Why Who Does What Matters: Governmental Design and Agency Performance

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ABSTRACT

How should the federal government be organized—and who (i.e., which departments, agencies, bureaus, and commissions) should do what? The issue is not new: President James Madison addressed governmental organization in his 1812 State of the Union Address, and, in the last century, it is the rare President that does not propose to reorganize some part of the federal government. On many occasions during the past century, nearly every part of the federal government has been repeatedly reorganized and reconfigured. In previous work, we have examined the dynamics that influence the assignment of regulatory duties to an agency, how those dynamics (and the allocation of responsibilities) can change over time, and how the specific combination of regulatory functions and purposes affects agency decisionmaking. We apply the framework developed in previous work to examine the costs and benefits of the design choices made by the architects of the Consumer Financial Protection Bureau, and make some (appropriately hedged) predictions about the future prospects of this recent addition to the federal bureaucracy. We also briefly consider the implications of our analysis for the implementation of the Patient Protection and Affordable Care Act.

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INTRODUCTION

"We live and do business in the Information Age, but the last major reorganization of the government happened in the age of black-and-white TV. There are 12 different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there's my favorite example: The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated once they're smoked."

– President Barack Obama (2011)[1]

1 President Barack Obama, State of the Union Address (Jan. 25, 2011) [hereinafter 2011

> *"There are four different kinds of bears in the United States, and, of course, all these bears come under the jurisdiction of one Government department or another. I think it is the brown bear that comes under the jurisdiction of the Department of the Interior, and I think the black bear comes under the Department of Agriculture; and the Alaska bear comes under the Department of Commerce; and jurisdiction over the grizzly bear is held by the Department of War. That has been going on from time immemorial in Washington. Each bear—the care of the bear and everything else about the bear—falls under a different department, depending on the genus of the bear. And I am told confidentially that sometimes there is a most awful mixup, because sometimes a black bear falls in love with a brown bear, and then nobody knows under what department the puppies belong."*
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> *– President Franklin D. Roosevelt (1928)*[2]

If we should not have twelve agencies dealing with exports, five agencies dealing with housing policy, two departments dealing with salmon, and four agencies dealing with bears, then how many agencies and departments (and which ones) should be responsible for exports, housing, salmon, and bears? Does it really matter whether salmon are

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State of the Union], *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

2 Franklin D. Roosevelt, *Extemporaneous Campaign Address, Binghamton, N.Y. October 17, 1928*, *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1938 THE CONTINUING STRUGGLE FOR LIBERALISM 16, 17–18 (Samuel I. Rosenman ed., 1941). As President, Roosevelt would revisit the issue of which government agency should have responsibility for bears. In 1939, the Bureau of Biological Survey (a unit of the Agriculture Department) and the Bureau of Fisheries (a unit of the Commerce Department) were transferred to the Interior Department to form the U.S. Fish and Wildlife Service. The American Fox and Fur Breeders Association proposed to have fur-animal research (previously handled by the Bureau of Biological Survey) moved from Interior back to Agriculture. *Letter from Franklin D. Roosevelt to the Congress*, *in* 2 FRANKLIN D. ROOSEVELT AND CONSERVATION, 1911–1945, at 361 (Edgar B. Nixon ed., 1972). Roosevelt had to decide whether Agriculture or Interior should have the fur-bearing animal portfolio. He resolved the dispute with a note that makes a tongue-in-cheek reference to the story of the four bears:

> I agree with the Secretary of the Interior. . . . You might find out if any Alaska bears are still supervised by (a) War Department (b) Department of Agriculture (c) Department of Commerce. They have all had jurisdiction over Alaska bears in the past and many embarrassing situations have been created by the mating of a bear belonging to one Department with another bear belonging to another Department. . . . P.S. I don't think the Navy is involved but it may be. Check also on the Coast Guard. You never can tell!

Memorandum from President Roosevelt to Harold D. Smith, Dir., Bureau of the Budget, *in* 2 FRANKLIN D. ROOSEVELT AND CONSERVATION, *supra*, at 361. We are indebted to Alvin Felzenberg for calling this episode to our attention.

the sole responsibility of the Department of the Interior (Fish and Wildlife Service) or the Department of Commerce (National Oceanic and Atmospheric Administration ("NOAA"))? What difference would it make if we stripped the Department of the Interior ("Interior") and the Department of Commerce ("Commerce") of responsibility for salmon and assigned sole authority to the Food and Drug Administration ("FDA") (currently responsible for seafood generally, and part of the Department of Health and Human Services ("HHS")) or the Department of Agriculture ("USDA") (which is responsible for catfish)? While we are at it, why is NOAA in Commerce, and why is regulatory authority over catfish in the USDA? More broadly, even if these particular allocations of responsibility are not optimal, might there be some utility in shared or overlapping authority or responsibility—and if so, under what circumstances?

These issues are policy perennials.[3] President James Madison addressed governmental organization in his 1812 State of the Union Address.[4] Over the past century, few Presidents have not proposed to reorganize at least some part of the federal government.[5]

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3 *Cf.* WILLIAM T. GORMLEY, JR., TAMING THE BUREAUCRACY: MUSCLES, PRAYERS, AND OTHER STRATEGIES 119 (1989) (observing that reorganization is the "cod liver oil of government—an all-purpose cure for whatever ails the body politic").

