulatory systems, see Eric Biber, *Which Science? Whose Science? How Scientific Disciplines Can Shape Environmental Law*, 79 U. CHI. L. REV. 471 (2012).

<sup>64</sup> See Timothy P. Duane, *Greening the Grid: Implementing Climate Change Policy Through Energy Efficiency, Renewable Portfolio Standards, and Strategic Transmission System Investments*, 34 VT. L. REV. 711, 743-44 (2010).

urged expansion of the Copyright Office's authority over complex and dynamic issues in which it has expertise.<sup>65</sup>

### *B. Functional Jurisdiction*

Despite the relative inattention to it in the academic literature, the nature of a governmental entity's functional authority is perhaps of equal importance to its substantive jurisdiction. Governmental authority may be organized according to the particular regulatory activities or tasks in which the agency is authorized to engage. Thus, although a statute may delegate to several agencies the authority to regulate a particular set of private activities, each agency may be in charge of a particular aspect of the regulatory program. One agency, for example, may be responsible for collecting information needed to make regulatory decisions, while another may be charged with using that information to adopt regulatory standards that constrain private conduct. The full array of agency functions include monitoring (whether ambient,<sup>66</sup> compliance<sup>67</sup> or effect and effectiveness monitoring<sup>68</sup>); scientific research and data generation; information organization and distribution; funding; planning; standard setting; implementation and permitting; and enforcement.

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

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<sup>65</sup> See, e.g., Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 148 (2004). But cf. Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 130 (2002) (criticizing New York's child protection laws on ground that "[d]omestic violence expertise within the agency is isolated and without substantive authority").

<sup>66</sup> See, e.g., Eric Biber, *The Problem of Environmental Monitoring*, 83 U. COLO. L. REV. 1 (2011) (detailing problems with ambient monitoring by resource agencies).

<sup>67</sup> See, e.g., Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,252, 35,253 (June 1, 2000) (defining compliance monitoring).

<sup>68</sup> See, e.g., *id.* (defining effect and effectiveness monitoring to include whether the action or plan is achieving its stated goals and objectives).

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water quality, respectively.<sup>69</sup> These subdivisions often have authority over a range of functions, including monitoring, standard setting, and implementation/permitting, with authority further subdivided either by substantive subcategory and/or by functional activity.<sup>70</sup>

However, agencies also often contain divisions or offices dedicated to particular regulatory functions, regardless of their substantive focus. At EPA, these include the Office of Enforcement and Compliance Assurance, the Office of Environmental Information, the Office of General Counsel, the Office of Inspector General, the Office of International and Tribal Affairs, and the Office of Research and Development.<sup>71</sup> These offices are charged with enforcement, information gathering, and research, respectively, across the entire range of EPA's substantive authority.<sup>72</sup> The Internal Revenue Service has separate offices to handle tax issues concerning small businesses and tax exempt organizations, a substantive division of authority, but it also reflects functional divisions, with separate offices for privacy and disclosure, whistleblowers, and criminal investigations, all of which cut across substantive lines.<sup>73</sup> Agencies routinely have separate offices to deal with congressional relations, media and communications, and legal matters, regardless of the substantive nature of the issue for which negotiations with the legislature, outreach of the media, or legal advice is required.<sup>74</sup>

Such division of functional authority also occurs between agencies. The federal Clean Water Act, for example, creates shared substantive regulatory authority between EPA and the Corps of Engineers in controlling wetlands development. The functions of the two agencies

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<sup>69</sup> EPA ORGANIZATIONAL STRUCTURE, <http://www.epa.gov/aboutepa/organization.html> (last visited Feb. 6, 2013).

<sup>70</sup> In 1993, EPA reorganized the Office of Compliance and Enforcement by centralizing in it enforcement authority previously dispersed among five offices. *U.S. Environmental Protection Agency Office of Environmental Justice in the Matter of the Fifth Meeting of the Environmental Justice Advisory Council*, 9 ADMIN. L.J. AM. U. 623, 663 (1995). This shift illustrates that the structural relationships among offices within a single agency may differ along each of the three dimensions identified in this Article, just as relationships may differ among separate agencies.

<sup>71</sup> EPA ORGANIZATIONAL STRUCTURE, *supra* note 69.

<sup>72</sup> See Alfred E. Marcus, *EPA's Organizational Structure*, 54-AUT. L. & CONTEMP. PROBS. 5, 23 (1991).

<sup>73</sup> See [http://www.irs.gov/pub/irs-news/irs\\_org\\_chart\\_2012\\_.pdf](http://www.irs.gov/pub/irs-news/irs_org_chart_2012_.pdf) (organizational chart of the IRS).

<sup>74</sup> See, e.g., United States Department of Agriculture, *USDA Agencies and Offices*, [http://www.usda.gov/wps/portal/usda/usdahome?navid=AGENCIES\\_OFFICES\\_C](http://www.usda.gov/wps/portal/usda/usdahome?navid=AGENCIES_OFFICES_C) (describing offices within the Department of Agriculture, including the Office of Communications, the Office of Congressional Relations, and the Office of the General Counsel).

largely differ, however. EPA and the Corps are jointly responsible for issuing guidelines for the issuance of dredge and fill permits that allow for the filling of wetlands,<sup>75</sup> but the Corps is vested with the power to issue permits, subject to only limited EPA override.<sup>76</sup> Similarly, under the Clean Air Act, EPA is charged with developing national ambient air quality standards to protect the public health and welfare,<sup>77</sup> but the states are primarily responsible for devising plans to implement and achieve those standards.<sup>78</sup>

Furthermore, though most regulatory authority is delegated firstly based on substantive scope, with functional jurisdiction usually a secondary organizing criterion, some agencies are organized with function as the principal basis for their authority. For instance, Congress has delegated to the United States Government Accountability Office responsibility for audit, investigation, reporting, and evaluation of the federal agencies, regardless of the substantive area of regulation.<sup>79</sup> Similarly, the White House Council on Environmental Quality has been granted responsibility to oversee implementation by all federal agencies of environmental impact assessment under the National Environmental Policy Act,<sup>80</sup> including promulgation of guidelines and dispute resolution when there is interagency conflict.<sup>81</sup> The United States Geological Survey is a research-only agency that generates biological, geographical, geological, and hydrological information that helps inform policy by regulatory authorities, but has no regulatory functions of its own.<sup>82</sup> More broadly, of course, the separation of legislative, executive, and adjudicative power among the branches of government is a form of functional jurisdiction. In this regard, William Buzbee has noted that a type of regulatory fragmentation, “institutional fragmentation,” is the result of an allocation of authority to “diverse institutions such as legislatures, agencies, courts and legally empowered citizens.”<sup>83</sup> As more fully explored in Part IV, one of the principal aims of this Article is to encourage policymakers and scholars to focus more attention on whether

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<sup>75</sup> 33 U.S.C. § 1344(b) (2006).

<sup>76</sup> *Id.* § 1344(a).

<sup>77</sup> 42 U.S.C. § 7409(b) (2006).

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

<sup>79</sup> <http://www.gao.gov/about/index.html>.

<sup>80</sup> 42 U.S.C. §§ 4321-4375 (2006).

<sup>81</sup> The Council on Environmental Quality – About, <http://www.whitehouse.gov/administration/eop/ceq/about> (“CEQ . . . acts as a referee when agencies disagree over the adequacy of such assessments.”).

<sup>82</sup> United States Geological Survey, About USGS, <http://www.usgs.gov/aboutusgs/>.

<sup>83</sup> William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323, 348 (2005).

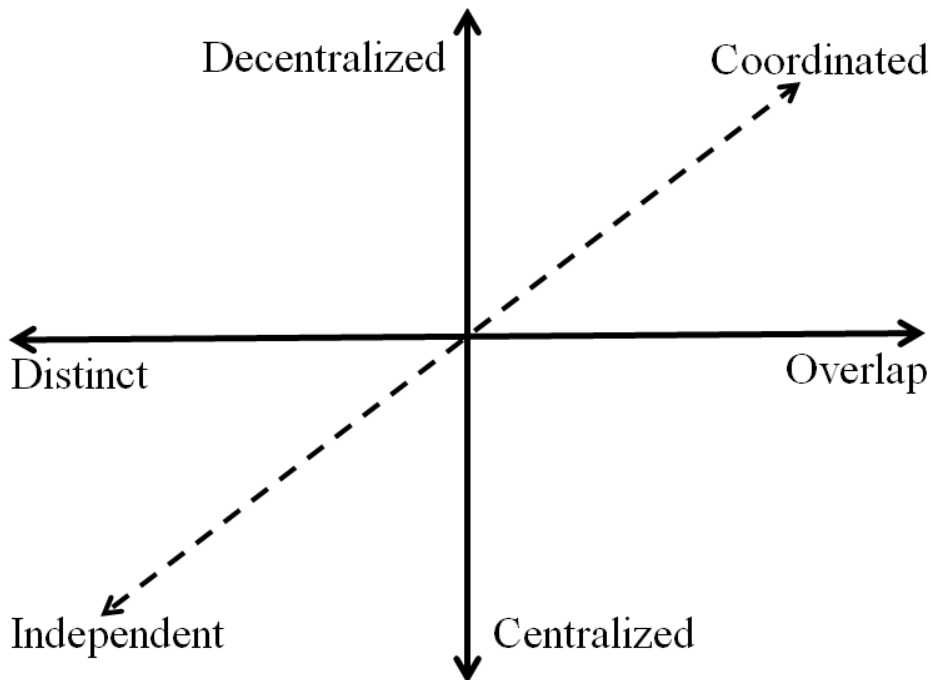
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evaluating and allocating agency authority along functional rather than substantive lines holds greater promise of achieving the policy goals of a particular government program at least cost to competing policy goals.

III. A TAXONOMY OF ALLOCATION OF AUTHORITY

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

*Figure 2. Dimension Relationships*



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

### A. *Decentralized versus Centralized Authority*

At least in the legal academic literature, perhaps the most frequently analyzed dimension for characterizing the allocation of regulatory authority focuses on the scale or level of government which is granted jurisdiction. As illustrated in Figure 3 below, governmental authority could be allocated anywhere in a range between more or less centralized. On one extreme, a regime may be preemptively federal (e.g., the regulation of immigration,<sup>84</sup> space exploration,<sup>85</sup> or nuclear production<sup>86</sup> or waste).<sup>87</sup> On the other end of the spectrum are regimes where authority is primarily local, such as land use zoning or the administration of water rights. In between, there is a vast range of hybrids of federal, state, and local authority. Some regimes involve various federal agencies;<sup>88</sup> others consist of a federal regulator and single state regulator whose standards other states can opt to follow;<sup>89</sup> still others a combination of both federal and state agencies.<sup>90</sup>

Accordingly, one key question for this dimension is whether authority over resources is primarily decentralized to a local or state jurisdiction or more centralized at the federal level. Another question, however, is whether regulatory authority within a certain level is delegated to one entity or divided among two or more entities. Thus, if a statute allows only federal agencies to address a problem (preempting supplemental state or local regulation), the regime is centralized compared to one in which

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<sup>84</sup> *But cf.* *Arizona v. U.S.*, 132 S. Ct. 2492 (2012) (refusing to enjoin implementation of state law requiring police to determine the immigration status of persons they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is” an unlawful alien).

<sup>85</sup> *Cf.* Van C. Ernest, Note, *Third Party Liability of the Private Space Industry: to Pay What No One Has Paid Before*, 41 CASE W. RES. L. REV. 503, 533 (1991) (referring to “extensive federal regulation of space exploration”).

<sup>86</sup> *See* *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (addressing impact of exclusive federal authority to regulate design and operation of nuclear power plants for health and safety, but not economic purposes).

<sup>87</sup> *Id.* at 218 (discussing Department of Energy’s control over nuclear waste disposal).

<sup>88</sup> *See, e.g.*, 16 U.S.C. § 1536(a)(2) (2006) (requiring consultation among federal agencies on impacts of proposed activities on endangered species); 42 U.S.C. § 7475(d) (2006) (establishing role for federal land management agencies in EPA review of state disposition of permit applications for construction of sources whose emissions might affect federal lands such as national parks).

<sup>89</sup> An example is automobile tailpipe emission regulation under the Clean Air Act, which grants EPA exclusive standard-setting authority, but allows California regulators to set alternative standards that, if approved by EPA, other state agencies can follow. 42 U.S.C. §§ 7507, 7543 (2006).

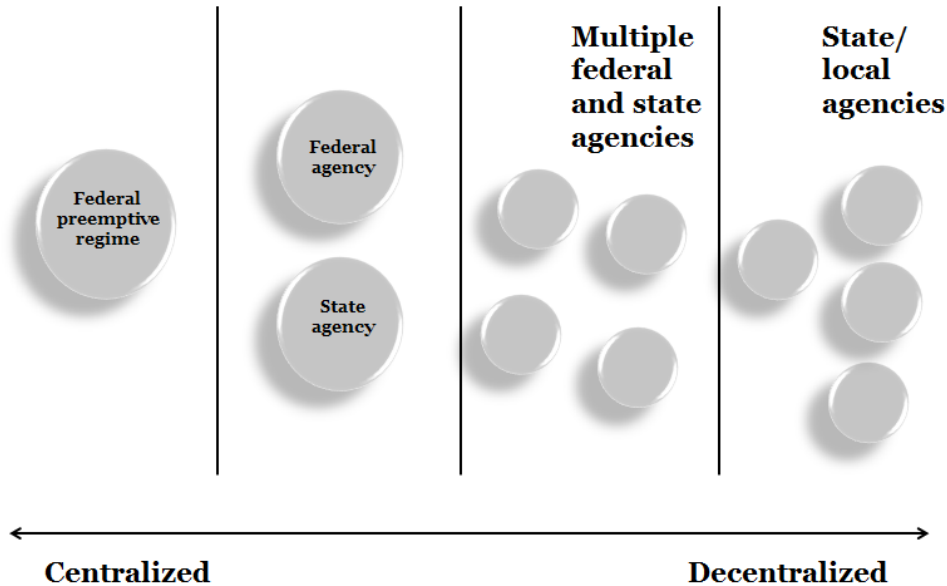
<sup>90</sup> For example, stationary source regulation under the Clean Air Act, 42 U.S.C. § 7402 (2006), or public land management. *See* 1 COGGINS & GLICKSMAN, *supra* note 57, at § 1:1.



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regulators in all fifty states were allowed to regulate. Within the federal government, regulatory authority could be fully centralized in one agency or decentralized by dividing authority among multiple federal agencies.<sup>91</sup> We regard the degree of fragmentation of authority among multiple regulators as a second aspect of characterizing a regulatory regime as centralized or decentralized.<sup>92</sup>

**Figure 3. Centralized versus Decentralized Authority**



<sup>91</sup> An example may best illustrate the point. With some exceptions, the authority to regulate federally owned lands is the sole prerogative of the federal government, so that the authority is centralized. In those substantive areas in which states retain concurrent jurisdiction, such as wildlife management, authority is more decentralized. *See* 3 COGGINS & GLICKSMAN, *supra* note 57, § 32:8. If Congress had vested federal land management authority in a single federal agency, authority would have been centralized still further. Instead, jurisdiction to manage different kinds of federal lands systems (e.g., national parks, national forests, wildlife refuges, and other public lands) has been delegated to (and decentralized among) a group of agencies, including the National Park Service, the National Forest Service, the FWS, and the Bureau of Land Management.

<sup>92</sup> Similarly, even if authority is delegated exclusively to one agency, federal or state, that agency may contain multiple offices, divisions, or bureaus. If so, authority is decentralized within the agency, and authority among the components within the agency can be overlapping or distinct, and coordinated or independent. For purposes of this Article, when we refer to a fully centralized agency, we mean an agency that has no internal subdivisions. We recognize, however, that subdivisions within an agency may be aligned at different points along the overlap and coordination dimensions, just as multiple agencies may be so aligned.

## 1. Decentralized Authority

For centuries, at least as far back as the origination of the concept of subsidiarity,<sup>93</sup> scholars have promoted the idea that authority is best allocated at the local level.<sup>94</sup> A popular rationale for decentralized regulation is its ability to leverage local knowledge and expertise,<sup>95</sup> while a related, second justification might be to ensure regulation is better tailored to local conditions, preferences, and economic conditions.<sup>96</sup> We refer to these justifications respectively as the expertise and diversity rationales for decentralized regulation. Third, many argue that decentralized government of this first kind allows opportunities for regulatory experimentation that can encourage innovation.<sup>97</sup> These three justifications for localizing regulation are primarily (although not exclusively) based on the pursuit of more effective regulation.<sup>98</sup>

A related and commonly purported benefit of decentralized governance is that interlocal competition maximizes social utility by

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<sup>93</sup> Subsidiarity is the organizing principle “that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.” Oxford English Dictionary, <http://www.oed.com/view/Entry/193007?redirectedFrom=subsidiarity#eid>. It is a general principle of European Union law. See Consolidated Version of the Treaty on European Union, Article 5(3).

<sup>94</sup> See Jeffrey S. Dornbos, *All (Water) Politics Is Local: A Proposal for Resolving Transboundary Water Disputes*, 22 *FORDHAM ENVTL. L. REV.* 1, 17 (2010) (“[T]he Constitution’s structure of reserving non-enumerated powers to the states ‘suggests a principle of ‘subsidiarity’”) (citation omitted).

<sup>95</sup> See, e.g., Dornbos, *supra* note 94, at 17. Professor Vermeule distinguishes between “local” and “global” knowledge, with proponents of decentralized authority tending to prefer context-specific knowledge about economic or regulatory programs, while advocates of centralized programs tend to focus on the benefits of a broader “synoptic” approach to regulation. Adrian Vermeule, *Local and Global Knowledge in the Administrative State*, at 2, 18, <http://ssrn.com/abstract=2169939>. Much as we do in this article with respect to the three dimensions we address, Professor Vermeule recognizes that the distinction between contextual and synoptic knowledge is “highly stylistic, whereas in reality there is a continuum between the two extremes and everything is a matter of degree.” *Id.*

<sup>96</sup> See, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 *N.Y.U. ENVTL. L.J.* 130, 136-37 (2005).

<sup>97</sup> See, e.g., Dornbos, *supra* note 94, at 17 (noting that states may “act as ‘laboratories’ for innovative solutions”); David L. Markell, *States as Innovators: It’s Time for a New Look to Our “Laboratories of Democracy” in the Effort to Improve Our Approach to Environmental Regulation*, 58 *ALB. L. REV.* 347, 355 (1994) (describing capacity of state and local governments to act as “innovation centers” for environmental regulation by providing “the opportunity to try a wide variety of approaches simultaneously or within short periods of time”); Adler, *supra* note 96, at 137.

<sup>98</sup> Though primarily based on promoting effective regulation, the diversity justification for decentralization—allowing regulation more closely tailored to local conditions and circumstances—can also be justified on equity grounds.

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allowing each local community to shape its interests and goals.<sup>99</sup> As indicated below, however, though some level of decentralization may be a necessary condition for competition to occur, we think that competition of this kind flows more precisely from what we define as independently structured government authority than from decentralization.<sup>100</sup> Finally, some also argue that localized allocation of authority makes decision-makers more accessible and therefore promotes more accountable and democratic governance.<sup>101</sup> A related claim postulates that local regulators tend to be more accountable than regulators at higher government levels.

Relying on these various justifications, before 1960 state and local laws were the only significant governmental constraints on pollution in the United States, with a few exceptions.<sup>102</sup> These included state common law causes of action such as nuisance, trespass, negligence, and strict liability, as well as local land use regulations designed to segregate industrial from residential uses, thereby minimizing opportunities for pollution produced by the former to harm the latter.<sup>103</sup> Other examples of traditional state and local regulation that the Supreme Court has identified include matters of health care and protection of public safety,<sup>104</sup> such as regulation of vaccines,<sup>105</sup> advertising,<sup>106</sup> family and probate law,<sup>107</sup> employee welfare

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<sup>99</sup> See generally Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (promoting decentralization model premised on interlocal competition for consumer-voters); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (same). According to one source, “[u]nder competitive federalism, state and federal governments compete with one another to provide regulation to a mobile citizenry.” Bruce Johnsen, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 405 (2004).

<sup>100</sup> See *infra* Part III.C.2.

<sup>101</sup> See, e.g., GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (PRINCETON U. PRESS 1999).

<sup>102</sup> The River and Harbors Act of 1899, 33 U.S.C. § 407, prohibited the discharge of “refuse matter” without a federal permit, but the program’s principal objective was to promote commerce by preserving navigability. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 729 (2006) [hereinafter Glicksman, *Mutation*].

<sup>103</sup> Local governments also enacted smoke control ordinances and laws. Glicksman, *Mutation*, *supra* note 102, at 729-30.

<sup>104</sup> *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008). *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002); *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000).

<sup>105</sup> *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1096 n.15 (2011).

<sup>106</sup> *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

<sup>107</sup> *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001).

benefit plans,<sup>108</sup> protection of the security of real estate titles,<sup>109</sup> insurance contracts,<sup>110</sup> education, and enforcement of criminal laws.<sup>111</sup>

It is important to note that though decentralized authority is most likely to be associated with local or state regulatory control, federal regulatory authority could be modified to be more or less decentralized (or fragmented) as well. Some of the same justifications for local or state regulatory authority may be similarly levied for delegating jurisdiction over particular substantive areas or regulatory functions to a variety of disparate federal agencies. Particularized expertise<sup>112</sup> and regulatory experimentation to promote innovation<sup>113</sup> may lead to the allocation of federal authority away from a heavily consolidated model toward one with more decentralized federal jurisdiction. These expertise and experimentation rationales tout the effectiveness advantages of decentralized regulation. The diversity and accountability rationales for decentralizing regulation to state or local authorities, however, would not support this second aspect of decentralization.

## 2. Centralized Authority

Despite the diversity, experimentation, democratic, and expertise critiques of centralized government,<sup>114</sup> many legislatures and scholars have increasingly accepted that at least for some regulatory problems, centralization makes sense. Centralization can take advantage of

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<sup>108</sup> *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 330 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995).

<sup>109</sup> *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

<sup>110</sup> *Metrop. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

<sup>111</sup> *U.S. v. Lopez*, 514 U.S. 549 (1995).

<sup>112</sup> See, e.g., Freeman & Rossi, *supra* note 4, at 1142 (noting that dispersal of authority can “harness the unique expertise and competencies of different agencies,” and that these benefits may justify resulting policy inconsistencies and wasteful redundancy).

<sup>113</sup> See Alejandro E. Camacho, *Transforming the Means and Ends of Natural Resources Management*, 89 N.C. L. REV. 1405, 1423 (2011) (noting how decentralized governance can promote “regulatory experimentation to reduce uncertainty”).

<sup>114</sup> See e.g., Liesbet Hooghe & Gary Marks, *Unraveling the Central State, But How?*, POLITICAL SCIENCE SERIES, INSTITUTE FOR ADVANCED STUDIES, VIENNA 6 (2003); available at: [http://aei.pitt.edu/530/2/pw\\_87.pdf](http://aei.pitt.edu/530/2/pw_87.pdf) (“Centralized government is not well suited to accommodate diversity. Ecological conditions may vary from area to area. . . . Preferences of citizens may also vary sharply across regions within a state, and if one takes such heterogeneity into account, the optimal level of authority may be lower than economies of scale dictate.”); Dornbos, *supra* note 94, at 17 (“[O]ver-centralized approaches to environmental regulation are inflexible and do not adequately account for local environmental conditions.”); ENVIRONMENTAL FEDERALISM 259, 263 (Terry L. Anderson & Peter J. Hill eds., 1997) (arguing that a centralized approach to environmental justice issues would be unresponsive to local conditions and needs).

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economies of scale that are forfeited if regulatory authority is dispersed.<sup>115</sup> Some have argued, for example, that certain government functions, such as research or standard setting, should be centralized at the federal level because of the economies of scale of a single authority administering the function.<sup>116</sup> This is obviously an argument premised on the comparatively greater administrative efficiency of centralized regulation.

In addition, authority may be best centrally allocated at the federal level because of the national character of the issues involved or because of collective action concerns. Some regulatory matters have national footprints that are best addressed by a federal authority. These might include immigration policy,<sup>117</sup> pension plan administration,<sup>118</sup> protection of intellectual property rights,<sup>119</sup> protection of union-related advocacy,<sup>120</sup> or control of activities on the high seas,<sup>121</sup> such as maritime commerce.<sup>122</sup> In environmental law and other contexts, some harms may cross jurisdictional lines, necessitating more centralized regulatory control to prevent or manage interstate spillovers.<sup>123</sup> Trade wars among the states<sup>124</sup> and state product labeling requirements<sup>125</sup> have been characterized as other kinds of activity that generates interstate spillovers that justify centralized federal regulation. Similarly, state public utility regulators have adopted policies designed to benefit in-state interests at the expense of outsiders.<sup>126</sup> In addition, states can export economic burdens to other

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<sup>115</sup> O'Connell, *supra* note 1, at 1680.

<sup>116</sup> See, e.g., Esty, *Environmental Federalism*, *supra* note 6, at, 614; Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1562 (1999) (discussing value of economies of scale through consolidation of scientific or analytic work needed for environmental regulation); Adler, *supra* note 96, at 148.

<sup>117</sup> See J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363, 423 (2009).

<sup>118</sup> See *Boggs v. Boggs*, 520 U.S. 833, 838-39 (1997).

<sup>119</sup> See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964).

<sup>120</sup> See *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 76 (2008).

<sup>121</sup> See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986).

<sup>122</sup> See *U.S. v. Locke*, 529 U.S. 89, 103 (2000); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982).

<sup>123</sup> Adler, *supra* note 96, at 139; ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT 11 (Richard L. Revesz et al. eds., 2000); Daniel A. Farber, *Climate Adaptation and Federalism: Mapping the Issues*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 259, 266 (2009).

<sup>124</sup> See Johnsen, *supra* note 99, at 449.

<sup>125</sup> See Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 666 (1985).

<sup>126</sup> See Amy L. Stein, *The Tipping Point of Federalism*, 45 CONN. L. REV. (forthcoming 2012) [MS at 37].

jurisdictions if they regulate the sale of products that produce local harms but that are manufactured (and produce employment and economic benefits) in other states.<sup>127</sup> In these contexts, centralized regulatory structures may be more effective than decentralized regulation.<sup>128</sup> Finally, James Madison and others have argued that centralized regulation has comparative fairness advantages because of its ability to promote uniform treatment of similarly situated entities regardless of location, and to temper the ability of self-interested factions to control the levers of power to the disadvantage of less powerful groups or interests.<sup>129</sup> Thus, centralization may promote equity among those affected by government programs by treating similarly situated entities alike.

In addition, much of American federal environmental law is premised on averting a “race to the bottom” from decentralized governance, in which local jurisdictions compete with each other by progressively lowering environmental standards.<sup>130</sup> Under this dynamic, individual states have incentives to lower standards to compete for industry whether or not other states do the same, even though the states as a collective would be better off not doing so.<sup>131</sup> Congress invoked the undesirable specter of a race to the bottom when, in 1977, it amended the Clean Air Act. A House report warned that “[i]f there is no Federal policy, States may find themselves forced into a bidding war to attract new industry by reducing pollution standards.”<sup>132</sup> Similarly, the Supreme Court, in *Hodel v. Virginia Surface Mining and Reclamation Association*,<sup>133</sup> characterized the Surface Mining Control and Reclamation Act,<sup>134</sup> also adopted in 1977,

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<sup>127</sup> See Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 599-600 (2008).

<sup>128</sup> See Stewart, *supra* note 6 at 1215 (discussing how interstate “spillover[s] ... generate conflicts and welfare losses not easily remedied under a decentralized regime”).

<sup>129</sup> See, e.g., JAMES MADISON, FEDERALIST NO. 10 56 (defining faction as citizens “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”); ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT, *supra* note 123, at 11 (“[E]nvironmental interests are often underrepresented at the local level and centralized regulation may . . . ensur[e] that a broad spectrum of interests is represented”).

<sup>130</sup> Kirsten Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?* 48 HASTINGS L.J. 271 (1997); Peter D. Swire, *The Race of Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67 (1996).

<sup>131</sup> If other states do not lower standards, an individual state is in a better position to attract industry, while if other states lower standards, then the state must act in a similar manner to compete effectively.

<sup>132</sup> H.R. REP. NO. 95-294, at 152 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1231.

<sup>133</sup> 452 U.S. 264 (1981).

<sup>134</sup> 30 U.S.C. §§ 1201–1328 (2006).

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as a response “to a congressional finding that nationwide ‘surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders.’”<sup>135</sup> Such a dynamic has been noted in other substantive jurisdictions as well.<sup>136</sup>

In some instances, Congress has chosen to centralize authority for only a particular governmental function, or to centralize authority incrementally over time on a function-by-function basis, as it did in adopting air and water pollution control laws. Beginning in the 1950s, the federal government enhanced its responsibility for performing certain functions in halting air and water pollution before others. At first, Congress imposed greater centralization of information-gathering and dissemination through passage of laws that funded research into the causes and effects of pollution.<sup>137</sup> These laws reflected the judgment that the states and localities lacked the resources to engage in or fund the research needed to support the adoption of effective pollution control laws.<sup>138</sup> Armed with the information that federally assisted research could provide, the states and localities were presumed to be able to attack pollution and avoid public health effects more effectively. In the 1960s, Congress chose to provide technical and financial assistance to the states, such as by subsidizing the construction of municipal sewage treatment works.<sup>139</sup> Before long, the federal government increased its role in standard-setting in a limited range of situations in which state and local control of interstate

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<sup>135</sup> *Hodel*, 452 U.S. at 281–82 (quoting 30 U.S.C. § 1201(g)).

<sup>136</sup> See, e.g., Cary, *supra* note 6, at 666 (identifying value of centralized regulation for preventing a race to the bottom in shareholder rights against corporations); Lynn LoPucki & Sara Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a “Race to the Bottom”*, 54 VAND. L. REV. 231, 266 (2000) (bankruptcy law); Laurence H. Tribe, *The Constitutionality of the Patient Protection and Affordable Care Act: Swimming in the Stream of Commerce*, 35 HARV. J.L. & PUB. POL’Y 873, 880 (2012) (health care for the uninsured); Dan T. Coenen, *Originalism and the “Individual Mandate”*: Rounding out the Government’s Case for Constitutionality, 107 NW. U. L. REV. COLLOQUY 55, 71 (2012) (same); Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008); Christopher Paul, Note, *Innovation or a Race to the Bottom? Trust “Modernization” in New Hampshire*, 7 PIERCE L. REV. 353, 372 (2009) (discretionary asset protection trusts).

<sup>137</sup> See, e.g., An Act to Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution, Pub. L. No. 88-206, 77 Stat. 392 (1963).

<sup>138</sup> See, e.g., H.R. REP. NO. 89-2170, at 4 (1966), as reprinted in 1966 U.S.C.C.A.N. 3473, 3476; Federal Water Pollution Control Act Amendments of 1961, H.R. REP. NO. 87-306, at 5 (1961), as reprinted in 1961 U.S.C.C.A.N. 2076, 2079 (“The need for a much greater Federal research effort was consistently recognized during the hearings on the bill.”).

<sup>139</sup> Glicksman, *Mutation*, *supra* note 102, at 730.

pollution was ineffective.<sup>140</sup> Congress subsequently gave EPA and other federal agencies broad standard-setting authority over a range of environmental media, including air, water, hazardous and solid waste, pesticides, and other toxic substances.<sup>141</sup>

### *B. Overlapping versus Distinct Authority*

Another important dimension takes the form of a spectrum ranging from overlapping to distinct regulatory authority. As represented in Figure 4 below, on one extreme, governmental authority over a particular substantive issue or governmental function may be separate from any other governmental authority. For the purposes of our analysis, two governmental entities have overlapping jurisdiction only if (and to the extent) that both their substantive and functional authority intersect and affect each other.<sup>142</sup> We do not treat agencies which share authority to regulate a particular subject matter but which perform wholly separate functions within that area as agencies with overlapping authority. Geographically distinct authority provides a straightforward illustration of agencies with different ranges of substantive authority. For example, each state has sovereign public trust and police powers (including the authority to manage its public lands and regulate land use) within its particular geographic boundaries that are largely discrete and exclusive from the authority of other states to do likewise.<sup>143</sup> Similarly, in federal land management, the USFS manages designated forests, NPS manages designated parks, and the BLM manages designated public lands, and in general each agency has little authority over how the others do so.<sup>144</sup>

On the other end of the spectrum are regimes in which there are many governmental institutions with considerable intersecting authority. For instance, the Council on Environmental Quality (CEQ), NPS, NFS, FWS, and state wildlife and land agencies share authority over the management of wildlife.<sup>145</sup> CEQ is granted some authority under the National Environmental Policy Act over information and planning, FWS engages in

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<sup>140</sup> See, e.g., Water Pollution Control Act Amendments of 1956, H.R. REP. NO. 84-1446, at 2 (1955), as reprinted in 1955 U.S.C.C.A.N. 3023, 3024.

<sup>141</sup> See LAZARUS, *supra* note 5, at 70-73.

<sup>142</sup> Accordingly, the authority of a municipality in Australia to regulate land use is effectively distinct from the authority of a municipality in Maine to do the same, even though both regulate land use.

<sup>143</sup> See, e.g., *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491-92 (4th Cir. 2007) (discussing constraints on extraterritorial application of the police power).

<sup>144</sup> See 1 COGGINS & GLICKSMAN, *supra* note 57, §§ 2:11-2:14, 6:14-6:18 (discussing the various federal lands systems and the jurisdictions of the agencies that manage them).