4 President James Madison, *Annual Message to Congress: Washington, Nov. 4, 1812*, *in* 5 THE PAPERS OF JAMES MADISON 427, 431–32 (J.C.A. Stagg et al. eds., 2004) ("And I cannot press too strongly on the earliest attention of the Legislature, the importance of the re-organization of the Staff [military] Establishment; with a view to render more distinct and definite, the relations and responsibilities of its several departments. That there is room for improvements which will materially promote both economy and success, in what appertains to the army and the war, is equally inculcated by the examples of other countries, and by the experience of our own.").

5 Peri E. Arnold, *Reform's Changing Role*, 55 PUB. ADMIN. REV. 407, 407 (1995) ("President Clinton is the 13th president in this century to initiate or embrace comprehensive reorganization or reform, using those terms interchangeably."); *see also* PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905–1996, vii (2d ed. 1998) (noting that thirteen of seventeen twentieth-century presidents initiated reforms). President Franklin Roosevelt conducted a bruising multiyear fight to reorganize the federal government, culminating with the creation of the Federal Security Agency. President Truman oversaw the unification of the Department of the Navy and the Department of War under a single Department of Defense in 1947. President Johnson oversaw the creation of the Department of Housing and Urban Development ("HUD") and the Department of Transportation ("DoT"). President Nixon proposed to reorganize seven departments (Agriculture, Commerce, Health, Education and Welfare, Housing and Urban Development, Interior, and Labor) into four superdepartments organized along functional lines (Community Development, Economic Resources, Human Resources, and Natural Resources) and was responsible for the creation of the Environmental Protection Agency. President Carter oversaw the creation of the Departments of Energy and Education and also proposed two additional Departments: a Department of Development Assistance and a Department of Natural Resources. President George W. Bush oversaw the

President Obama called for governmental reorganization in both the 2011 and 2012 State of the Union Addresses and recently proposed the creation of a single cabinet-level department responsible for "boosting American business and promoting competitiveness."[6] He also oversaw the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[7] in 2010—which shuttered one agency (the Office of Thrift Supervision ("OTS")), merged its functions into the Office of the Comptroller of the Currency, and created a new bureau within the Federal Reserve ("Fed"): the Consumer Financial Protection Bureau ("CFPB").[8]

Reorganization has also played a role in presidential campaigns and primaries. President Carter ran on a platform of reorganizing government.[9] During the 2012 presidential primaries, four of the Republican candidates promised to "reorganize" parts of the federal government. Governor Rick Perry committed to eliminating three cabinet-level departments, but memorably could only name two (Commerce and the Department of Education) when asked during a November 2011 debate.[10] Representatives Newt Gingrich and Mi-

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merger of components of twenty-two separate agencies into the Department of Homeland Security—which was itself reorganized two years later. *See* Daniel Carpenter, *The Evolution of National Bureaucracy in the United States*, *in* THE EXECUTIVE BRANCH 41, 49–50 (Joel D. Aberbach & Mark A. Peterson eds., 2005); *see also Department Six-Point Agenda*, U.S. DEP'T OF HOMELAND SECURITY, http://www.dhs.gov/department-six-point-agenda (last visited Nov. 19, 2014).

6 Binyamin Appelbaum & Helene Cooper, *White House Debates Fight on Economy*, N.Y. TIMES, Aug. 14, 2011, at A1; Mark Landler & Annie Lowrey, *Obama Bid to Cut the Government Tests Congress*, N.Y. TIMES, Jan. 14, 2012, at A1; President Barack Obama, State of the Union Address (Jan. 24, 2012) [hereinafter 2012 State of the Union], *available at* http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address; 2011 State of the Union, *supra* note 1; Matt Compton, *Making It Easier to Do Business in America*, WHITE HOUSE BLOG (Jan. 13, 2012, 12:14 PM), http://www.whitehouse.gov/blog/2012/01/13/making-it-easier-do-business-america.

7 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5481–5603 (2012)).

8 12 U.S.C. § 5532(a); *see* Cheyenne Hopkins, *Acting OTS Chief Attacks Dodd-Frank Law as Burdensome, Ineffective*, ONWALLSTREET (Nov. 17, 2010), http://www.onwallstreet.com/news/ots-bowman-dodd-frank-2669814-1.html.

9 HARRISON WELLFORD, JITINDER KOHLI & JAMES HAIRSTON, CTR. FOR AM. PROGRESS, EXECUTIVE REORGANIZATION: SIX LESSONS FROM THE 1970S 2 (2011), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/exec_reorg.pdf.

10 Ed O'Keefe, *What Do the Departments of Commerce, Education and Energy Think of Rick Perry's Plan?*, WASH. POST FED. EYE (Nov. 10, 2011, 10:45 AM), http://www.washingtonpost.com/blogs/federal-eye/post/what-do-the-departments-of-commerce-education-and-energy-think-of-rick-perrys-plan/2011/11/10/gIQAXiSe8M_blog.html; *see also* Mark Schmitt, *Let's Get Real, No One's Eliminating Any Cabinet Departments*, NEW REPUBLIC (Nov. 11, 2011), http://www.newrepublic.com/article/politics/97327/perry-debate-oops-cabinet-energy-commerce.

chele Bachman both promised to shutter the Environmental Protection Agency ("EPA").[11] Representative Ron Paul wanted to close five federal departments: Education, Commerce, Energy, Interior, and Housing and Urban Development.[12]

Over the past century, many parts of the federal government have been reorganized and reconfigured. In the process, entire departments, agencies, bureaus, and commissions have been created, moved, consolidated, divided, turned upside down and inside out, or, infrequently, eliminated entirely.[13] Coordinators, "czars," and interagency working groups have come and gone, along with multiple shifts in responsibility for particular firms, industries, and areas of law.[14]

Why all this fuss over organization? Simply stated, what an agency is assigned to do and where it is located matters. As Professor Amy Zegart aptly observed:

> [O]rganization is never neutral. . . . It matters who has the information, who has the jurisdiction, who has the last word. It matters whether intelligence is collected by diplomats or spies, whether international negotiations are conducted through the Department of State or through back channels in the White House. . . . [T]he devil often lies in the details of agency design.[15]

We have previously analyzed the dynamics that influence the assignment of regulatory duties to an agency, how those dynamics (and the allocation of responsibilities) can change over time, and how the specific combination of regulatory functions and purposes can affect agency behavior.[16] Building on this understanding, we developed an

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11 John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 18, 2011, at A1.