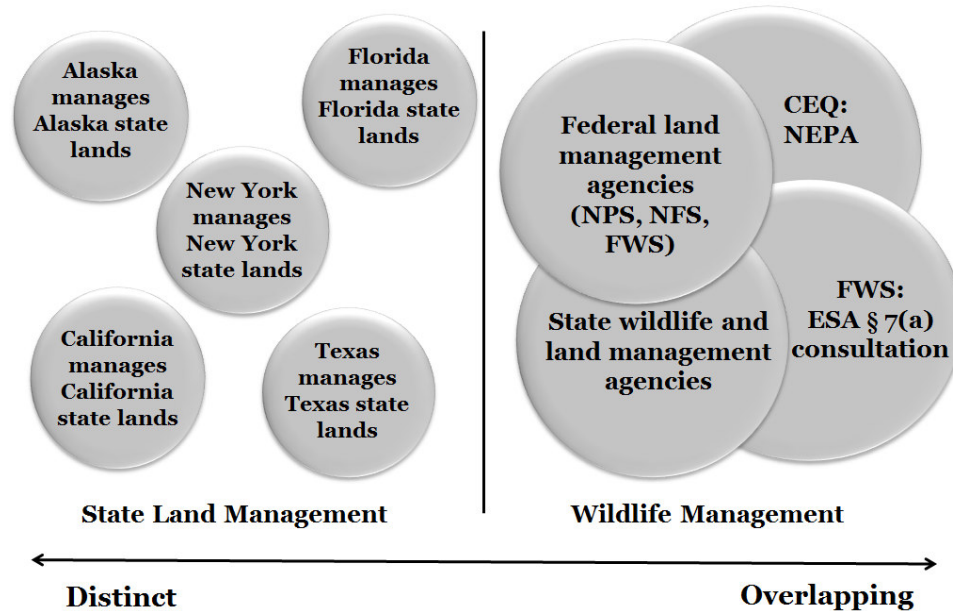
<sup>145</sup> See 3 COGGINS & GLICKSMAN, *supra* note 57, §§ 32:6-32:17 (discussing jurisdiction of federal and state agencies over wildlife on federal lands).



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planning and standard setting over endangered species pursuant to the Endangered Species Act, while federal and state land management agencies have planning, implementation and enforcement authority.<sup>146</sup>

**Figure 4. Prototypical Examples of Distinct and Overlapping Authority**



Accordingly, although more than one agency may share substantive authority (e.g., more than one agency has the authority to control wetlands development), we do not treat that authority as overlapping unless the agencies perform the same governmental function within that area (e.g., shared enforcement authority between federal and state regulators for state requirements adopted under delegated federal authority). If regulatory power is fully centralized in one regulator, this dimension does not come into play. If, however, policymakers decide to divide authority among more than one entity, this dimension implicates two key questions. The first is whether authority over a particular resource or regulatory problem (e.g., water pollution) should be divided up so that, even though there are multiple regulators, each is responsible for addressing a distinct component of the larger problem (e.g., one controls point source and another controls nonpoint source pollution, or one controls pollution by non-nuclear materials while another has sole authority over nuclear materials).<sup>147</sup> The second is whether regulatory functions should overlap (e.g., if one agency is authorized to review and, if appropriate, veto, the

<sup>146</sup> See generally 2 & 3 COGGINS & GLICKSMAN, *supra* note 57, ch. 17, 29, 32.

<sup>147</sup> See, e.g., Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 864 (2006) (discussing jurisdictional overlap, in which agencies have “regulatory authority over the same individuals or institutions, with regard to the same or related issues”).

issuance of permits by another) or instead comprise distinct mandates (e.g., if one agency sets standards, while another applies those standards in the context of resolving individual permit applications).<sup>148</sup>

### 1. Distinct Authority

Legislatures have long adopted and scholars have promoted the idea that authority over a particular regulatory problem is best allocated to a single or few regulators. Such a perspective is primarily based on an explicit or implicit “matching principle”—that legislatures should match each regulatory problem (or aspect of a regulatory problem) to the *single* authority that can best address that problem.<sup>149</sup> Advocates of the matching principle urge, for example, that environmental regulatory authority generally should be vested in “the political jurisdiction that comes closest to matching the geographic area affected by a particular externality.”<sup>150</sup>

In addition, scholars have identified various weaknesses of a regulatory system with overlapping regulatory authority. Some criticize overlapping governance because regulator accountability to the public may be diminished in a regulatory system where authority intersects.<sup>151</sup> Agencies with shared authority may shirk their responsibilities, blaming co-regulators for program failures.<sup>152</sup> The resulting inaction may unfairly impose risks or costs on those affected by the unregulated activity. Similar risks and costs may not occur in jurisdictions in which at least one regulator with shared authority is more diligent or conscientious in the exercise of that authority. Others have posited that overlapping jurisdiction can lead to a lack of finality in the regulatory process.<sup>153</sup>

One of the more common criticisms of overlapping jurisdiction is that it is wasteful and inefficient, both for regulators and regulated entities. The government’s “transaction costs” of regulating increase if multiple

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<sup>148</sup> See, e.g., 33 U.S.C. §§ 1311(b), 1342(b) (2006) (delegating standard-setting function to EPA and permitting function to states meeting certain minimum requirements).

<sup>149</sup> See HENRY N. BUTLER & JONATHAN R. MACEY, *USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY* (1996).

<sup>150</sup> *Id.* at 48. See also Adler, *supra* note 96, at 133.

<sup>151</sup> Robert Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 17 (2006); Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812-13 (2008); Engel, *supra* note 7, at 162.

<sup>152</sup> Freeman & Rossi, *supra* note 4, at 1187; Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 241, 288 (2011) (“Regulatory overlap thus may lead each regulator to shirk . . . within an area of overlapping jurisdiction.”).

<sup>153</sup> Engel, *supra* note 7, at 162.

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agencies perform tasks that could have been handled by a single agency.<sup>154</sup> Efforts to coordinate among multiple regulators can address redundancy, but can themselves be costly.<sup>155</sup> Consolidation of authority therefore may make sense within a governmental level. As the proposed reorganization of the six agencies with jurisdiction over small businesses discussed in the introduction to this Article illustrates, such consolidation is often seen as a way to minimize redundancy and duplication of effort, thereby promoting administrative efficiency.<sup>156</sup>

For regulated entities, multiple bodies of regulation require tracking and complying with disparate and potentially conflicting sets of obligations.<sup>157</sup> Overlapping regulation also can reduce certainty and thus effectiveness if the relationships among the mandates of different regulators are unclear.<sup>158</sup> Some suggest it be fundamentally unfair if an entity is regulated by multiple government bodies and potentially subject to various different standards.<sup>159</sup> Some also claim that overlapping authority can lead to over-regulation where “numerous regulators are confronted with a more particularized project or proposal with localized and discernible effects.”<sup>160</sup> These scholars consider overlapping authority ineffective “because it may result in the development of inefficient standards, both through the introduction of regulatory goals other than externality elimination, and through interference with the free movement of firms through government over-appropriation of fixed capital assets.”<sup>161</sup>

Others, however, have asserted that overlapping jurisdiction can lead to under-regulation, an unintended result of what Professor William

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<sup>154</sup> Freeman & Rossi, *supra* note 4, at 1150. Freeman and Rossi cite as an example the shared responsibility of the Department of Justice and the Federal Trade Commission in enforcing the federal antitrust laws. *Id.* at 1146. See also Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 214 (discussing duplicative monitoring and enforcement costs).

<sup>155</sup> Aagaard, *supra* note 152, at 288; Vermeule, *supra* note 95, at 24 (discussing increased costs of communication among agencies that accompany the creation of dense networks of related agencies).

<sup>156</sup> William W. Buzbee, *State GHG Regulation, Federal Climate Change Legislation, and the Preemption Sword*, 1 SAN DIEGO J. CLIMATE CHANGE & ENERGY L. 23, 53 (2009) (referring to “additional cops on the beat”).

<sup>157</sup> Marisam, *supra* note 20, at 223 (referring to “the burdens on regulated entities that must comply with two agencies’ regulations”); Freeman & Rossi, *supra* note 4, at 1150.

<sup>158</sup> See Ahdieh, *supra* note 147, at 897.

<sup>159</sup> Cf. Laura E. Little, *Empowerment through Restraint: Reverse Preemption or Hybrid Lawmaking?*, 59 CASE W. RES. L. REV. 955, 984 (2009) (referring to the “problems of legal instability and unfairness resulting from multiple regulations on one wrong”).

<sup>160</sup> See Buzbee, *supra* note 83, at 349. See also James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 11–12 (2000).

<sup>161</sup> Engel, *supra* note 7, at 165-66.

Buzbee has dubbed the creation of a “regulatory commons,”<sup>162</sup> especially when the regulated problem or harm is large-scale and broadly dispersed.<sup>163</sup> Buzbee attributes this to high information costs of developing a regulatory response, limited credit for regulators, bias toward the regulatory status quo, and regulator risk aversion.<sup>164</sup> The result may be that although multiple regulators have authority to address a particular problem, regulatory gaps develop as each assumes or hopes that others are addressing it.<sup>165</sup> Buzbee suggests that reducing the number of potential regulators and/or combining the regulatory authority of particular regulators could lessen the incentives for regulatory inaction in some contexts.<sup>166</sup> Thus, some argue that distinct regulation may be more effective than overlapping regulation.

Other collective action problems may support distinct regulation. Congress adopted exclusive federal jurisdiction over standard-setting for nuclear waste disposal facilities, transportation of hazardous waste, transportation and disposal of other forms of nuclear material, and management of biomedical waste based on concerns that state and local governments would adopt constraints on locally unwanted activities with broader, more diffuse social benefits.<sup>167</sup> For example, Congress passed the Low-Level Radioactive Waste Policy Act of 1980<sup>168</sup> to distribute the environmental burdens of the disposal of nuclear waste more equitably.<sup>169</sup>

Though obviously related, at least in some cases the centralization and overlap dimensions do not necessarily present the same choices to policymakers, and moves along the two dimensions may have different effects on regulatory authority. Typically, a centralization of substantive regulatory power results in a decrease in overlap. Federal deregulation that provides for unitary state regulation would decrease overlap in authority, just as federal ceiling preemption of state law (under which state

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<sup>162</sup> Buzbee, *supra* note 7, at 5–6.

<sup>163</sup> See Buzbee, *supra* note 83, at 348 (noting incentives of multiple potential regulators for regulatory inattention, especially for cross-jurisdictional problems).

<sup>164</sup> Buzbee, *supra* note 182, at 30–36.

<sup>165</sup> Ahdieh, *supra* note 147, at 897-98 (noting the costs of intersystemic regulation, including shirking, diminished oversight, free-riding, loss of incentives to regulate carefully, and tendency to blame co-regulators).

<sup>166</sup> See Buzbee, *supra* note 7, at 51.

<sup>167</sup> See, e.g., 49 U.S.C. § 5125 (preempting some state regulation of hazardous waste packaging and transportation); *Tennessee v. United States Dep’t of Transp.*, 326 F.3d 729, 730–31 (6th Cir. 2003) (describing federal hazardous materials transportation legislation as “an effort to create a coherent approach to . . . problems posed by the interstate transportation of hazardous material”).

<sup>168</sup> 42 U.S.C. §§ 2021b–2021d (2000).

<sup>169</sup> See Glicksman & Levy, *supra* note 127, at 600-01.

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governments are barred from regulating more stringently than the federal government)<sup>170</sup> would. For example, in addition to being a shift toward centralization, the creation of certain federal authority over automobile tailpipe emission standards,<sup>171</sup> pesticides,<sup>172</sup> and nuclear waste<sup>173</sup> represented movements away from overlap by preempting supplemental state standards, even if they were more stringent than the federal standards.

On the other hand, a federal law establishing a new federal agency with only floor preemption authority — under which state authorities may adopt more stringent regulation than their federal counterpart — would result in an increase in centralization as well as overlap.<sup>174</sup> Moreover, decreases or increases in overlap may occur not only over substantive jurisdiction but also over particular regulatory functions. For example, increasing limitations on or barring the authority of federal agencies to overfile — to commence enforcement action against permit holders in addition to state agency enforcement<sup>175</sup> — would decrease overlap in enforcement functions.<sup>176</sup>

## 2. Overlapping Authority

Overlapping authority has its proponents. A large and growing literature identifies a variety of effectiveness and accountability benefits associated with a regulatory system with concurrent regulatory authority.

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<sup>170</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1551 (2007) (discussing arguments for and against ceiling or “unitary federal choice” preemption that “eliminates institutional diversity.”)

<sup>171</sup> See 42 U.S.C. § 7543 (2006) (generally prohibiting the adoption or enforcement of state tailpipe emission standards, but allowing EPA to waive prohibition by granting a waiver to California).

<sup>172</sup> See 7 U.S.C. § 136v(b) (2006) (preempting state regulation of labeling and packaging of pesticide products).

<sup>173</sup> See *supra* note 167. Congress adopted exclusive federal jurisdiction in this area based on concerns that state and local governments would adopt constraints on locally unwanted activities with broader, more diffuse social benefits. See 49 U.S.C. § 5125 (2006).

<sup>174</sup> Thus, many of the federal pollution statutes provide for floor preemption, retaining state authority to adopt regulations that are more stringent than their federal counterparts. See, e.g., 33 U.S.C. § 1370 (2006); 42 U.S.C. § 7416 (2006).

<sup>175</sup> See *infra* note 272 and accompanying text (discussing the advantages and disadvantages of overlapping enforcement authority).

<sup>176</sup> Similarly, in adopting the Atomic Energy Act of 1954, Congress chose to preempt all state regulation of the manner in which nuclear power plants operate, but to retain state authority to decide whether to bar issuance of operating permits based on economic reasons (such as the affordability of the energy produced by nuclear plants). *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983).

Some scholars have reasoned that an approach that minimizes overlap and consolidates decision making in a single or few authorities can have a number of negative consequences. In addition to pointing to the implausibility of eliminating already extensive regulatory segmentation,<sup>177</sup> many scholars have detailed the undesirability of doing so.<sup>178</sup>

Some scholars argue that the redundancy that occurs through overlapping jurisdiction can be advantageous.<sup>179</sup> Though much of this literature relates to allocation of authority between the federal government and the states and localities,<sup>180</sup> the same dynamic applies to overlap within a particular level of government. To begin with, although overlap can create inefficiencies, as described above,<sup>181</sup> it can enhance the prospects for effective regulation. The key idea is that concurrent jurisdiction increases the likelihood of regulatory action because there are more actors with authority to regulate.<sup>182</sup> Should one regulatory entity backslide or fail to regulate, others would be available to fill the gap.<sup>183</sup> Concurrent jurisdiction thus may be particularly valuable for regulatory contexts<sup>184</sup> where the costs of under-regulation are high, such as those that seek to address high-cost or irreversible effects or the management of

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<sup>177</sup> Buzbee, *supra* note 7, at 51.

<sup>178</sup> Ruhl & Salzman, *supra* note 7; Buzbee, *supra* note 7, at 51; Adelman & Engel, *supra* note 7, at 1800-01; Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1417 (1999).

<sup>179</sup> Jared Snyder & Jonathan Binder, *The Changing Climate of Cooperative Federalism: The Dynamic Role of the States in A National Strategy to Combat Climate Change*, 27 UCLA J. ENVTL. L. & POL'Y 231, 252 (2009).

<sup>180</sup> See, e.g., Blake Hudson, *Reconstituting Land-Use Federalism to Address Transitory and Perpetual Disasters: The Bimodal Federalism Framework*, 2011 B.Y.U. L. REV. 1991, 2037.

<sup>181</sup> See *supra* notes 154 to 266 and accompanying text.

<sup>182</sup> Buzbee, *supra* note 156, at 53.

<sup>183</sup> See Freeman & Rossi, *supra* note 4, at 1138 (arguing that redundancy provides insurance against a single agency's failure); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354 (2011) (arguing that overlap "opens space" for each regulator "to prod and plea with one another when the danger . . . is one of government *underreach*"); Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1819 (2011) (arguing that redundancy can "provid[e] an important failsafe").

<sup>184</sup> Professor Biber has argued that the desirable amount of overlap is likely to be highly contextual, depending on factors such as whether the agencies concerned have goals that are complementary or in tension with one other, the cultures and professional backgrounds of agencies and their personnel, and the political context. See Biber, *supra* note 51, at 78. The location of the relevant agencies along the other dimensions identified in this article is also likely to be important, such as whether the agencies have cooperative or competitive relationships.

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nonrenewable resources.<sup>185</sup> Relatedly, concurrent jurisdiction has the potential to improve decisions and enhance the effectiveness of government programs by allowing authorities with a range of different competencies to be brought to bear on a problem.<sup>186</sup>

The regulatory safety net resulting from overlap also can foster accountability by indirectly combating interest group capture that may exist for one governmental entity but not another.<sup>187</sup> As Anne Joseph O’Connell has noted, “[o]ne interest group generally will find it more difficult to capture several agencies than a single agency; to wield power over multiple agencies, interest groups may have to work together, which is a costly enterprise for the groups.”<sup>188</sup> In addition, agencies with overlapping subject matter and functional jurisdiction may be more reluctant to respond favorably to interest group pressure because other agencies sharing regulatory authority may detect and cast adverse light on that behavior.<sup>189</sup>

Both distinct and overlapping authority, therefore, have the potential to enhance accountability, depending on the circumstances and incentives of regulators. Distinct authority is better situated to promote accountability if the primary accountability problem is the tendency of co-regulators to shirk their responsibilities and to blame co-regulators for program failures.<sup>190</sup> On the other hand, overlapping authority is better designed to promote accountability if one co-regulator’s likely response to another’s lack of regulation is not to assign blame, but instead to step into the regulatory breach, or if capture is a prominent concern. Which account is more compelling to policymakers may depend on assessments of the history of the particular regulatory program and social problem in question, and policymakers’ philosophies about institutional incentives and behavior.<sup>191</sup>

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<sup>185</sup> See Engel, *supra* note 7, at 179. See also Ewing & Kysar, *supra* note 183, at 410 (“Overlapping governance mechanisms . . . ensure a fuller and more inclusive characterization of emerging threats to social and environmental well-being.”).

<sup>186</sup> Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1, 67-68 (2009).

<sup>187</sup> See Engel, *supra* note 7, at 178-79 (noting that overlap can combat excessive influence of interest groups that prevents effective regulation).

<sup>188</sup> O’Connell, *supra* note 1, at 1677. Likewise, agencies with broader jurisdiction are harder to capture than agencies with narrower ones because “all of the covered industries must bid against one another to capture the regulator.” Hyman & Kovacic, *supra* note 3, at 33.

<sup>189</sup> Aagaard, *supra* note 152, at 294 (2011).

<sup>190</sup> See *supra* notes 151 to 152 and accompanying text.

<sup>191</sup> See *infra* note 210 and accompanying text.

Some also argue that overlapping authority may provide space for initial regulatory strategies by one entity that can serve as a proving ground.<sup>192</sup> These commenters contend that a dispersed and overlapping regulatory system, such as the delegation of authority to the states allowing the adoption of pollution controls more stringent than federal standards,<sup>193</sup> may allow for a diversity of tailored approaches, promoting innovative management experimentation and creating the opportunity for learning about the advantages and disadvantages of particular management strategies.<sup>194</sup> According to these scholars, concurrent authority can promote innovation by providing regulators close access to information about the efficacy of alternative management strategies based on their observations of the experience of co-regulators.<sup>195</sup> As detailed in Part IV, however, these arguments touting the diversity benefits of overlapping jurisdiction appear to be erroneously conflating it with decentralized authority.<sup>196</sup>

### C. *Independent versus Coordinated Authority*

A final dimension for characterizing the allocation of authority focuses on the extent of formal or informal coordination among authorities with jurisdiction over a particular regulatory problem or government function. For this dimension, the key question is how much multiple regulatory authorities communicate, coordinate, and collaborate in addressing any particular substantive problem or in performing a delegated governmental function. As illustrated in Figure 5, on one end of the spectrum<sup>197</sup> is a regulatory framework in which governmental entities are highly independent and isolated in their regulatory activities. At the other end is a regulatory relationship characterized by close agency collaboration and regulatory coordination. Accordingly, this dimension assumes some level of decentralization. It may come into play whether or not there is

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<sup>192</sup> Carlson, *supra* note 7, at 1100-01.

<sup>193</sup> The Clean Air Act, for example, authorizes EPA to adopt technology-based emission controls for certain sources and pollutants, 42 U.S.C. §§ 7411-7412 (2006)), but it allows states to adopt more stringent emission control standards in most areas. *Id.* § 7416.

<sup>194</sup> Adelman & Engel, *supra* note 7, at 1820-21 (2008); Ahdieh, *supra* note 147, at 892.

<sup>195</sup> Engel, *supra* note 7, at 161, 179 (noting that “regulatory activity at one level . . . may be a stepping stone to regulation at the governing level that dual federalism proponents label ‘optimal’”).

<sup>196</sup> See *infra* notes 298 to 307 and accompanying text.

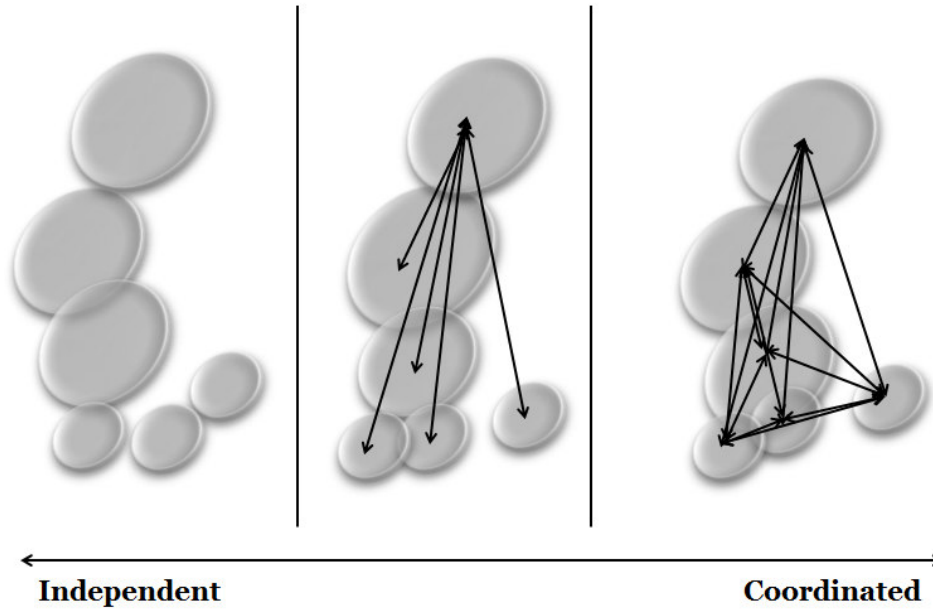
<sup>197</sup> As indicated *infra*, at notes 216 to 224 and accompanying text, it is more difficult to conceptualize the coordination-independence dimension as a simple spectrum ranging from greater to lesser degrees of coordination because coordination can be measured in different ways, including the frequency, duration, scope, and voluntariness of coordination. It is typically simpler to determine with respect to a given substantive area or government function whether the authority to address that area or function is centralized or decentralized, or distinct or overlapping.



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jurisdictional overlap among authorities, and, if so, whether that overlap is substantive and/or functional.<sup>198</sup> Coordination among agencies with distinct jurisdictional charges is possible, just as it is among those with overlapping responsibilities.

**Figure 5. Independent versus Coordinated Authority**



1. Coordinated Authority

In response to the considerable incentives and effects of regulatory fragmentation, some scholars and regulatory actors have called for more coordination among regulatory authorities. Indeed, coordination exists or has been proposed over a wide range of substantive jurisdictions, such as natural resources,<sup>199</sup> food safety,<sup>200</sup> and bioterrorism.<sup>201</sup> Though

<sup>198</sup> If regulatory power is concentrated in one entity, the issue of whether that authority should be exercised in independent or coordinated fashion is moot (although the degree of coordination among employees or offices within a single agency can differ).

<sup>199</sup> Many inter-jurisdictional natural resource management coordination regimes have been created. *See, e.g.,* Chesapeake Bay Program, <http://www.chesapeakebay.net/index.aspx> (last visited October 25, 2011); California Bay-Delta Authority (CBDA), <http://calwater.ca.gov/calfed/oversight/CBDA/index.html> (last visited October 25, 2011). For additional examples, see Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 217–18 (2002).

<sup>200</sup> *See e.g.,* Title II, FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (requiring the Departments of Homeland Security, Health and Human Services, Agriculture, Commerce, and EPA to coordinate in information collection, analysis, and reporting on foodborne illnesses, outbreak response planning, and technical assistance to local governments).

eliminating fragmentation or overlap may be implausible or even undesirable, many scholars have emphasized the value of agency dialogue and collaboration to reduce fragmentation's adverse effects.<sup>202</sup> Coordination can increase the effectiveness of government action by promoting exchanges of ideas and the pooling of the expertise of different agencies.<sup>203</sup> Although efforts to coordinate require the investment of time and resources that need not be incurred when agencies act independently, some claim that these costs may be more than offset by reductions in duplication of effort and inconsistent action, so that coordination can result in a net administrative efficiency gain.<sup>204</sup>

Scholars also argue that coordination can promote accountability by combating drift, shirking, and free-riding through facilitation of inter-agency monitoring.<sup>205</sup> Coordination also can promote accountability by providing governmental authorities the opportunity and even duty to review and serve as a check on other authorities in the performance of delegated governmental functions, thereby reducing the risk of regulator capture.<sup>206</sup> Each regulatory authority can essentially serve as an accountability check on the others.<sup>207</sup> Finally, the coordinated exercise of multi-jurisdictional authority can promote fairness by minimizing the imposition of inconsistent or redundant demands on regulated entities.<sup>208</sup>

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<sup>201</sup> For example, the Drinking Water Security and Safety Amendments, adopted as part of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188 §§ 401- 403, 116 Stat. 594, 682-87 (2002), requires coordination, led by EPA, to abate and respond to threats to drinking water infrastructure security. *See generally* Steven D. Shermer, *The Drinking Water Security and Safety Amendments of 2002: Is America's Drinking Water Infrastructure Safer Four Years Later?*, 24 *UCLA J. ENVTL. L. & POL'Y* 355, 395-96 (2005-2006).

<sup>202</sup> *See, e.g.*, EUGENE BARDACH, *GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP* (1998) (providing recommendations for fostering interagency collaboration); Ruhl & Salzman, *supra* note 7, at 66-67 (discussing a system of "weak ties" for alleviating the effects of fragmentation).

<sup>203</sup> Freeman & Rossi, *supra* note 4, at 1185 (noting potential for coordination to improve decisionmaking by adding data and expertise and diversifying perspectives).

<sup>204</sup> *Id.* at 1183.

<sup>205</sup> *Id.* at 1189 (noting that coordination can "control drift by providing structured opportunities for agencies to account to each other").

<sup>206</sup> *See* Freeman & Rossi, *supra* note 4, at 1186 ("Agencies will be harder to isolate and neutralize to the extent that their approaches are aligned.").

<sup>207</sup> Affording government officials access to information on the performance of other regulators can provide increased capacity to pressure those other regulators to comply with regulatory requirements. *See* Camacho, *supra* note 186, at 74-75.

<sup>208</sup> *Cf.* Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 *CORNELL INT'L L.J.* 171, 195 (2007) (discussing "efforts of state regulators to coordinate their regulatory approaches and ensure equitable treatment in international negotiations"); Maribeth Wilt-Seibert, *Unemployment Compensation for Employees of Educational Institutions: How State*

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Recently, a number of scholars and government officials have examined the various characteristics of interagency coordination.<sup>209</sup> For several reasons, its definition is unsettled. Different schools of organizational theory seek to explain institutional coordination, and their definitions differ from one another.<sup>210</sup> In addition, coordination can take any number of forms. Coordination can be formal or informal.<sup>211</sup> It can be long or short-term, and frequent or occasional. Coordination can be voluntary and cooperative,<sup>212</sup> or mandated by legislative or executive action.<sup>213</sup> The National Environmental Policy Act,<sup>214</sup> discussed below,<sup>215</sup> is a prominent example of mandated, formal federal interagency coordination, but primarily only over agency planning and information-gathering functions.

Coordination also can be understood as a spectrum that ranges from less active inter-jurisdictional relationships to those that require significant synchronization.<sup>216</sup> The range of coordination activities includes mere communication of adopted agency actions;<sup>217</sup> creation of formal or

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*Courts Have Created Variations on Federally Mandated Statutory Language*, 29 U. MICH. J.L. REF. 585, 611 (1995) (encouraging coordination among states to ensure consistency and equitable treatment of similarly situated employees with respect to unemployment compensation benefits).

<sup>209</sup> See e.g., Freeman & Rossi, *supra* note 4; Bradley, *supra* note 8; DeShazo & Freeman, *supra* note 7.

<sup>210</sup> Gregg Macey, *Environmental Crisis and the Paradox of Organizing*, 2011 B.Y.U. L. REV. 2063, 2113 (2011) (mentioning different definitions of coordination in game theory, resource exchange, contingency theory, and transaction cost economics, among others).

<sup>211</sup> See Freeman & Rossi, *supra* note 4, at 1156 (describing the presence of considerable informal coordination that may or may not involve explicit communication between agencies). See also Vermeule, *supra* note 95, at 22 (referring to “myriad” devices and mechanisms for achieving coordination, ranging from conversations to formal interagency memoranda of agreement); Hyman & Kovacic, *supra* note 3, at 43 (same).

<sup>212</sup> See CRAIG W. THOMAS, BUREAUCRATIC LANDSCAPES: INTERAGENCY COOPERATION AND THE PRESERVATION OF BIODIVERSITY 24 (2003) (describing non-mandatory interagency cooperation). Professor Marisam has identified three kinds of benefits that agencies may derive from cooperation with other agencies: the power they derive from influencing other agencies’ actions, the reputational benefits that may flow from contributing to the solution to another agency’s problem, and reciprocation from other agencies in the future. Marisam, *supra* note 20, at 7.

<sup>213</sup> See Freeman & Rossi, *supra* note 4, at 1157.

<sup>214</sup> 42 U.S.C. 4321-4347.

<sup>215</sup> See *infra* Part IV.A.3.

<sup>216</sup> See Bradley, *supra* note 8, at 757-757 (describing spectrum of interagency coordination, including advisory, mandated interaction, veto power, and lobbying power).

<sup>217</sup> Publication of public notices by government agencies in the Federal Register, <https://www.federalregister.gov/>, may be the most recognizable example at the federal level.

informal fora for inter-jurisdictional discussion;<sup>218</sup> providing to other governmental authorities an opportunity to comment on or respond to potential or proposed agency actions, whether discretionary<sup>219</sup> or mandatory;<sup>220</sup> required consideration of or response to the comments or recommendations of other governmental authorities;<sup>221</sup> the harmonization of agency activities through voting arrangements or mutual/consensus agreement;<sup>222</sup> and providing a governmental authority a de facto or express veto power over the activity of another authority.<sup>223</sup> Of course, even each of these types of coordination can vary considerably. For example, inter-jurisdictional agreements can range in scope, strength, and duration.<sup>224</sup>

Because of this multiplicity of factors, it may at times be challenging to characterize one regulatory program as more or less coordinated than another. To be sure, infrequent and short-term communication typically would be less coordinated than continued and enduring interaction;

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<sup>218</sup> Formal examples of these include some functions of federal interagency task forces such as the Interagency Climate Change Adaptation Task Force (<http://www.whitehouse.gov/administration/eop/ceq/initiatives/adaptation>), or the National Endowment for the Arts Federal Interagency Task Force (<http://www.nea.gov/news/news11/Task-Force-Announcement.html>).

<sup>219</sup> See Freeman & Rossi, *supra* note 4, at 1157 (describing “discretionary consultation”). For example, the Federal Insecticide, Fungicide, and Rodenticide Act provides that when considering applications for pesticide registration, EPA “may consult” with any other federal agency. See *id.*

<sup>220</sup> See *id.*; Bradley, *supra* note 8, at 750-56 (discussing examples of mandatory agency consultation requirements); Biber, *supra* note 8, at 41-60 (same).

<sup>221</sup> See Bradley, *supra* note 8, at 755 (describing how the Federal Power Act requires Federal Energy Regulatory Commission to consider input from fish and wildlife agencies before approving plans to construct new hydroelectric dams); Freeman & Rossi, *supra* note 4, at 1158 (citing EPA’s duty under federal pesticide laws to solicit opinions from Departments of Agriculture and Health and Human Services before promulgating regulations).

<sup>222</sup> Some international treaties or interstate compacts, such as those that help govern use of the Colorado River, exemplify relatively robust forms of harmonization over standard setting. See, e.g., Colorado River Compact of 1922, 70 CONG. REC. 324 (1928); Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 (1949). Other versions focus primarily on the information-gathering function. See, e.g., Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414, 415-17 (1968) (establishing the Great Lakes Commission to gather information and make non-binding recommendations to member states).

<sup>223</sup> See Bradley, *supra* note 8, at 755-56 (discussing de facto veto and express veto powers).

<sup>224</sup> CRAIG W. THOMAS, BUREAUCRATIC LANDSCAPES: INTERAGENCY COOPERATION AND THE PRESERVATION OF BIODIVERSITY 25 (2003) (“[S]pecific cooperative agreements should be measured in terms of their scope, strength, and duration, not simply their existence. Scope refers to the range of issues covered. . . . Strength refers to the binding nature of the agreements, ranging from verbal or tacit agreements to legally binding documents. Duration refers to the endurance of an agreement.”).

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

## 2. Independent Authority

Although coordination of regulatory efforts has theoretical effectiveness and administrative efficiency advantages, many of the calls for collaboration and the formation of coordinating regimes are reflexive, without any additional discussion of the costs of such additional regimes. Adding layers of consultation and collaboration requirements to an overlapping regulatory landscape will undoubtedly divert already limited agency resources, and it is worth considering whether the benefits of particular communications or collaborations among authorities are worth these opportunity costs. Particularly if they are not designed properly, efforts at collaboration may not be worth the cost.<sup>225</sup>

Moreover, both experience and a notable literature suggest loss of regulatory effectiveness through close agency coordination, particularly in the management of complex and uncertain regulatory problems. At least some inter-jurisdictional collaborations in the past have failed to provide meaningful opportunities for cross-jurisdictional information sharing and collaboration.<sup>226</sup> In discussing the benefits of divided regulatory authority,

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<sup>225</sup> Freeman & Rossi, *supra* note 4, at 1182 (noting substantial “up-front investments required to coordinate agencies,” and that giving one agency veto power may elevate costs substantially by requiring extensive negotiations).