12 RON PAUL, PLAN TO RESTORE AMERICA 1 (2011), *available at* http://c3244172.r72.cf0.rackcdn.com/wp-content/uploads/2011/10/RestoreAmericaPlan.pdf.

13 Donald F. Kettl, *Reforming the Executive Branch of the U.S. Government*, *in* THE EXECUTIVE BRANCH, *supra* note 5, at 344, 345–46; *see* RONALD C. MOE, ADMINISTRATIVE RENEWAL: REORGANIZATION COMMISSIONS IN THE 20TH CENTURY 25–130 (2003) (tracking the work and evaluating the success of reorganization commissions).

14 Most recently, the Obama Administration named a czar for coordinating the response to Ebola, even though HHS has long had an assistant secretary for preparedness and response. *See* Suzy Khimm, *Here's What Ebola Czar Ron Klain Has Been Up To*, MSNBC (Oct. 31, 2014, 8:37 AM), http://www.msnbc.com/msnbc/ebola-czar-ron-klain. For a comic examination of Klain's credentials to hold the position, see Katia McGlynn, *'SNL' Mocks President Obama, Ebola Czar Ron Klain In Cold Open*, HUFFINGTON POST (Oct. 26, 2014, 10:00 AM), http://www.huffingtonpost.com/2014/10/26/snl-obama-ebola_n_6049384.html.

15 AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 1–2 (1999).

16 *See generally* David A. Hyman & William E. Kovacic, *Competition Agencies with Com-*

analytical framework for evaluating the organization of government agencies.[17] In this Article, we apply that framework to the CFPB. We also consider the implications of our framework for the implementation of the Patient Protection and Affordable Care Act ("PPACA").[18]

The CFPB is an independent entity within the Fed, with responsibility for consumer protection in financial products and services. Combining issues that had previously been handled by seven different federal agencies, the CFPB has regulatory oversight over banks, credit unions, securities firms, mortgage-servicers, payday lenders, debt collectors, and other financial companies.[19] The CFPB has diverse tools to prevent "unfair, deceptive, or abusive" acts or practices in the financial services sector.[20]

The CFPB has been mired in controversy since it was first proposed, including disputes over how it should be structured, where it should be located within the federal bureaucracy, and what powers it should exercise.[21] Because our past work helps cast light on these issues, we analyze the CFPB as a case study of the complexities and contingencies of agency design.

We also use the same analytical framework to assess the implementation of the PPACA by HHS. We focus on the failed launch of healthcare.gov, because it is a high-profile example of bureaucratic dysfunction and programmatic failure, but we also discuss other aspects of the PPACA's implementation.

Part I provides a historical perspective on the complexities of designing a public agency. Part II briefly reintroduces our analytical framework for analyzing the problem of agency design. Part III specifies seven factors that we believe have proven significant in the success (and failure) of various past combinations of functions. Part IV

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plex Policy Portfolios: Divide or Conquer?, CONCURRENCES, No. 1-2013, at 9 [hereinafter Hyman & Kovacic, *Competition Agencies*], *available at* http://www.concurrences.com/Journal/Issues/No-1-2013/Articles/Competition-agencies-with-complex; William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527 (2012); *see also* David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163 (2013).

17 Hyman & Kovacic, *Competition Agencies*, *supra* note 16.

18 Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29, and 42 U.S.C.).

19 12 U.S.C. § 5481(21) (2012). The seven agencies are the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Federal Trade Commission, and the Department of Housing and Urban Development. *Id.* § 5581.

20 *Id.* § 5493.

21 *See infra* Part I.

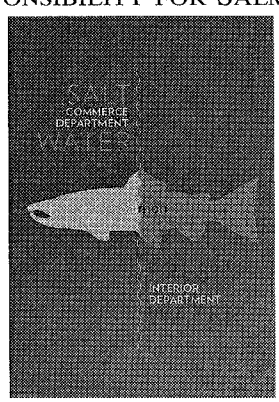
applies the framework to the CFPB. Part V focuses on the PPACA, and Part VI briefly considers the implications of our findings for administrative law.

I. DESIGNING A REGULATORY AGENCY: WHO, WHAT, AND WHERE?

How should the federal government be organized—and who (i.e., which departments, agencies, bureaus, and commissions) should do what? When a law is passed, should responsibility for enforcing it be given to an existing department, agency, bureau, or commission—and, if so, which one? If responsibility is given to a new department, agency, bureau, or commission, where should it be located in the bureaucratic firmament?

The examples in President Obama's 2011 State of the Union address (exports, housing, and salmon) suggest that these organizational issues are straightforward and that inefficiencies are specific and isolated.[22] Indeed, the graphic that accompanied the on-line version of the State of the Union, reproduced in Figure 1, suggests that the problem is a bit of a joke, and is easily remedied once it is recognized. In fact, as detailed below, the duplication and "jurisdictional chaos" that give rise to the demand for government reorganization are policy perennials.[23]

FIGURE 1. ALLOCATION OF REGULATORY RESPONSIBILITY FOR SALMON[24]



22 2011 State of the Union, *supra* note 1.