<sup>226</sup> See Camacho, *supra* note 186, at 30-36 (analyzing inter-jurisdictional collaborations for managing resources in the Great Lakes and criticizing these efforts as serving as “yet another layer of fragmentation to the already disjointed regulatory landscape”).

numerous scholars have focused on the value of inter-jurisdictional competition in promoting socially optimal environmental regulation. Richard Revesz has argued in an influential article that interstate competition for industry should produce “an efficient allocation of industrial activity among the states.”<sup>227</sup> Jonathan Adler argues that inter-jurisdictional competition “can encourage policy innovation as policymakers seek to meet the economic, environmental, and other demands of their constituents,” while allowing competing authorities to act as environmental ‘laboratories’ developing new and improved ways of addressing environmental concerns.”<sup>228</sup> Competition among authorities may be a contest for political credit, resources, or additional regulatory responsibilities. Such competition is premised on the regulatory autonomy and independence of individual regulators from the activities of other government authorities. Though these competition benefits are often ascribed as a feature of decentralization,<sup>229</sup> it is the fact that regulators are acting independently rather than in coordinated fashion that yields the competitive dynamic.

In addition, some forms of coordination may lead to an “anti-commons” problem.<sup>230</sup> The most acute forms of coordination, such as required harmonization of agency activities, include requiring all governmental authorities with jurisdiction over a particular problem to agree to a particular regulatory strategy.<sup>231</sup> Some scholars have argued that a consensus decision rule can encourage holdouts and mutual vetoes that can result in the underutilization of resources.<sup>232</sup>

Though arguments promoting regulatory independence are typically raised in conjunction with arguments promoting the devolution of regulatory authority to localities or states,<sup>233</sup> regulatory independence can be valuable even among federal agencies. In the context of analyzing the possible reorganization of the governmental provision of national security intelligence, Anne Joseph O’Connell has argued that competition among

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<sup>227</sup> Revesz, *supra* note 6, at 1211-12. See also Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961 (2007) (discussing how the Supreme Court’s modern federalism jurisprudence “privileges state sovereignty in order to promote efficiency and intergovernmental competition.”).

<sup>228</sup> Adler, *supra* note 96, at 134.

<sup>229</sup> See *e.g.*, Cohen et al., *supra* note 1, at 710-11 (noting that centralization can diminish inter-agency competition and prevent efficient performance).

<sup>230</sup> See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622-26 (1998).

<sup>231</sup> See *supra* notes 217 to 223 and accompanying text.

<sup>232</sup> See, *e.g.*, Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 590 (2001); Heller, *supra* note 230, at 622-26.

<sup>233</sup> See, *e.g.*, Carlson, *supra* note 7, at 1102.

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even federal authorities in some instances may be preferable to coordination because it may prevent “pernicious” collusion, encourage a creative “race to the top,” motivate correction of other agencies’ mistakes, and facilitate adaption to changing conditions.<sup>234</sup>

In addition, O’Connell asserts that providing multiple governmental entities with regulatory authority over a particular problem can help prevent “group think”<sup>235</sup> and increase the diversity of viewpoints.<sup>236</sup> Any such benefits result from the existence of multiple governmental authorities acting autonomously. Finally, assuming alternative mechanisms for obtaining information about the performance of other regulators, inter-jurisdictional competition also may serve as a source of accountability. Regulators may have substantial incentives to vigilantly review and challenge the actions of other intersecting authorities,<sup>237</sup> particularly when there are inter-jurisdictional spillovers or attempts by an authority to obtain a competitive advantage.

As in the case of the distinctness/overlap dimension,<sup>238</sup> proponents of both coordination and independence have identified accountability benefits. Both accounts note the potential for one agency armed with information about what others are doing to serve as a check on the failures of co-regulators. Whether one finds one account or the other more convincing in a particular context may turn on a number of factors, including what is the particular governmental function at issue. It also may depend on whether this checking function is likely to be best promoted by the relatively greater access to information about the activities of co-regulators among coordinating agencies, or by the potentially greater willingness of competing as opposed to coordinating agencies to call other agencies to account for drift, shirking, capture, or other forms of regulatory failure.

In some circumstances, then, maintaining the independence of agencies and limiting cooperation may be more important for managing

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<sup>234</sup> O’Connell, *supra* note 1, at 1677-78.

<sup>235</sup> See IRVING JANIS, VICTIMS OF GROUPTHINK 8-9 (1972) (coining the term “groupthink” as a product of cohesive ingroups “when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action.”). See also Susan Cain, *The Rise of the New Groupthink*, N.Y. TIMES, Jan. 15, 2012 (citing research showing that brainstorming sessions do not stimulate creativity).

<sup>236</sup> O’Connell, *supra* note 1, at 1676. Though Professor O’Connell focuses on this as a benefit of regulatory redundancy, it is more properly understood as a feature of whether the applicable regulators are independent from each other.

<sup>237</sup> Cf. Engel, *supra* note 7, at 178–79 (discussing how intersecting agencies can promote accountability by monitoring each other’s compliance).

<sup>238</sup> See *supra* notes 151-203 and accompanying text.

certain regulatory problems than a heavily collaborative model. Most prominently, depending on the governmental function at issue, regulator independence may be more consistent with (and better promote) the redundancy benefits of overlapping jurisdiction than a heavily coordinated model. Such a circumstance might exist during periods of change,<sup>239</sup> where there is considerable uncertainty, harm may be catastrophic, and prevention or mitigation of such harm by one of the independent authorities is possible (for example, in prevention of terrorism attack or natural disaster).<sup>240</sup>

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

As one scholar has noted, “arguing that lines of organization are entirely inconsequential is likely to be as difficult as arguing that lines of geographic jurisdiction are inconsequential.”<sup>241</sup> A variety of academic disciplines suggest “that formal lines of authority, jurisdictional limits, and formal hierarchical arrangements should be expected to change how legal mandates are carried out.”<sup>242</sup> This Article focuses on two aspects of agency institutional structure that we believe have not been fully appreciated in the literature: the role of functional jurisdiction in allocating agency authority, introduced in Part II, and the existence of (and relationships among) three different dimensions of governmental authority introduced in Part III.

Section A below documents the neglect of functional jurisdiction in both academic and political considerations of agency structure and illustrates why it is important to differentiate between substantive and functional jurisdiction in allocating government authority. Section B substantiates the tendency of policymakers and scholars to conflate the three dimensions of authority and analyzes how the failure to fully appreciate the effects of allocating authority along each of the dimensions may defeat the goals of government programs or prevent them from realizing their full potential. The conclusion that follows provides some tentative recommendations for fully integrating functional and dimensional considerations into the analysis of government structure.

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<sup>239</sup> Ahdieh, *supra* note 147, at 890 (arguing for “intersystemic regulation” that minimizes inertia and promotes regulatory competition and learning, especially “amidst transition.”).

<sup>240</sup> *Cf.* Marisam, *supra* note 20, at 224 (touting the benefits of redundancy “where there are potentially catastrophic or irreversible risks from agency failures”).

<sup>241</sup> Mariano-Florentino Cuellar, “*Securing*” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939-1953, 76 U. CHI. L. REV. 587, 644 (2009).

<sup>242</sup> *Id.* According to Cuellar, these include institutional sociology, political economy, and social psychology. *Id.*



*FUNCTIONAL GOVERNMENT IN 3-D**A. The Importance of Appreciating Functional Jurisdiction*

The literature on government organization and structure is a rich one. A few commenters have noted problems with organizing administrative agencies primarily based on substantive jurisdictional authority.<sup>243</sup> Relatively little attention has been paid, however, to the possibility of allocating agency authority along functional as opposed to substantive lines. Only a few scholars have identified the possible division of authority along functional lines<sup>244</sup> or noted the relative scarcity of functional divisions of government authority.<sup>245</sup> This tendency to emphasize substance rather than function is reflected in comparisons of centralized and decentralized, overlapping and distinct, and coordinated and independent organizational structures.

Consideration of functional jurisdiction expands the options available in crafting government programs to deal with social problems. Awareness of the option of allocating jurisdiction functionally provides a more nuanced framework for analyzing the advantages and disadvantages of alternative structural designs. Moreover, by choosing to structure the exercise of various functions at a different point along each of the three dimensions, it may be possible for policymakers to harness the advantages of certain dimensions when they are particularly prominent for certain governmental functions while minimizing the shortcomings if they exist for others. Through the prism of governmental function, legislators can better understand and then design allocations of authority to promote chosen regulatory goals.

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<sup>243</sup> See, e.g., Elizabeth Glass Geltman & Andrew E. Skroback, *Reinventing the EPA to Conform with the New American Environmentality*, 23 COLUM. J. ENVTL. L. 1, 6-12 (1998) (discussing problematic development of EPA's media-specific enforcement approach); Peter J. Fontaine, *EPA's Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 50 (1993) noting that EPA's organizational structure and culture have produced separate program offices with their own parochial agendas). See also Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 350 (2012) (suggesting reform of "specific counterterrorism intelligence functions, to set policy-appropriate balances of centralization and localization").

<sup>244</sup> See, e.g., Geltman & Skroback, *supra* note 243, at 10 (discussing functional organization at EPA); Freeman & Rossi, *supra* note 4, at 1145 (discussing "overlapping agency functions . . . (as when two agencies share enforcement authority over the same malfeasance)").

<sup>245</sup> David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 988 (2004). For further discussion analogizing the issues involved in agency organization to those in organizing business entities, and citing some of the literature on the industrial organization of firms, see Vermeule, *supra* note 104, at 21; Hyman & Kovacic, *supra* note 3, at 19.

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

Though there is an extensive literature on the advantages and disadvantages of centralized and decentralized governmental authority, this literature largely neglects the significance of functional jurisdiction. Academics frequently offer arguments for or against centralized authority without considering whether the persuasiveness of those arguments differs depending on the agency function involved.<sup>246</sup> Similarly, when creating or reorganizing governmental institutions, legislatures often give short shrift to differentiating based on governmental function the assessment of possible benefits of creating more or less centralization.<sup>247</sup>

The failure to consider on a function-by-function basis whether centralized or decentralized authority is appropriate may lead to missed opportunities for better achieving policy goals by centralizing some functions but providing for the exercise of decentralized authority for others. This is because the tradeoffs among competing values may differ based on function. Centralizing authority to gather scientific or technical information, for example, may provide significant economies of scale, while the need to experiment and take advantage of local expertise may be minimal.<sup>248</sup> The case for centralizing the task of accumulating the data needed for effective health care regulation, for instance, appears strong.<sup>249</sup> In contrast, the diversity, expertise, democratic, and experimentation benefits of decentralizing standard-setting and/or implementation functions may be more important than the efficiencies that result from having only one regulator perform those functions and any unfairness of subjecting affected entities to multiple standards. As Abigail Moncrieff and Eric Lee have argued with respect to health care regulation:

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<sup>246</sup> See, e.g., Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 945-46 (2011) ("Centralized decisionmakers cannot adequately replicate or anticipate the experientially-based and contextual response of interested local actors who base their judgments on their 'particular circumstances of time and place.'"); ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT, *supra* note 123, at 11 (arguing for benefits of centralized environmental authority without regard to functional differences); Dornbos, *supra* note 94, at 17 (discussing the benefits of decentralization without mentioning functional differences).

<sup>247</sup> See, e.g., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 399-419 (2004) (discussing unification of national security/intelligence operations, but not potential for making different judgments on centralization based on governmental function).

<sup>248</sup> See 6, *supra* note 6, at 623.

<sup>249</sup> See, e.g., Abigail R. Moncrieff & Eric Lee, *The Positive Case for Centralization in Health Care Regulation: The Federalism Failures of the ACA*, 20-SPG KAN. J. L. & PUB. POL'Y 266, 276 (2011).

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If the states choose different policy approaches to manage the costs of, quality of, and access to healthcare, then regulators might learn which approaches work and which do not. At a minimum, regulators would learn more through the states' various attempts than they ever could from a single, uniform national policy.<sup>250</sup>

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

The enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010<sup>251</sup> illustrates the benefits of drawing functional distinctions in determining whether to create centralized or decentralized authority. The Obama Administration opposed preemption of stricter state regulatory protections,<sup>252</sup> and the statute limits the authority of agencies such as the Financial Stability Oversight Council (FSOC) and Consumer Financial Protection Bureau (CFPB) to preempt state regulation.<sup>253</sup> Thus, Dodd-Frank preserves decentralized standard-setting. According to the General Accountability Office (GAO), however, Dodd-Frank's delegation of authority to the CFPB to assist in improving the financial literacy and education of individual consumers of financial products, services, and concepts meant that fourteen federal agencies are now responsible for administering sixteen significant federal financial literacy programs or activities.<sup>254</sup> The GAO concedes the potential benefits of having multiple federal agencies involved in financial literacy efforts, including the ability to take advantage of "deep and long-standing expertise and experience addressing a specific issue area."<sup>255</sup> But the resulting multiplicity of authority "increases the risk of inefficiency and duplication of efforts,"<sup>256</sup> particularly in light of the substantial "similarities in mission between CFPB's statutory responsibilities and those of certain other federal

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<sup>250</sup> *Id.* at 276.

<sup>251</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>252</sup> See DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 61(2009) (Obama Administration white paper proposing financial regulatory reform). For further discussion of the background of the white paper, see Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. (forthcoming 2013), <http://ssrn.com/abstract=2130942>, at 5-6.

<sup>253</sup> Edward F. Greene, *The Limits of "Name-and-Shame" in International Financial Regulation*, 97 CORNELL L. REV. 1083, 1094-95 (2012).

<sup>254</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, OVERLAP OF PROGRAMS SUGGESTS THERE MAY BE OPPORTUNITIES FOR CONSOLIDATION, GAO-12-588, at 9 (July 2012), available at <http://www.gao.gov/assets/600/592849.pdf>.

<sup>255</sup> *Id.* at 14.

<sup>256</sup> *Id.*

entities.”<sup>257</sup> The vesting in the CFPB of a significant role in enhancing consumer financial protection was an opportunity to consolidate federal financial literacy efforts in a more efficient and effective way.<sup>258</sup> The GAO urged policymakers to consider consolidating authority over financial literacy information to avoid overlap, duplication, and inefficiency.<sup>259</sup> Whether the GAO’s assessment is ultimately convincing or not, this example suggests that the pros and cons of centralization and decentralization may differ by function, and that policymakers should carefully consider the possibility of different organizational structures for different functions.

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

As with analyses of the appropriate scale of government, a focus on functional jurisdiction makes clear that decisions on whether to provide for jurisdictional overlap are not an all-or-nothing proposition. Simply because two agencies share substantive jurisdiction does not mean that they overlap if their functional jurisdictions are distinct. Unfortunately, proponents and detractors of overlapping jurisdiction often ignore whether agency jurisdictions overlap functionally, losing an opportunity to accommodate some of the accountability benefits of overlap while minimizing inefficiencies. Finally, policymakers may be able to better achieve regulatory goals by designing governmental institutions to overlap for some functions but not others.

Congress has sometimes chosen to define distinct realms of agency functional authority, even though the agencies involved share substantive jurisdictions. For example, Congress vested in one agency the authority to adopt and in another the authority to enforce occupational safety standards.<sup>260</sup> Similarly, the Homeland Security Act of 2002<sup>261</sup> vested authority over the service aspects of immigration, including asylum and naturalization, in the U.S. Citizenship and Immigration Services,<sup>262</sup> while placing immigration enforcement duties in the hands of the U.S. Customs

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<sup>257</sup> *Id.* at 15, 19.

<sup>258</sup> *Id.* at 20.

<sup>259</sup> *Id.* at 20-21.

<sup>260</sup> See George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 330 (1987); Freeman & Rossi, *supra* note 4, at 1150.

<sup>261</sup> Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

<sup>262</sup> See <http://www.uscis.gov/portal/site/uscis>.

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and Border Protection.<sup>263</sup> Though both agencies have jurisdiction over immigration, their authority is largely distinct because there is little overlap in functional jurisdiction.

Yet in other cases, opportunities for promoting more efficient and effective regulation through the creation of distinct functional divisions of authority may have been missed. Detractors of overlap often focus on the inefficiencies and ineffectiveness of duplicative regulation, concluding that the solution should be agency consolidation.<sup>264</sup> In 1939, for example, President Franklin Roosevelt used authority derived from the Reorganization Act of 1939<sup>265</sup> to combine half a dozen agencies responsible for matters dealing with health care, economic security, and education into a new subcabinet-level agency, the Federal Security Agency (FSA).<sup>266</sup> Roosevelt justified the consolidation by highlighting the efficiency that would result by combining agencies with shared substantive jurisdiction over matters such as medical research, civil defense, national security, social security, federal education assistance, weapons development, and food and drug regulation.<sup>267</sup>

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

Relatedly, attention to functional jurisdiction allows policymakers to focus on whether there are good reasons to decrease overlap for one function but maintain or increase it for another. A few scholars, such as Jody Freeman and Jim Rossi, have helpfully recognized that the arguments in favor of creating overlapping or distinct authority may differ

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<sup>263</sup> See <http://www.cbp.gov/>; The Honorable Asa Hutchinson, *Holes in the Fence: Immigration Reform and Border Security in the United States*, Keynote Address, 59 ADMIN. L. REV. 533, 537 (2007).