23 NAT'L COMM'N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 36 (2003) [hereinafter VOLCKER COMMISSION], *available at* http://www.washingtonpost.com/wp-srv/opinions/documents/Urgent_Business_for_America__Revitalizing_the_Federal_Government_for_the_21st_Century.pdf (citing specific "Examples of Jurisdictional Chaos").

24 Source: *2011 Enhanced State of the Union Address Graphics*, WHITE HOUSE (Jan. 26,

A. *How Frequent and Severe Is the Problem?*

The problem identified by President Obama in his 2011 and 2012 State of the Union addresses is pervasive and longstanding, and it has proven remarkably resistant (if not completely immune) to repeated reform efforts.[25] Over the past century, numerous public and private blue ribbon commissions, task forces, advisory councils, and working groups have studied how to reorganize the federal government.[26]

In 2003, in a representative assessment, the Volcker Commission called the organization and operations of the federal government "a mixture of the outdated, the outmoded and the outworn."[27] It noted that the government is "a flotilla of many distinct organizational units."[28] Although more vessels join the fleet nearly every year, "[v]irtually never are they combined to eliminate program duplication," nor are missions "realigned or even rationalized."[29] Public officials "often find themselves at sea in an archipelago of agencies and departments that have grown without logical structure."[30] These flaws inevitably degrade the quality of public policy and public administration, as the "organization and operations of the federal government are a mixture of the outdated, the outmoded and the outworn."[31]

The Volcker Commission's report provides some concrete examples of the magnitude of the problem:

> Prior to the post 9/11 reorganizations, over 40 federal agencies were involved in activities to combat terrorism. The Department of Housing and Urban Development operates 23 self-sufficiency and economic opportunity programs that target tenants of public housing and other low-income clients. Responsibility for federal drug control strategies and their implementation is fragmented among more than 50 federal agencies. There are over 90 early childhood programs scattered among 11 federal agencies and 20 offices. Nine federal agencies administer 69 programs supporting education and care for children under age five. There are 342 federal economic development related programs administered by 13 of the 14 cabinet departments. Seven agencies administer 40

2011), http://www.slideshare.net/whitehouse/2011-enhanced-state-of-the-union-address-graphics (slide 54).

25 2012 State of the Union, *supra* note 6; 2011 State of the Union, *supra* note 1.

26 *See generally* MOE, *supra* note 13.

27 VOLCKER COMMISSION, *supra* note 23, at 1.

28 *Id.* at 36.

29 *Id.*

30 *Id.* at 1.

31 *Id.*

> different programs that have job training as their main purpose. At least 86 teacher-training programs in nine federal agencies fund similar types of services. . . . There are 50 homeless assistance programs administered by eight agencies. . . . 29 agencies collectively share responsibility for federal clean air, clean and safe water, and better waste management programs.[32]

Analogous paragraphs can readily be found in the reports issued by blue ribbon commissions, task forces, and other entities over the course of the twentieth century.[33] Yet, despite regular reorganizations, the problems persist—and, if anything, have gotten worse over time.[34]

Several specific examples highlight the pervasiveness and longevity of the problem. President Roosevelt had to resolve turf battles between the Federal Bureau of Investigation ("FBI") and the Office of Coordinator of Information ("OCI"), as well as between the FBI and the Office of Strategic Services ("OSS").[35] When OSS agents burglarized the Spanish embassy in Washington, D.C. in October 1942, the FBI sent two cars to the embassy, arrested the OSS agents, and sought to bring criminal charges—jeopardizing U.S. security interests in order to protect its turf.[36] Although the Central Intelligence Agency ("CIA") replaced the OSS in the late 1940s, the turf war has continued to the present day.[37]

More recent examples are easy to find. Why do fifteen federal agencies share responsibility for food safety—with HHS (more specifically, the FDA) responsible for cheese pizza and the USDA responsi-

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32 *Id.* at 36–37.

33 *See, e.g.*, MOE, *supra* note 13, at 53–54. Presidents Taft, Truman, Eisenhower, Johnson, Nixon, Carter, Reagan, and Clinton used advisory commissions to review the structure and performance of the federal government. *See generally id.* at 25–128. The Government Accountability Office ("GAO") has also issued periodic reports on the problem of duplication. *See, e.g.*, *Improving Efficiency and Effectiveness*, U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/duplication/overview (last visited Nov. 19, 2014).

34 On the frequency of reorganization, see JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 212 (1989) ("During the 1960s, 270 federal offices were created, 109 were abolished, 61 were transferred, and 109 had their names changed. From 1953 to 1970 the Office of Education was reorganized six times and the Food and Drug Administration eight times.").

35 FRANCIS MACDONNELL, INSIDIOUS FOES: THE AXIS FIFTH COLUMN AND THE AMERICAN HOME FRONT 170–71 (1995).

36 *Id.* at 171.

37 *See generally, e.g.*, MARK RIEBLING, WEDGE: FROM PEARL HARBOR TO 9/11: HOW THE SECRET WAR BETWEEN THE FBI AND THE CIA HAS ENDANGERED NATIONAL SECURITY (2002).

ble for pepperoni pizza?[38] Why is the FDA responsible for bottled water, but the EPA responsible for tap water?[39] Why do three federal agencies jointly regulate the safety of drinking water on commercial airlines, with responsibility among the three determined by the water's physical location and its form (e.g., is it bottled water, tap water, or culinary water, such as ice, coffee, or tea)?[40]

Federal financial literacy efforts are "spread among more than 20 different agencies and more than 50 different programs and initiatives."[41] Regulatory responsibility for eggs bounces between the FDA and the USDA, depending on whether the egg is inside or outside of the chicken, and whether or not the egg is in the shell.[42]

How many Institutes should the National Institutes of Health ("NIH") contain, and should they be organized around specific diseases, organ systems, life stage, field of science, or by the profession or technology?[43] Why is the National Institute for Occupational Safety and Health ("NIOSH") located within the Centers for Disease Control and Prevention ("CDC") instead of NIH or the Department of Labor ("Labor")?[44] Why do four federal agencies have authority over

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38 Jane Black & Ed O'Keefe, *Overhaul of Food Safety Rules in the Works*, WASH. POST, July 8, 2009, at A3.

39 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-610, BOTTLED WATER: FDA SAFETY AND CONSUMER PROTECTIONS ARE OFTEN LESS STRINGENT THAN COMPARABLE EPA PROTECTIONS FOR TAP WATER 2–3 (2009), *available at* http://www.gao.gov/new.items/d09610.pdf.

40 *Id.*; *Aircraft Water Drinking Rule (AWDR)*, U.S. ENVTL. PROTECTION AGENCY, http://water.epa.gov/lawsregs/rulesregs/sdwa/airlinewater/index.cfm (last visited Nov. 19, 2014) (discussing rulemaking history).

41 *Financial Literacy: The Federal Government's Role in Empowering Americans to Make Sound Financial Choices*, GAO HIGHLIGHTS (U.S. Gov't Accountability Office, Washington, D.C.), Apr. 12, 2011, *available at* http://www.gao.gov/highlights/d11504thigh.pdf.

42 Karen Tumulty & Ed O'Keefe, *The Government Tends to Resist Reorganization*, WASH. POST, Jan. 28, 2011, at A1.

43 NIH uses all four approaches. Nine NIH institutes are disease focused, four are organ system focused, two are focused on life stage, three are focused on a particular field of science, and two are focused on a specific profession or technology. *See* Michael McGeary & Philip M. Smith, Organizational Structure of the National Institutes of Health (2002) (unpublished manuscript) (on file with authors).

44 Congress put NIOSH in HHS (which was then the Department of Health, Education, and Welfare) rather than Labor to distance it from the "highly political workplace enforcement environment." Denny Dobbin, *Where to Put NIOSH*, MEDSCAPE PUB. HEALTH PERSP. (May 31, 2005), http://www.medscape.com/viewarticle/504483 (login required). Stated more concretely, there was a fundamental dispute between those who wanted the Occupational Safety and Health Administration ("OSHA") to aggressively regulate workplace health and safety and those who wanted no OSHA at all. The resulting compromise created two separate agencies (NIOSH and OSHA) and gave authority to two different departments (HHS and Labor, respectively). NIOSH was responsible for making recommendations to OSHA on workplace health and safety standards, and OSHA was responsible for bringing enforcement actions and promulgating regu-

outer space?[45] Why did the Department of State ("State") engage in a decades-long dispute with Commerce over which of them should be responsible for federal employees who handled trade promotion and were stationed outside the United States (usually within foreign embassies)?[46]

The FDA is responsible for both food and drugs when there is effectively no real overlap between these two industries, other than some dietary supplements. NOAA is in Commerce, the Coast Guard is in the Department of Homeland Security ("DHS"), and the U.S. Public Health Service is in HHS, even though all three include significant uniformed services, like the Army, Navy, Air Force, and Marines (all of which reside in the Department of Defense ("DoD")).[47] Even if NOAA doesn't belong in the DoD, shouldn't there be a better reason for it being in the Commerce Department than President Nixon's personal pique at the then-Secretary of Interior (since Interior was the leading candidate for housing NOAA when it was created)?[48]

Why is the U.S. Forest Service (and responsibility for National Forests) in the USDA and the National Park Service (and responsibility for National Parks) in Interior, when the territory being supervised

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lations. This structure effectively constrained OSHA's ability to set its own regulatory agenda, because it could not do its own research on workplace safety. *But see* Andrew P. Morriss & Susan E. Dudley, *Defining What to Regulate: Silica & the Problem of Regulatory Categorization*, 58 ADMIN. L. REV. 269, 322–23 (2006) ("This separation of standard-setting and enforcement from research 'has its roots in the history of earlier occupational safety and health activities and conflicts between the Department of Labor and the Public Health Service.'" (quoting JACQUELINE KARNELL CORN, PROTECTING THE HEALTH OF WORKERS: THE AMERICAN CONFERENCE OF GOVERNMENTAL INDUSTRIAL HYGIENISTS 1938–1988, at 88 n.* (1989))).

When one of us (Hyman) presented this paper at the University of Illinois, he asked the audience to vote where they thought NIOSH belonged (without revealing where it was currently located). Given the choice between the three locations in the text, the overwhelming majority voted to put it in the DoL. No one voted to put NIOSH in the CDC.

45 Tumulty & O'Keefe, *supra* note 42.

46 On the dispute between State and Commerce, see MAURICE H. STANS, ONE OF THE PRESIDENTS' MEN: TWENTY YEARS WITH EISENHOWER AND NIXON 212–14 (1995).

47 *See generally* NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.noaa.gov (last visited Nov. 19, 2014); U.S. COAST GUARD, http://www.uscg.mil (last visited Nov. 19, 2014); COMMISSIONED CORPS OF THE U.S. PUB. HEALTH SERV., http://www.usphs.gov (last visited Nov. 19, 2014).