<sup>264</sup> See *supra* notes 154 to 266 and accompanying text.

<sup>265</sup> 3 U.S.C. § 45a (1946).

<sup>266</sup> See *supra* notes 9 to 21 and accompanying text.

<sup>267</sup> *Id.* at 592.

depending on the particular governmental function involved.<sup>268</sup> Yet, when most scholars or agencies make assertions promoting overlapping jurisdiction, they appear to underappreciate the significance of differentiating along this dimension based on agency function and give short shrift to whether overlap is appropriate or effective for all governmental functions.<sup>269</sup> Proponents of overlapping jurisdiction usually focus on the effectiveness and accountability benefits of redundant institutions, especially for significant or irreplaceable resources or for situations in which massive costs are anticipated if regulatory failure occurs.<sup>270</sup> Yet the assessment of whether these redundancy benefits are worth the inefficiency costs may differ from function to function. Policymakers might structure authority differently along the overlap-distinctness dimension because the relative value of efficiency and redundancy differ based on the task at issue. Redundant development of information on the health risks of pollutant exposures at different levels, for example, may create waste without improving significantly the quality of the output.<sup>271</sup> On the other hand, the efficiency gains of vesting exclusive standard-setting or enforcement authority in one regulator may not justify the loss of the safety net that results from having multiple enforcement authorities to protect against ineffective or absent enforcement by a single agency.<sup>272</sup> In short, failure to consider whether overlapping or distinct authority is preferable on a function-by-function basis may result in the unnecessary sacrifice of effectiveness to achieve efficient governance, or vice versa.

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<sup>268</sup> See Freeman & Rossi, *supra* note 4, at 1146 (arguing that overlapping authority to enforce the antitrust laws may create inefficiencies and disagreements over enforcement policy); *id.* at 1147 (noting that two agencies set food safety standards, but that they bring different kinds of expertise to the effort).

<sup>269</sup> See, e.g., Aagaard, *supra* note 152, at 286-300 (addressing costs and benefits of overlap, mostly without drawing clear distinctions based on function).

<sup>270</sup> See, e.g., Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 745-46 (2010) (describing critical role of local governments in reducing greenhouse gas emissions to “create redundancy to compensate for regulatory failures”).

<sup>271</sup> Cf. Sandra B. Zellmer, *The Devil, the Details, and the Dawn*, 32 ARIZ. ST. L.J. 941, 1048 (2000) (discussing the value of EPA’s technical expertise in adopting air quality standards).

<sup>272</sup> See Engel, *supra* note 7, at 179-80 (discussing “regulatory safety net” provided by overlapping state and federal jurisdiction over pollution regulation and enforcement). There may be a strong argument for distinct authority, however, if there is directly conflicting authority by regulators (at whatever level of government) without a discernible difference in subject-matter competence.

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3. Functional Jurisdiction and the Coordination-Independence Dimension

A few scholars have addressed the need for agency coordination across not only substantive but also functional domains, recognizing that it may be advisable to require coordinated action for some governmental functions but to allow independent agency action for others.<sup>273</sup> In discussing the federal government's approach to agricultural policy, for example, David Weisbach and Jacob Nussim posit that the Internal Revenue Service is well situated to control financing through investment subsidies, while the Department of Agriculture is the best agency to regulate farmers more generally through standard-setting and related functions.<sup>274</sup> They conclude that "separate agencies for each function, and the resulting lack of coordination, could be optimal."<sup>275</sup>

More frequently, however, those analyzing agency structure promote either increased independence or coordination without fully appreciating or even acknowledging the significance of functional jurisdiction.<sup>276</sup> Because the arguments for coordinated or independent authority are likely to vary with the governmental function in question, this oversight creates the risk that analysts will overlook opportunities to achieve the optimal balance of policy goals by coordinating some functions but taking advantage of the exercise of independent authority for others. For instance, it may make sense to strike the balance between avoiding the inefficiency or inconsistency (arising from uncoordinated action) and avoiding groupthink (through independent agency authority) differently for the financing or planning and standard-setting functions. Policymakers should not elide these differences by confining their analysis solely to the extent of coordination in substantive authority.

Two examples illuminate the potential value of situating disparate agency functions at different points along the coordination-independence dimension. The first involves requiring multiple intelligence agencies to report to a single supervisor, the Director of National Intelligence. The 9/11 Commission and the Center for Strategic International Studies expressed concerns that such coordination might suppress innovation and competition among intelligence agencies, and that enhanced coordination

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<sup>273</sup> See, e.g., Arnold M. Howitt & Herman B. "Dutch" Leonard, *Katrina and the Core Challenges of Disaster Response*, 30-WTR FLETCHER F. WORLD AFF. 215, 220 (2006).

<sup>274</sup> Weisbach & Nussim, *supra* note 245, at 994-95.

<sup>275</sup> *Id.* The authors note the need to recognize "that desirable separation of functions into divisions is going to lead to lack of coordination." *Id.*

<sup>276</sup> See, e.g., DeShazo & Freeman, *supra* note 7, at 2221, 2232, 2253 (discussing forms of agency coordination, but failing to differentiate between functional and substantive coordination).

is likely to discourage opposing views precisely when they are most needed.<sup>277</sup> Others have pointed out, however, that the value of competition may be outweighed by the risk that agencies taking inconsistent approaches in acting on accumulated intelligence will operate inefficiently, if not at cross-purposes, thwarting achievement of efforts to thwart terrorist attacks.<sup>278</sup> Yet these seemingly dueling arguments are not necessarily irreconcilable; the detractors of coordination were focused primarily on the gathering and analysis of intelligence information, while proponents were focusing on governmental action in response. In these circumstances, the arguments for allowing agencies to act independently may be stronger for the information-analysis function than for the implementation function, and effective regime design might seek to limit coordination in the former but promote it in the latter.

The second example involves a comparison of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). NEPA requires each agency proposing a major federal action to consult with and solicit the comments of other federal agencies with jurisdiction or special expertise during the process of preparing environmental impact statements on such proposed actions.<sup>279</sup> The proposing agency must incorporate or respond to any comments in the final EIS.<sup>280</sup> In addition, NEPA created an agency, the Council on Environmental Quality (CEQ) to supervise compliance by other agencies with their NEPA evaluation and disclosure responsibilities, a task it has undertaken through the issuance of binding regulations that govern NEPA implementation by other agencies.<sup>281</sup> NEPA thus provides for coordination across the federal government of information-gathering and planning responsibilities<sup>282</sup> concerning agency actions that may affect the environment. NEPA does little, however, to require agencies to undertake or coordinate monitoring of the actual environmental impacts of activities for which impact statements have been prepared once implementation of

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<sup>277</sup> O'Connell, *supra* note 1, at 1685.

<sup>278</sup> See Freeman & Rossi, *supra* note 4, at 1135 (arguing that although overlap allows harnessing of specialized agencies' expertise and competencies, "that potential can be wasted if the agencies work at cross-purposes or fail to capitalize on one another's unique strengths and perspectives."); Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577, 2588 (2011) (noting need for coordination to control illegal drugs because law enforcement and health care agencies were ignorant of or hostile to each other's approaches).

<sup>279</sup> 42 U.S.C. § 4332(2)(C) (2006).

<sup>280</sup> 40 C.F.R. § 1503.4(a).

<sup>281</sup> *Id.* § 1500.3.

<sup>282</sup> See *id.* §§ 1501.1, 1501.2(a).



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those activities begins.<sup>283</sup> NEPA would likely have been more effective at actually minimizing the adverse environmental consequences of federal agency activities if it had extended coordination obligations to monitoring of the effects of project activities.

Some NEPA critics go one step further by disapproving the statute's absence of any substantive content. The Supreme Court has clearly ruled that NEPA's mandates are procedural in nature, not substantive.<sup>284</sup> Critics have urged that it be amended (or reinterpreted by the courts) to infuse substantive content into its environmental protection mandates.<sup>285</sup> Such a change would prioritize environmental values in a way that NEPA does not currently do. Short of that change, one way to increase the CEQ's coordinating role would be to vest in it authority to remand projects on the basis of their adverse environmental effects, which would provide a stronger form of agency coordination than NEPA now provides.

Although such a strengthening of NEPA's coordination mechanisms is unlikely to occur any time soon, the ESA provides a model for what that form of coordination might look like. The ESA mandates federal interagency coordination not only in information generation and planning, but also in project implementation. Section 7 requires federal agencies to avoid actions that will "jeopardize the continued existence" of listed endangered or threatened species or "result in the destruction or modification of" their critical habitat.<sup>286</sup> It requires an agency to consult with the National Marine Fisheries Service (for marine species) or Fish and Wildlife Service (for freshwater and wildlife species) on any agency action which is likely to jeopardize a listed species.<sup>287</sup> The formal consultation process concludes when the Service issues a biological opinion on whether the proposed activity is likely to jeopardize a listed species or adversely modify critical habitat, suggesting reasonable and prudent alternatives (RPAs) that would avoid such harms. The opinion may also include an incidental take statement conditionally authorizing the take of individual species members, provided the agency complies with the specified RPAs.<sup>288</sup> According to the Supreme Court, the Service's

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<sup>283</sup> The CEQ regulations provide only that "[a]gencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases." 40 C.F.R. § 1505.3.

<sup>284</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

<sup>285</sup> James T.B. Tripp, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74, 76-77 (2003) (citing critiques to this effect).

<sup>286</sup> 16 U.S.C. § 1536(a)(2).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* § 1536(b)(3), (4); 50 C.F.R. § 402.14.

Biological Opinion has a powerful coercive effect.<sup>289</sup> If the action agency ignores the RPAs, it must articulate its reasons for disagreement. It runs a substantial risk if those reasons turn out to be wrong,<sup>290</sup> placing it at risk of violating the statutory prohibition on the taking of listed species,<sup>291</sup> while an agency that complies with the terms of an incidental take statement is shielded from a finding that it has violated that prohibition.<sup>292</sup>

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

#### *B. The Importance of Appreciating the Dimensions of Authority*

The literature on how to apportion substantive authority is much more extensive than the literature on functional authority.<sup>293</sup> Nevertheless, this literature is incomplete for two reasons. First, scholars and policymakers often fail to consider how authority should be allocated along each of the dimensions described in Part III. Second, even when they do consider multiple dimensions of authority, they sometimes conflate the advantages and disadvantages of locating authority along two or more of the dimensions. Regardless of the particular dimensions that are being neglected or conflated, the bottom line is the same – incomplete vetting of the organizational choices and lost opportunities to foster primary goals or achieve complementary objectives. Separating out the dimensions as we suggest will preserve as many policy options as possible among competing organizational structures. Where to situate a particular program along each dimension should reflect consideration of the values promoted by each dimensional choice and prioritization of any conflicting values.

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<sup>289</sup> *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 170. The taking prohibition is codified at 16 U.S.C. § 1538(a)(1)(B) (2006).

<sup>292</sup> 16 U.S.C. § 1536(o)(2).

<sup>293</sup> The literature on the federalism aspects of government programs is particularly extensive. See Alessandra Arcuri & Giuseppe Dari-Mattiacci, *Centralization and Decentralization as a Risk-Return Trade-off*, 53 J. L. & ECON. 359, 361 (2010); *supra* note 6.

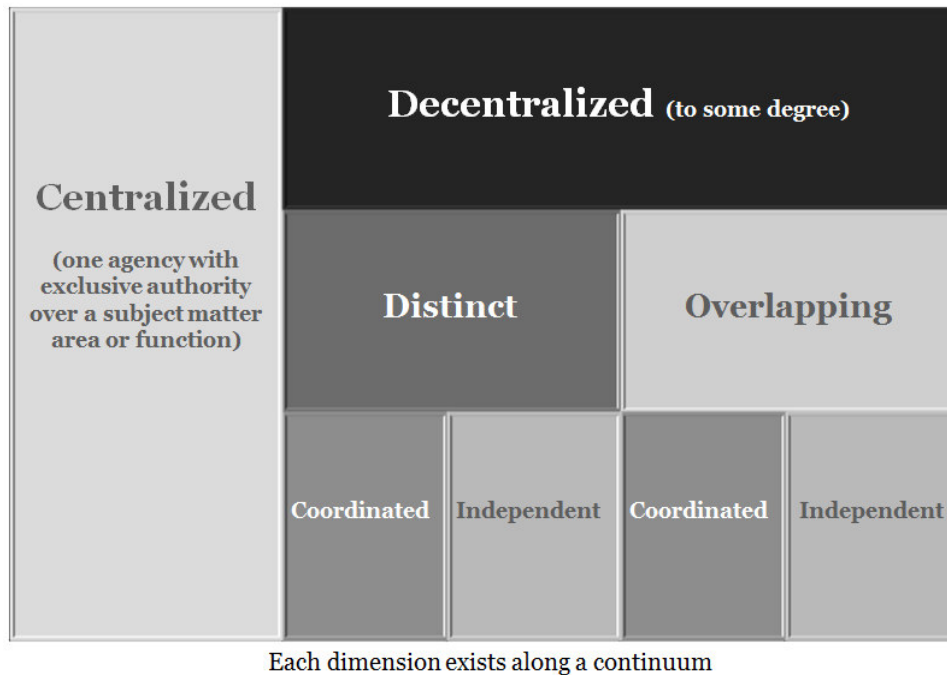
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The three dimensions should not be viewed in isolation; in all but one situation, they are iterative. If policymakers with authority to contemplate the creation of a new government program or the reorganization of an existing one choose to vest all authority to administer the program in a single centralized governmental entity, they need not consider either of the other two dimensions.<sup>294</sup> As Figure 6 below demonstrates, however, if the desired program is decentralized (either among governmental levels or within a level), then more than one agency will necessarily have authority (unless the geographic boundaries of each regulator's jurisdiction are mutually exclusive).<sup>295</sup> If more than one governmental entity has jurisdiction, policymakers have meaningful institutional design options beyond simply choosing a decentralized structure. The remaining options involve whether to vest the two or more agencies that will have jurisdiction with distinct or overlapping authority, and whether to allow or require those agencies to act independently of one another or to allow or require coordinated action.

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<sup>294</sup> Even in this circumstance, the single institution may exercise substantive authority that is at least peripherally within the realm of other entities' substantive powers, both within and outside the jurisdiction, and there may be value in considering coordination with these other entities. In addition, agencies are not monolithic entities, and different divisions or offices within a single agency may provide choices along the overlap and coordination dimensions.

<sup>295</sup> Both New York City and Los Angeles have the authority to adopt land use controls such as zoning laws. In most respects, this Article is not concerned with the relationship between the authority of those two regulators. They do not have overlapping jurisdiction, as this Article uses that term, even though both are authorized to regulate land use, because no landowner is subject to the jurisdiction of both agencies. The structuring of agency authority to allow geographically distinct regulators to act is relevant to the centralization-decentralization dimension, however, to the extent that decentralization is justified by the desire to promote experimentation and innovation by multiple regulators.

**Figure 6. Dimension Relationships**

The interactions among the dimensions are important because they may act synergistically or at cross-purposes with one another. Although the dividing lines among the dimensions will in some instances blur at the margins,<sup>296</sup> we suggest that the values promoted by the poles of each dimension are sufficiently different from one another that there is value in considering each choice sequentially.

Thus, for example, suppose that policymakers have chosen to create a program of both federal and state authority in order to achieve the diversity, experimentation, and accountability benefits of a decentralized regime. They should next consider whether they prefer that overlapping authority among federal and state regulators (to provide redundancy and a safety net against inactivity or capture by regulators at one level), or instead prefer to promote the efficiencies resulting from the creation of distinct regulatory responsibilities.<sup>297</sup> Finally, policymakers should consider whether they place a higher priority on achieving the efficiencies of coordinated regulation among multiple regulators and on minimizing the risk of agencies working at cross-purposes, or the effectiveness

<sup>296</sup> Efforts to reduce overlap may bleed over into centralization, for example. *See supra* note 160 and accompanying text.

<sup>297</sup> *See Hyman & Kovacic, supra* note 3, at 17 (urging that issues concerning overlap be considered in terms of the optimal level of agency and regulatory redundancy/overlap – a framing which necessarily requires balancing the costs and benefits of such strategies compared to the alternatives).

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advantages that stem from allowing regulators to act independently so as to avoid groupthink that may stifle the experimentation benefits provided by decentralized government.