48 Steven Eli Schanes, *The Battle for the National Oceanic and Atmospheric Administration (NOAA)*, MAKING OF AN AM. PUB. SERVANT (May 21, 2008, 8:11 PM), http://schanes.wordpress.com/2008/05/21/the-battle-for-the-national-oceanic-and-atmospheric-administration-noaa; *see also* Steven Eli Schanes, *Putting NOAA Together–1970*, MAKING OF AN AM. PUB. SERVANT (May 24, 2008, 7:56 PM), http://schanes.wordpress.com/2008/05/24/putting-noaa-together-1970; Eileen L. Shea, *A History of NOAA*, NOAA HISTORY (June 8, 2006, 9:34 AM), http://www.history.noaa.gov/legacy/noaahistory_3.html.

is physically contiguous?[49] Why have the FBI and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") gotten into "turf battles at crime scenes," even though both reside in the Department of Justice ("DoJ")?[50] Why, when President Obama proposed to move NOAA from Commerce to Interior, did environmentalists and fishing interests both oppose the move?[51]

Similar difficulties emerged when President Obama proposed in the 2012 State of the Union address to move the U.S. Trade Representative ("USTR") from its current location within the Executive Office of the President ("EOP") into a new business and trade agency. Trade is a focal point for interdepartmental conflict, as each department emphasizes the issues of most importance to its mission and its constituents: "Commerce Department officials continually urged U.S. trade negotiators to take a pro-business position, while State Department officials said that non-business foreign policy matters should determine whether the United States wanted to pursue an agreement or a liberalization or tightening up of trade rules."[52] USTR's location in the EOP allows it to serve a trade coordination function, but subsuming it within a larger super-trade bureaucracy placed this role (and USTR's flexibility and autonomy) at risk.[53] Not surprisingly, USTR's "clients" opposed the relocation or merger.[54]

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49 For the largely historical answer, see DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES 1862–1928, at 280–81 (2001); *see also* HAROLD SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION 126 (5th ed. 1998) ("The Forest Service might well be in the Interior Department today if the historic dispute between Secretary Ballinger and Gifford Pinchot had not left conservationists with a nearly pathological distrust of the department."); *About Us*, NAT'L PARK SERV., http://www.nps.gov/aboutus/index.htm (last visited Nov. 19, 2014).

50 Tumulty & O'Keefe, *supra* note 42.

51 Charles S. Clark, *Obama Reorganization Bid Faces Challenges on Capitol Hill*, GOV'T EXECUTIVE (Jan. 13, 2012), http://www.govexec.com/oversight/2012/01/obama-reorganization-bid-faces-challenges-on-capitol-hill/35839; The Scottish White Fish Producers' Ass'n, *Fishermen Wary of Obama's Reforms*, FISHNEWSEU.COM (Jan. 16, 2012), http://www.fishnewseu.com/latest-news/world/7378-fishermen-wary-of-obamas-reforms.html.

52 *Reorganization Proposal Could Impact Food Safety, USTR*, THE HAGSTROM REP. (Jan. 13, 2012, 5:09 PM), http://www.hagstromreport.com/2012news_files/2012_0113_reorganization.html.

53 Daniel F. Runde & Meredith Broadbent, *President's Proposed Reorganization of Trade Agencies*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 18, 2012), http://csis.org/publication/presidents-proposed-department-trade-and-innovation.

54 Opponents to the relocation or merger included two dairy associations (the U.S. Dairy Export Council and the National Milk Producers Federation) and the American Soybean Association. *See USDEC, NMPF Raise Concerns About U.S. Trade Policy Reorganization Impact*, DAIRYBUSINESS (Jan. 17, 2012), http://dairybusiness.com/seo/headline.php?title=usdec-nmpf-raise-concerns-about-u-s-trade-pol&date=2012-01-17&table=headlines.

The division of responsibility over particular areas can cause problems when separate agencies share jurisdiction and/or must coordinate their efforts.[55] Profound difficulties can result when agencies do not "get along" or have conflicting assessments of the nature and seriousness of apparent problems.[56] Even when agencies get along and agree on a problem's nature, and the seriousness of the problem, they can disagree profoundly on the optimal solution and on which agency is best situated to act.[57] Conflicts within intelligence agencies, and between intelligence and law enforcement agencies, are legendary.[58] A trivial example makes the point. When top brass at the CIA and FBI announced that analysts from each agency would be detailed to the other in order to break down these barriers, personnel at both agencies called it a "hostage exchange program."[59] As detailed below, inter-service conflicts within the DoD have deep roots. Even the children of military personnel are rapidly socialized into the tribal nature of the individual services.[60]

Consider one final complication. All of these examples assume the allocation of regulatory responsibility is static. History makes clear that the location of any agency, bureau, or regulatory function is fluid. The frequency of past reorganizations means that the "home" of any function is hardly permanent, and "[i]t does not take much dig-

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55 *See* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 215–18 (2011) (discussing how duplicative delegations can lead to multiple agency claims of jurisdiction over an area).

56 *See In re* Aiken Cnty., 645 F.3d 428, 439 (D.C. Cir. 2011) ("This case is a mess because the executive agency (the Department of Energy) and the independent agency (the Nuclear Regulatory Commission) have overlapping statutory responsibilities with respect to the Yucca Mountain project.").

57 *See* RIEBLING, *supra* note 37, at 454–55 (discussing the disagreement between the CIA and the FBI on the proper solutions, if solutions exist, to interagency problems).

58 *See id.* (detailing historical problems between the FBI and CIA and the need for solutions); AMY B. ZEGART, SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11, at 2–3 (2007) (examining systemic forces that prevented the CIA and FBI from responding to new security threats that emerged between the end of the Cold War and September 11); Luis Garicano & Richard A. Posner, *What Our Spies Can Learn from Toyota*, WALL ST. J., Jan. 13, 2010, at A23 ("The national intelligence apparatus of the U.S . . . consists officially of 16 separate agencies, and unofficially of more than 20. Each of these agencies is protected by strong political and bureaucratic constituencies, so that after each intelligence failure everything continues pretty much the same and usually with the same people in charge.").

59 John Diamond, *CIA & FBI in the Hot Seat*, USA TODAY, June 4, 2002, at A10.

60 *See* MARY EDWARDS WERTSCH, MILITARY BRATS: LEGACIES OF CHILDHOOD INSIDE THE FORTRESS 311–12 (2006) ("When I was a small child, I understood that we were something called an 'Army family,' although I had only a vague idea of what that meant. But I knew one thing for certain: We were most definitely *not* Navy. . . . One Army colonel's daughter told me her father refused to attend her wedding because she was marrying a Navy brat.").

ging for an organization archeologist to uncover evidence of prior civilizations and cultures within the executive branch."[61] Even completely "new" agencies and bureaus are usually cobbled together from "bits and pieces" of other agencies and bureaus.[62] As Professor Daniel Carpenter has observed, "The institutions of the future seem endlessly created from the organization of the past . . . ."[63] These complicated genealogies result from polycentric, path-dependent, and intensely political processes—played out repeatedly over many decades.[64] Before we turn to a more systematic consideration of factors that affect the location and combination of functions for a public agency, Part I.B explains how the focus on "jurisdictional chaos" misses some of the gains from agency or regulatory duplication and overlap.

B. Benefits of Agency Redundancy

Framing the problem as "jurisdictional chaos" is a powerful device. After all, who could favor chaos?[65] If one un-weights the rhetorical dice, and asks about the costs and benefits of agency or regulatory redundancy, the issue becomes less clear-cut. In engineering, redundancy is used to build in a safety margin. Although the Boeing 777 can fly for hours on a single engine, no one thinks that the pilot should turn the second engine off while in flight, or that Boeing should just build 777s with a single engine.[66] Computer users are supposed to

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61 SEIDMAN, *supra* note 49, at 126.

62 WILSON, *supra* note 34, at 55 ("[M]ost new agencies are formed out of bits and pieces of old ones . . . .").

63 Carpenter, *supra* note 5, at 43 (explaining that new agencies are often "built from existing agencies and institutions").

64 *See* Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989) ("American public bureaucracy is not designed to be effective. The bureaucracy arises out of politics, and its design reflects the interests, strategies, and compromises of those who exercise political power."); Barry R. Weingast, *Caught in the Middle: The President, Congress, and the Political-Bureaucratic System*, *in* THE EXECUTIVE BRANCH, *supra* note 5, at 312, 335 ("*Ex ante* constraints are designed to mirror the political environment facing the enacting coalition and to stack the deck in favor of particular interests and to disadvantage others.").

65 Similar rhetorical tactics explain other labels, such as "smart growth" and "death tax." *But see* HEATHERS (Cinemarque Entertainment 1988) ("Chaos is what killed the dinosaurs, darling.").

66 *See Malaysia Airlines: Experts Surprised at Disappearance of "Very Safe" Boeing 777*, GUARDIAN (Mar. 8, 2014, 1:31 AM), http://www.theguardian.com/world/2014/mar/08/malaysia-airlines-experts-surprised-at-disappearance-of-very-safe-boeing-777 ("[T]he chance of both engines failing at the same time was very low. 'If you lose an engine in a cruise it doesn't fall out of the sky' . . . . Government safety regulators have determined that it could fly for nearly three hours on a single engine in the case of an emergency."); *cf.* Jacob E. Gersen, *Designing Agencies*,

back up their computer files—even though doing so is, by definition, redundant. Cars come with both seatbelts and airbags. As these simple examples illustrate, it is more useful to frame the issue in terms of the optimal level of redundancy or overlap—a framing that requires the balancing of costs and benefits of each strategy compared to the alternatives. The costs of redundancy or overlap are visible and attract considerable attention.[67] The benefits of redundancy and overlap are less visible, and require more in-depth examination. To what extent might potential benefits of redundancy and overlap explain the agency design choices that we actually observe?

In recent years, a number of legal scholars have focused on these issues—usually in the context of disputes involving a single statute, agency, or substantive area of law. Professor Jody Freeman and coauthors have outlined various ways in which the involvement of multiple agencies can influence agency decisionmaking for the better, by encouraging or requiring the "deciding agency" to take account of factors and goals it would otherwise downplay or ignore.[68] Professors David Weisbach and Jacob Nussim argue that we should consider tax preferences and spending programs in an integrated fashion, and they highlight the organizational logic (focusing on specialization and coordination) of having overlapping programs run by separate agencies.[69] Professor Keith Bradley suggests that the division of responsibilities between agencies, when coupled with a "rule-based interface," helps coordinate resolution of complex regulatory problems and strengthens presidential control of the administrative state.[70]

Professor Rachel Barkow explores the importance of agency design in resisting capture, particularly when dealing with asymmetrical political pressure.[71] Professor Jason Marisam suggests that "duplicative delegations" make it possible for the President to choose from a

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in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 351 (David A. Farber & Anne Joseph O'Connell eds., 2010) ("[R]edundancy is a standard design principle in both engineering and organizations.").