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

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

As Jody Freeman and Jim Rossi have pointed out, “[i]nstances of overlap and fragmentation are not rare or isolated. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation.”<sup>298</sup> A growing literature promotes overlapping jurisdiction based on its capacity to provide diversity, experimentation, and expertise benefits, but some scholars appear to commingle the advantages of overlap with those of decentralized authority.<sup>299</sup> For example, some have promoted overlapping jurisdiction based on its capacity to take advantage of the exercise of authority that is tailored to particular regulatory circumstances or to benefit from unique agency expertise.<sup>300</sup> Such arguments conflate overlap with decentralization because the benefits of accommodating diversity of circumstances or taking advantage of agency expertise are more appropriately attributed to decentralized governance.<sup>301</sup> Put another way, it is the feature of decentralization that allows for localized tailoring of regulation and the application of an array of expertise, not the fact that the authority is overlapping.

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

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<sup>298</sup> Freeman & Rossi, *supra* note 4, at 1134.

<sup>299</sup> See, e.g., O’Connell, *supra* note 1, at 1659 (equating redundancy and decentralization); *id.* at 1673 n.104 (same, but recognizing that differences may exist).

<sup>300</sup> See, e.g., Doran, *supra* note 173, at 1820-21 (stating that information theory “implies that the institutional determinants of redundancy usually facilitate specialization”); *id.* at 1849 (discussing theory that Congress enacts redundant programs to pursue informational efficiency).

<sup>301</sup> For a description of the expertise and diversity benefits of decentralization, see *supra* notes 93-96 and accompanying text.

by devising new solutions to new problems.”<sup>302</sup> Another claims that redundancy “enables a range of experts with diverse viewpoints to contribute to the lawmaking process and it fosters competition and rivalry among decisionmakers, leading to a level of innovation and creativity that is impossible to achieve with a single decisionmaking body.”<sup>303</sup> Still others have asserted that overlapping authorities “are more likely to discover which instruments most effectively respond” to a particular problem.<sup>304</sup>

These arguments largely also conflate decentralized with overlapping authority.<sup>305</sup> The opportunity to learn from the experiences of other jurisdictions that have adopted different regulatory strategies is more appropriately regarded as a benefit of decentralized governance.<sup>306</sup> If policymakers adopt a redundant governmental structure in order to achieve the diversity or experimentation benefits of having multiple regulators, they may fail to appreciate that though decentralization promotes those ends, a decentralized regime can be structured with either overlapping or distinct authority. The choices along that dimension call for analysis of the tradeoff between the efficiency advantages of a system of distinct authority and the protections against capture and agency inaction<sup>307</sup> provided by overlapping authority.

Conflation of these two dimensions sometimes also occurs in the opposite direction. Scholars have attributed to decentralization of authority the benefits of creating a regulatory safety net that protects against the risk of capture and agency inaction.<sup>308</sup> Decentralized authority may not create such a safety net, however, if each agency is assigned a discrete substantive jurisdiction. It is the overlap and coordination of

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<sup>302</sup> Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2325 (2006).

<sup>303</sup> Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1200 (2006).

<sup>304</sup> Ruhl & Salzman, *supra* note 7, at 107.

<sup>305</sup> In rare circumstances when experimentation must occur quickly, such as when the problem to be addressed by government is expected to be ephemeral and/or infrequent, overlap arguably may be a way to spur innovation. In such cases, simultaneous activity by agencies with overlapping jurisdiction may be best suited to generating the lessons provided by experimentation.

<sup>306</sup> See Wulf A. Kaal, *Initial Reflections on the Possible Application of Contingent Capital in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 317 (2012) (“[E]xperimentation is probably most effective when several different approaches can be tried simultaneously in different jurisdictions.”); Esty, *Environmental Federalism*, *supra* note 6, at 606 (“A decentralized regulatory strategy permits the simultaneous testing of various policy responses.”)

<sup>307</sup> See Katyal, *supra* note 302, at 2324 (discussing the risks of relying on one agency because “[w]hen one bulb blows, everything goes.”).

<sup>308</sup> See, e.g., Aagaard, *supra* note 152, at 294-95.

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jurisdiction among multiple agencies that may protect against capture and inaction, not decentralization.<sup>309</sup>

Although overlap provides redundancy benefits, it also creates the potential for duplicative regulation that wastes agency resources, regulation that creates conflicting or onerous obligations for regulated entities, or inadequate regulation by agencies seeking to rely on (or blame) the efforts of peer agencies.<sup>310</sup> A common response to the incentives toward either over-regulation or under-regulation caused by overlapping governance is to call for the consolidation of regulatory authority.<sup>311</sup> Proponents of centralized authority argue that consolidation within a governmental level minimizes pursuit of divergent goals or inconsistent actions by multiple agencies that may interfere with agency missions. However, consolidation is not the only way to address inappropriate levels or methods of regulation. Instead, policymakers can retain the same number of agencies and delegate distinct tasks to each. Conflation of the overlap-distinctness and decentralization-centralization dimensions masks this option.

The reorganization of federal agencies to establish the Department of Homeland Security is illustrative. Congress created the DHS in 2002 out of more fragmented federal authorities in part to reduce the potential for the numerous existing intelligence-gathering agencies to work at cross-purposes.<sup>312</sup> Some have questioned whether the pre-2002 landscape actually was characterized by excessive overlap of agency authority.<sup>313</sup> Even if it was, however, it is not clear that consolidation effectively reduced inter-agency interference. Professors Freeman and Rossi charge that the 2002 Act failed to eliminate overlapping and potentially conflicting functions in the new DHS.<sup>314</sup>

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<sup>309</sup> See *supra* notes 182 to 185 and accompanying text. The degree to which overlap counters capture may depend on whether one of the agencies with overlapping jurisdiction has the authority to veto actions by others or whether each agency has the authority to proceed without the consent of the others. If, for example, a regulated entity wants to squelch regulatory action, it will be easier for it to achieve its goal by capturing an agency with veto power than multiple agencies, each of which have the authority to regulate on its own.

<sup>310</sup> See *supra* notes 154 to 166 and accompanying text. See also Aagaard, *supra* note 152, at 287-88; Marisam, *supra* note 20, at 198.

<sup>311</sup> See *supra* notes 170, 294 and accompanying text.

<sup>312</sup> See Cohen et al., *supra* note 1, at 683-84.

<sup>313</sup> See, e.g., Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1224 (2008).

<sup>314</sup> Freeman & Rossi, *supra* note 4, at 1153-54.

In such cases, policymakers may be well advised to consider delineating more distinct lines of substantive authority or allocating distinct functional authority to different agencies with jurisdiction over the same subject matter instead of centralizing authority through a reduction in the number of agencies.<sup>315</sup>

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

It is tempting to consider substantial levels of coordination to be akin to centralized authority. However, even at its most robust, coordination is a different characteristic of governance than centralization.<sup>316</sup> The benefits of centralization tend to be the opportunity to achieve economies of scale, the ability to address collective action problems (such as inter-jurisdictional spillovers) more effectively than decentralized approaches can, and the achievement of fairness through uniformity and weakening of the power of factions.<sup>317</sup> Coordination primarily promotes cost-effective government and reduces the risk that the acts of one authority will counteract or frustrate those of another.<sup>318</sup> Though centralization may help decrease the costs of coordination, they seek fundamentally different goals.

Yet, many policymakers and scholars have touted coordinated government as a way to take advantage of economies of scale.<sup>319</sup> As Jacob Gersen has noted, the centralized regulatory review literature “often equates coordination with centralized control, even though centralization is neither a necessary nor a sufficient condition for coordination. Strong vertical control over subordinates may facilitate coordination, but there seems to be no shortage of lackadaisical supervisors in the world.”<sup>320</sup>

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<sup>315</sup> According to several observers, the folding of the Federal Emergency Management Agency into the DHS deemphasized emergency management, hampering the response to Hurricane Katrina. Elizabeth F. Kent, Note, “*Where’s the Cavalry?*” *Federal Response to 21st Century Disasters*, 40 *SUFFOLK U. L. REV.* 181, 206 (2006); Cohen et al., *supra* note 1, at 740. Increased centralization may have subordinated emergency management to the DHS’s priority concern, prevention of terrorism. Reduction of overlap by assigning different functions to agencies responsible for information gathering and planning, and emergency response implementation, may have minimized inter-agency interference while continuing to benefit from agency experience and expertise.

<sup>316</sup> See Hyman & Kovacic, *supra* note 3, at 40 (arguing that “the coordination of functions and responsibilities will not happen merely because previously separate bureaus are combined into a single department”).

<sup>317</sup> See *supra* notes 115 to 136 and accompanying text.

<sup>318</sup> See *supra* notes 204 to 207 and accompanying text.

<sup>319</sup> Symposium Transcripts, *Sustainable Energy Development in Emerging Markets*, 24 *U. PA. J. INT’L ECON. L.* 759, 792 (2003) (remarks of Steven Richards) (concerning energy access).

<sup>320</sup> Jacob E. Gersen, *Unbundled Powers*, 96 *VA. L. REV.* 301, 346 (2010).



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Likewise, extensive inter-jurisdictional coordination can certainly occur in a largely decentralized regime.<sup>321</sup>

Though some may fail to differentiate coordination from centralization, others actually have conflated coordinated and decentralized authority. Some scholars have advocated coordination as a way to garner the benefits of multiple perspectives, specialized knowledge, and opportunities for agencies to test new ideas.<sup>322</sup> To be sure, some coordination of information between authorities must occur for these benefits to accrue. However, because these diversity and expertise benefits more fundamentally rely on the existence of various authorities, we assert that these are primarily attributes of decentralization.

Still other scholars conflate decentralization with independence. These commenters have asserted that a key attribute of decentralized governance is that it provides a way for governmental authorities to compete with each other and thus promote efficiency and effectiveness. According to one source, for example, “economic insights, such as the heterogeneity of preferences and the efficiency of the competitive process for government regulation, may lead to the conclusion that decentralization guarantees efficiency gains.”<sup>323</sup> However, while some level of decentralization of governmental authority undoubtedly must exist for there to be inter-jurisdictional competition, it is not decentralization, but rather the independence of multiple agencies with jurisdiction over a problem, that provides the primary foundation for competition. For example, lodging considerable governmental jurisdiction in only two or three national agencies might create a fairly centralized regulatory regime; yet such governmental authorities could be designed to be highly competitive.<sup>324</sup> Likewise, a fundamentally decentralized allocation of governmental authority might nonetheless involve considerable cooperation and collaboration between governmental authorities, hardly the hallmark of inter-jurisdictional competition.<sup>325</sup>

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<sup>321</sup> See COUNCIL OF GREAT LAKES GOVERNORS, *THE GREAT LAKES CHARTER: PRINCIPLES FOR THE MANAGEMENT OF GREAT LAKES WATER RESOURCES* (1985); *supra* note 222 and accompanying text (discussing coordination through interstate compacts).

<sup>322</sup> See Freeman & Rossi, *supra* note 4, at 1210.

<sup>323</sup> Aurélian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 COLUM. J. EUR. L. 231, 239 (2011). See also Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281, 310 (2012) (questioning assumption that decentralized decision making and interjurisdictional competition will foster fiscal responsibility and efficiency).

<sup>324</sup> Cf. O’Connell, *supra* note 1 (advocating an almost exclusively federal but competitive governmental regime for national security intelligence gathering).

<sup>325</sup> See, e.g., Blake Hudson, *Fail-Safe Federalism and Climate Change: The Case of U.S. and Canadian Forest Policy*, 44 CONN. L. REV. 925, 936 (2012) (arguing for

By conflating the coordination/independence and centralization/decentralization dimensions, scholars and policymakers lose an opportunity to better tailor the design of governmental authority. If a policymaker's goal is to achieve economies of scale or uniform and equitable regulatory treatment, then centralization is often the best way to do so. If, however, a policymaker decides to create a decentralized regime to take advantage of the democracy, diversity, expertise, and experimentation benefits that such a structure is apt to provide, the policymaker should further consider whether decentralized power should be accompanied by coordination or independence among the multiple agencies authorized to address the problem in question. That choice involves a tradeoff between the advantages of a fair and cost-efficient structure that minimizes the risk of conflicting policy approaches<sup>326</sup> with a structure that avoids the administrative costs of coordinated action and fosters competition, while protecting against groupthink. Conflation of the centralization/decentralization and coordination/independence dimensions may mask the important tradeoffs involved in situating a regime along the latter dimension.

One example of a reorganization effort that may have failed to appreciate the option of moving along the coordination-independence dimension instead of the centralization-decentralization dimension is the reorganization of agency power over consumer financial products and services that resulted from enactment of the Dodd-Frank Act of 2010.<sup>327</sup> Dodd-Frank delegated to the newly created CFPB the combined authority of seven federal agencies previously responsible for protecting consumers of financial services.<sup>328</sup> Part of the impetus for that consolidation was dissatisfaction with the competition between the OTS and the Office of the Comptroller of the Currency (OCC) for new charters by banks and thrift institutions. By lowering their standards, the OTS and the OCC competed for the ability to issue charters to banks and thrift institutions, which had the option of choosing to subject themselves to either regulator.<sup>329</sup> As two

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decentralized but coordinated forest policy-making process); Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 935 (2011) (supporting decentralized but cooperative regime for renewable energy development).

<sup>326</sup> See Freeman & Rossi, *supra* note 4, at 1182 (discussing potential for conflicting interpretations of legal requirements and incompatible compliance requirements absent coordination).

<sup>327</sup> See *supra* notes 60 to 61, 251 to 259 and accompanying text (discussing the Dodd-Frank Act).

<sup>328</sup> Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. OF BANKING & FINANCIAL L. 881, 882 (2012).

<sup>329</sup> Dain C. Donelson & David Zaring, *Requiem for a Regulator: the Office of Thrift Supervision's Performance During the Financial Crisis*, 89 N.C. L. REV. 1777, 1781 (2011).

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scholars explained, “[t]he combination of fee dependence on the part of the regulators and the ability of regulated institutions to credibly threaten to switch charters is thought by detractors to create a capture-ready environment, in which agencies become beholden to the industries that underwrite their budgets.”<sup>330</sup> The existence of multiple agencies charged with regulating consumer financial transactions created a diffusion of responsibility and lax enforcement.<sup>331</sup> Dodd-Frank consolidated in the CFPB federal regulatory functions (including research, information distribution, and standard-setting) over banks and thrifts as a way to eliminate inter-agency competition that reduced the effectiveness of regulation.<sup>332</sup>

Greater centralization of regulatory power was not the only way to reduce destructive competition, however. Indeed, the antidote for excessive competition is perhaps more logically found by moving toward the coordination end of the independence-coordination dimension. According to some assessments, congressional efforts through consolidation to streamline and eliminate destructive inter-agency competition did not fully succeed, as “Congress did not substantially reduce or consolidate existing federal regulators, as some had proposed,” and “information sharing and coordination remain significant challenges to the effective operation of the fragmented regime.”<sup>333</sup> As these scholars recognized, Congress may have been better advised to require information-sharing and other forms of coordination of the activities of multiple bank and thrift regulators instead of consolidating authority in the hands of the CFPB.<sup>334</sup> At the very least, a move toward greater coordination (without centralization) should have been on the table as an option worth considering. Allowing multiple agencies to retain authority but requiring them to coordinate might have reduced destructive (and unfair) inter-agency competition, while taking advantage of the expertise and experimentation benefits that decentralized governance may supply.

A similar story may be told about the adoption of the Homeland Security Act in response to the events of 9/11, which is also discussed above in connection with conflation of the overlap/distinctness and

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<sup>330</sup> *Id.* at 1785, 1787, 1788.

<sup>331</sup> That configuration also may have contributed to unequal and unfair treatment of participants in those transactions at the hands of different regulators.

<sup>332</sup> ADAM J. LEVITIN, *THE PEW ECONOMIC GROUP: THE CONSUMER FINANCIAL PROTECTION AGENCY* 7 (2009).

<sup>333</sup> Freeman & Rossi, *supra* note 4, at 1148.

<sup>334</sup> *Id.* at 1154. *See also* Hyman & Kovacic, *supra* note 3, at 48-49 (noting that consumer financial protection regulatory reform could have taken different paths, including creation of a new agency, centralization of power in an existing agency, or creation of a system for closer coordination of effort by existing agencies).

centralization/decentralization dimensions.<sup>335</sup> Congress consolidated the authority of many federal agencies in the new DHS in part to reduce competition among agencies performing intelligence functions that was perceived as being counterproductive.<sup>336</sup> Some critics have taken issue with the objective of eliminating competition, which they believe had yielded helpful policy innovations.<sup>337</sup> Even if reduced competition was desirable, however, others have concluded that the creation of the DHS failed to increase the efficiency of intelligence-gathering functions<sup>338</sup> and that coordination across agencies was in some instances better than within the sprawling new Department.<sup>339</sup> They claim that it may have been possible to accomplish the efficiency and effectiveness gains sought with the creation of the DHS through the creation of a much smaller White House-based agency that facilitated coordination at a fraction of the administrative costs entailed in the shifting of responsibilities from other agencies to the DHS.<sup>340</sup> A decision to increase coordination without centralizing authority previously exercised by many agencies within a single new Department also may have preserved the expertise built up by the agencies folded into the DHS.<sup>341</sup>

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

Another source of potential confusion is the conflation of coordination and overlap. A discussion of wildfire management policy along the wildland-urban interface, for example, describes the governing regime as having shifted from one dominated by the U.S. Forest Service to one in which state and local governments now play a significant role. In describing the benefits of this “overlapping authority regime,” the author refers to the strengthening of state and local firefighting resources through

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<sup>335</sup> See *supra* notes 312 to 315 and accompanying text.

<sup>336</sup> Cohen et al., *supra* note 1, at 718.

<sup>337</sup> *Id.* at 752.

<sup>338</sup> *Id.* at 751-52.

<sup>339</sup> Had Congress paid more attention to functional rather than substantive jurisdiction, it might have chosen to coordinate among agencies with authority to protect national security for certain functions but not others. It might have decided, for example, not to coordinate information-gathering to preserve the independence of agencies and promote innovative competition among them. It may also have decided, however, to require coordinated implementation of national security plans and programs to prevent agencies from working at cross-purposes.

<sup>340</sup> Cohen et al., *supra* note 1, at 712, 753.

<sup>341</sup> According to one observer, congressional neglect of expertise developed by agencies before the creation of DHS “threatens those aspects of the other agencies’ missions that overlap with new homeland security agenda. Jon Kalmuss-Katz, *Eco Anti-terrorism: EPA’s Role in Securing Our Nation’s Chemical Plants*, 18 N.Y.U. ENVTL. L.J. 689, 733 (2011).

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increased funding, investment in the dissemination of best practices and standards, resource sharing, and, generally, the strengthening of interagency ties.<sup>342</sup> However, resource and information sharing and the strengthening of interagency ties are more accurately attributed to a coordinated regime, not necessarily an overlapping one. Multiple agencies with overlapping authority could work completely in ignorance of what agencies with shared authority are doing, or even at cross-purposes. Likewise, governmental authorities with little overlap in jurisdiction (such as peer agencies from different states) can and often do coordinate and learn from common experiences in their exercise of authority.<sup>343</sup>

Similarly, some have conflated the opposite ends of these two dimensions—that is, distinct and independent authority. Professor O’Connell, for example, has asserted that distinct authorities can avoid the groupthink to which redundant authority is prone.<sup>344</sup> Groupthink is more appropriately regarded, however, as the byproduct of highly coordinated authority, and can be avoided by allowing and encouraging agencies to act independently (whether or not their respective jurisdictions overlap).

Other scholars have identified a tradeoff between specialization and coordination.<sup>345</sup> We regard these as two separate choices – overlap or distinctness (a form of specialization), and coordination or independence. The first pair deals largely with a tradeoff between effectiveness through the creation of redundant authorities and efficiency through the elimination of duplication of functions. The latter, however, largely entails choosing between the effectiveness that results from reduced opportunities for agencies working at cross-purposes with one another, balanced against the reduced administrative costs resulting from avoidance of the need to coordinate and the enhanced effectiveness from averting groupthink. The two dimensions both involve efficiency-effectiveness considerations, but they differ from one another.

The principal problem with conflating the overlap/distinctness and coordination/independence dimensions is again the risk of missed opportunities or thwarted goals. A policymaker may choose to require coordination among multiple regulators as a means of achieving cost-effectiveness and reducing opportunities for conflicting approaches.<sup>346</sup>

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<sup>342</sup> Lauren Wishnie, *Fire and Federalism*, 17 N.Y.U. ENVTL. L.J. 1006 (2008).

<sup>343</sup> See, e.g., Freeman and Rossi, *supra* note 4, at 1156 n.105 (discussing “Brown Bag Lunch Group” involving information exchange among officials from across the government, to “develop common approaches to shared problems.”).

<sup>344</sup> O’Connell, *supra* note 1, at 1676.

<sup>345</sup> See, e.g., Weisbach & Nussim, *supra* note 245, at 992.

<sup>346</sup> See *supra* note 204 and accompanying text.

Unless the policymaker also considers whether the coordinating agencies should have overlapping or distinct authority, however, it may never address whether it is better to supplement those goals with a structure that creates redundancy as a means of creating a safety net against inaction, or instead with a structure that is designed to achieve the administrative efficiencies resulting from the creation of a distinct set of substantive authorities.<sup>347</sup> Likewise, a policymaker initially may choose overlapping authority to create a safeguard against regulatory failure. It should also consider, however, whether it prefers a coordinated approach that minimizes opportunities for working at cross-purposes or one that stresses the need to combat groupthink.

A recent example of coordination of overlapping authority is the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>348</sup> which requires the President to facilitate the sharing of information relating to terrorism among federal, state, and local entities. In 2008, the Director of National Intelligence published a strategy declaring “the imperative need of moving beyond considering State and local government to be only ‘first responders,’ preferring instead to thinking [sic] of them as the first line of defense in a very deep line of information assets.”<sup>349</sup> The federal government, through the DHS, has since financed state-operated “fusion centers” to promote communication and coordination in the information gathering function among regional, state, and local authorities on intelligence matters.<sup>350</sup>

The USA PATRIOT Act of 2011<sup>351</sup> also sheds light on the relationship between the overlap/distinctness and coordination/independence dimensions. A consensus developed that national security officials needed to share information to help them “connect the dots” that would allow the government to prevent future attacks.<sup>352</sup> Notably, however, coordination did not necessarily mean the elimination of redundancy, which represents a different dimension in our typology. Professor Nathan Sales explained that coupling coordination with redundancy facilitates information sharing, resulting in competitive analysis among intelligence agencies consulting a common pool of information, exposing policy makers to diverse perspectives, and counteracting “groupthink tendencies.”<sup>353</sup>

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<sup>347</sup> See *supra* notes 154 to 156, 182 to 185 and accompanying text.

<sup>348</sup> 6 U.S.C. § 485 (2006).

<sup>349</sup> Waxman, *supra* note 243, at 304-05.

<sup>350</sup> *Id.* at 308-09.

<sup>351</sup> Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of U.S.C.).

<sup>352</sup> Nathan Alexander Sales, *Mending Walls: Information Sharing after the USA Patriot Act*, 88 TEX. L. REV. 1795, 1796 (2010).

<sup>353</sup> *Id.* at 1801-02.

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Though we concur that reliance on redundant authority is not inconsistent with coordination, we would characterize the structure created by the USA PATRIOT Act somewhat differently. We regard competition as a by-product of independence, not redundancy (or overlap). The Act actually seems to have required coordination among national security with respect to one function—information distribution or sharing—to promote efficiency and avoid waste. At the same time, it encouraged competition through independent performance of a different function—information analysis—so as to garner to the benefits of competition and to avoid groupthink.<sup>354</sup>

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

## CONCLUSION

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

The appropriate balance among competing goals or values inevitably must be struck contextually.<sup>355</sup> Nevertheless, it may be useful to provide some tentative generalizations on how the relative merits of dimensional allocations of authority are likely to differ by function. Additionally, a consideration of how functional jurisdiction may generally interface with the various dimensions of authority suggests novel opportunities to maximize the advantages of a particular dimensional allocation while minimizing its risks. In this conclusion, we begin by providing a few preliminary observations regarding likely general tendencies in the allocation of authority.

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<sup>354</sup> See O'Connell, *supra* note 1, at 1690 (urging such functional allocation).

<sup>355</sup> See, e.g., Aagaard, *supra* note 152, at 280.

*Coordinating or Centralizing Research, Information Dissemination, and Financing.* In general, arguments for centralization and coordination are likely to be stronger for scientific research, information organization and distribution, and financing than for other governmental functions. Centralization may frequently be a way to overcome collective action problems, such as the incentives for each governmental entity to free ride on the efforts of others, assuming information accumulated by one agency will be shared with others.<sup>356</sup> In addition, centralization (or coordination)<sup>357</sup> can produce administrative efficiencies by reducing duplication of effort. On the other hand, the experimentation and diversity benefits of decentralizing scientific research and particularly the collating and distribution of information are likely to be more muted.

One factor in determining whether to centralize on the one hand or decentralize and coordinate on the other might be the likelihood of innovation by multiple governmental authorities. The more valuable innovations are likely to be, the less advantages centralization is likely to offer. The analysis of accumulated information, for example, may benefit from the experimentation and expertise benefits of decentralization, as multiple agencies may interpret the same data in different ways or devise different strategies for acting on that data, reducing the risk of groupthink that prevents innovative action that may promote values such as effectiveness.<sup>358</sup> Assuming some level of decentralization, the choice between overlapping or distinct authority might often be made by comparing the efficiency gains of distinct authority with the redundancy advantages of overlap.

The value of centralizing the scientific research and information dissemination functions has been recognized in a variety of regulatory contexts. In the environmental area, as Daniel Esty has explained, delegating these functions to state and local regulators will tend to weaken technical capacity and forfeit economies of scale, particularly because the nature of many scientific and technical questions will be the same regardless of jurisdiction.<sup>359</sup> In the field of national security, the costs of harmonizing state and local data collection efforts may be high, and trust in the accuracy of shared information may be greater if it is accumulated

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<sup>356</sup> See, e.g., Eric T. Laity, *The Corporation as Administrative Agency: Tax Expenditures and Institutional Design*, 28 VA. TAX REV. 411, 455 (2008).

<sup>357</sup> See, e.g., Marisam, *supra* note 20, at 26-27 (arguing that while “the risk of free riding is substantial when Congress assigns the same tasks to multiple agencies,” that risk “is diminished when each agency contributes different information or performs different subtasks”).

<sup>358</sup> See O’Connell, *supra* note 1, at 1676.

<sup>359</sup> Esty, *Environmental Federalism*, *supra* note 6, at 614-15.



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centrally.<sup>360</sup> Similarly, because “healthcare regulation . . . has become increasingly objectivist and data-driven . . . , the greatest need is not for voice or diversity . . . but rather for scale to gather reliable data.”<sup>361</sup> In addition, the federal government may have incentives to accumulate health care data that lower levels of government lack, creating collective action problems in a decentralized information-gathering regime.<sup>362</sup>

As with scientific research and information distribution, collective action problems generally appear to provide a strong justification for centralizing the financing function for many substantive jurisdictional areas. States and localities will often lack incentives to invest in intelligence and national security functions, for example, because the risks of inadequate surveillance may be externalized if terrorist activity is conducted in locations different from where they are planned, and some jurisdictions may regard themselves as at low risk. In addition, the political flack of ineffective counterterrorism measures tends to be borne by the federal government.<sup>363</sup> Finally, the federal government generally will have superior capacity to finance regulatory programs.<sup>364</sup>

Of course, the appropriate allocation of authority is likely to differ for other types of information gathering. In contrast to scientific research, information distribution, and financing, the arguments for decentralization are likely to be stronger for various monitoring activities, particularly of localized conditions in fields of regulation such as environmental protection. Knowledge of local pollution sources and conditions will often provide a stronger justification for decentralized monitoring of current levels of pollution, for example, than exists for the accumulation and analysis of information on matters such as the degree of exposure to a particular pollutant that creates unacceptable levels of health risk.<sup>365</sup> Similarly, there frequently may be advantages to vesting in lower levels of government the task of determining the effect of regulated activity such as pollution on local populations, especially local concentrations of vulnerable or disadvantaged groups. Even in these circumstances,

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<sup>360</sup> See Waxman, *supra* note 243, at 344. *But cf. id.* at 345-46 (arguing that local law enforcers or partnerships between them and the federal government are likely to discover terrorist activities conducted inside the United States, seeding “long-term, bottom-up learning”).

<sup>361</sup> Moncrieff & Lee, *supra* note 249, at 278, 283.

<sup>362</sup> *Id.* at 280 (arguing that the Affordable Care Act falls short of “the full centralization that seems functionally justified”).

<sup>363</sup> Waxman, *supra* note 243, at 340-41.

<sup>364</sup> David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2648, 2652 (2005).

<sup>365</sup> See David A. Strifling, *Environmental Federalism and Effective Regulation of Nanotechnology*, 2010 MICH. ST. L. REV. 1129, 1171 (2010).

however, sound reasons likely remain for coordinating information distribution systems among governmental authorities, or even centralizing the distribution function in a dedicated authority. Again, context matters in getting the functional allocation right.

*Decentralizing and Coordinating Distinct Planning Authority.* The case for decentralized but coordinated planning generally seems stronger than for other governmental functions. Superior knowledge of location-specific needs and conditions may often support delegating planning responsibilities to regional or local branches of federal agencies<sup>366</sup> or to lower levels of government.<sup>367</sup> In addition, the experimentation and learning benefits of planning by many agencies would frequently support decentralization. Conversely, economies of scale are likely to be more difficult to achieve when planners must consider localized conditions in detail and the issues are not entirely or even largely national in character, reducing the value of centralization.

Assuming some level of decentralized planning authority is deemed appropriate, policymakers also must consider how to situate that authority along the overlap and coordination axes. Because overlapping planning jurisdiction creates the potential for inconsistent mandates, planning would appear to often be a good candidate for establishing an allocation of substantively distinct authority. Regardless of whether authority is overlapping or distinct, coordinated planning requirements may be essential to avoid disastrous results like those experienced in the responses to Hurricane Katrina.<sup>368</sup> If, for example, the federal government is responsible for providing food and water to populations affected by national disasters, they would need to know where local authorities are planning to move at-risk populations.<sup>369</sup> As compared to the value of harmonization, the value of competition among agencies may be relatively small at the planning stage. The risk of holdouts, one of the anti-commons problems associated with excessive coordination,<sup>370</sup> might be minimized in some circumstances by authorizing the federal government to take over

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<sup>366</sup> Planning for the national forests, for example, is conducted at the individual forest level. 16 U.S.C. § 1604(f)(1). The same is true for individual units of the National Park System. See 2 COGGINS & GLICKSMAN, *supra* note 57, § 16:4.

<sup>367</sup> The states are responsible for planning to achieve the national ambient air quality standards under the Clean Air Act. 42 U.S.C. § 7410.

<sup>368</sup> See David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 129-30 (2011); Representative Bennie G. Thompson, *A Legislative Prescription for Confronting 21st-century Risks to the Homeland*, 47 HARV. J. ON LEGIS. 277, 305 (201).

<sup>369</sup> See DAVID M. DRIESEN ET AL., AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 27 (Sept. 2005), available at [http://www.progressivereform.org/articles/Unnatural\\_Disaster\\_512.pdf](http://www.progressivereform.org/articles/Unnatural_Disaster_512.pdf).

<sup>370</sup> See *supra* notes 230 to 232 and accompanying text.

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the planning function if a state or locality fails to bear its fair share of the planning burden.<sup>371</sup>

*Decentralizing Independent Implementation and Enforcement.* Though increased inter-jurisdictional coordination may often make more sense for functions such as ambient monitoring, financing, and planning, maintenance of regulator independence for implementation and enforcement may more frequently be beneficial. Arguments for decentralizing implementation and enforcement of regulatory programs will likely be even more persuasive than for the planning function. Decentralized authority allows for a range of management strategies in implementation, which should facilitate the development of specialized approaches tailored to local variations and circumstances. Furthermore, maintaining decentralized implementation and enforcement should continue to provide opportunities for regulatory experimentation. Diversity and experimentation benefits have often been cited as justifications for decentralizing implementation and enforcement activities in diverse regulatory areas such as environmental,<sup>372</sup> energy,<sup>373</sup> and health care policy.<sup>374</sup> Additionally, collective action problems may be less likely to arise from decentralized implementation and enforcement than for other functions, particularly when information gathering, financing and standard setting are centralized and/or coordinated.<sup>375</sup>

*Reducing Functional Overlap in Conjunction with Stronger Coordination.* Though we largely agree with the literature asserting that overlapping substantive jurisdiction provides a number of benefits,<sup>376</sup> instituting redundant governmental authority for every function is unlikely to be valuable except in rare circumstances. Although shared regulatory authority coalesced around particular substantive areas may often make sense, in many circumstances such jurisdictional redundancy may better be strategically focused on certain governmental functions (such as

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<sup>371</sup> See 42 U.S.C. § 7410(c) (2006) (authorizing EPA to adopt federal implementation plan under the Clean Air Act).

<sup>372</sup> See, e.g., Buzbee, *supra* note 170, at 1589; Esty, *Environmental Federalism*, *supra* note 6, at 623.

<sup>373</sup> See, e.g., Pursley & Wiseman, *supra* note 325, at 946.

<sup>374</sup> See, e.g., Moncrieff & Lee, *supra* note 249, at 278, 283.

<sup>375</sup> Decentralization for either implementation or enforcement may not be appropriate, however, for regulatory activities that raise collective action problems, such as inter-jurisdictional externalities. Cf. Esty, *Environmental Federalism*, *supra* note 6, at 623-24 (discussing transboundary problems). Even in those circumstances, however, overlap among regulators (and even delegation of enforcement authority to private entities through mechanisms such as citizen suits) can protect against capture and regulatory inactivity. See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1144-45, 1153 (2012).

<sup>376</sup> See *supra* notes 177 to 196 and accompanying text.

implementation and enforcement) than characterized by perfunctory duplication when there are few likely redundancy benefits (such as in information dissemination). Thus, it often may be valuable to reduce overlap in functional jurisdiction even as shared substantive jurisdiction is maintained or increased.

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

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