67 *See supra* Part II.B.

68 J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2303 (2005); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1210 (2012); *Freeman Urges Coordination of Agencies in Shared Regulatory Spaces*, HARV. L. TODAY (Mar. 23, 2011), http://today.law.harvard.edu/freeman-urges-coordination-of-agencies-in-shared-regulatory-spaces-video.

69 David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957, 992 (2004).

70 Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 788 (2011).

71 Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 79 (2010).

"menu of agencies" in deciding which agency is best situated to do what.[72] Professor Eric Biber highlights the challenges faced by multigoal agencies and explores the costs and benefits of various strategies to monitor and motivate such agencies to do better.[73]

Professor Jacob Gersen emphasizes the benefits of overlapping jurisdiction in solving various agency problems, including bureaucratic drift and the impact of agency design.[74] Professor Anne Joseph O'Connell highlights the role of rivalry between agencies with overlapping jurisdiction in encouraging higher-quality intelligence.[75] Professors Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry Weingast describe how the creation of the DHS strengthened presidential control and simultaneously promoted domestic policy priorities other than homeland security.[76]

Professor Michael Doran has studied how the fragmentation of congressional committee jurisdiction and parliamentary prerogatives helps create redundancy, and has explored the informational efficiencies and distributive consequences that result.[77] Professor Jonathan Macey has analyzed the structure and design of administrative agencies in terms of their ability to reduce the agency costs that exist between Congress and the bureaucrats within those agencies, as well as to reduce the chance that "future changes in the political landscape will upset the terms of the original understanding among the relevant political actors."[78] Finally, Professors Matthew McCubbins, Roger Noll, and Barry Weingast have explored how Congress can manipu-

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72 Marisam, *supra* note 55, at 234.

73 Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 60–62 (2009); *see also* Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78, 80–83 (2012), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol125_biber.pdf.

74 Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 211–14. In *Designing Agencies*, *supra* note 66, Gersen considers at greater length the public choice perspective on agency design, including the mechanisms of vertical and horizontal control.

75 Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1657–59 (2006).

76 Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 678 (2006) ("By moving a large set of agencies to the new Department and giving them new homeland security responsibilities without the promise of additional budgets, the President all but forced these agencies to draw resources away from their legacy mandates.").

77 Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1819–21 (2011).

78 Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 93 (1992).

late agency design and decision rules to "stack the deck" in favor of the outcomes preferred by those responsible for drafting the legislation in question.[79]

We have described only the legal literature on these subjects. Political scientists and public administration scholars have spent decades working on these issues.[80] Despite this limitation, our abbreviated summary of the literature makes it clear that there are both costs and benefits to agency or regulatory redundancy. More important, dismissing the status quo as "jurisdictional chaos" provides no useful insight into how best to organize or reorganize once there is agreement that the costs of a particular organizational structure or agency design exceed the benefits. To frame an intelligible response to that problem, one must consider how the location and the combination of functions and goals of a public agency affect its performance. We now turn to that issue.

II. PUBLIC AGENCY DESIGN

A. *First Principles*

To form a new public agency, one must answer five basic institutional questions: (1) what will be the agency's substantive mandate; (2) where will the agency reside within the existing framework of government entities; (3) how broad will the agency's jurisdiction be (e.g., the entire economy, or only selected sectors); (4) how may the agency execute its duties (e.g., by gathering data, issuing reports, filing cases, promulgating rules, educating businesses and consumers, conducting

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79 Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432–33 (1989).

80 *See generally, e.g.*, THE EXECUTIVE BRANCH, *supra* note 5; FEDERAL GOVERNMENT REORGANIZATION: A POLICY AND MANAGEMENT PERSPECTIVE (Beryl A. Radin & Joshua M. Chanin eds., 2009); KAREN M. HULT, AGENCY MERGER AND BUREAUCRATIC REDESIGN (1987); DONALD F. KETTL, SYSTEM UNDER STRESS: HOMELAND SECURITY AND AMERICAN POLITICS (2004); DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY 1946–1997 (2003); BERYL A. RADIN & WILLIS D. HAWLEY, THE POLITICS OF FEDERAL REORGANIZATION: CREATING THE U.S. DEPARTMENT OF EDUCATION (1988); WILSON, *supra* note 34; ZEGART, *supra* note 15; ZEGART, *supra* note 58.

Professor David Lewis, in particular, has devoted considerable effort to these issues, focusing on the interface of politics and agency performance. *See David E. Lewis*, VANDERBILT U. DEP'T OF POLITICAL SCI., http://www.vanderbilt.edu/political-science/bio/david-lewis (last visited Nov. 19, 2014). Economists have also written about these issues, but they have spent considerably more time on the organization of private firms. For a review of the literature, see Weisbach & Nussim, *supra* note 69, at 983–92.

administrative adjudication); and (5) how should the agency be governed (e.g., by a multimember board, or by one chief executive)?

The public agency design choices we explore resemble the issues associated with the design and operation of business enterprises (i.e., the theory of the firm).[81] Private firms must decide whether to perform functions internally or contract them out to third parties. When they engage third parties, they must find the best way to organize the relationship (e.g., by one-shot contracts, long-term relational or supply contracts, or through more complete forms of integration, such as a joint venture or an outright acquisition). Should the company focus on one line of business or diversify into related (and unrelated) products? How do transaction costs compare when performing functions internally versus enlisting outsiders? How do existing and emerging technologies affect the choice between performing functions internally versus enlisting outsiders? All of these considerations affect the organizational design that is (often temporarily) settled upon by a private firm.

This analysis of the institutional design choices made by private firms provides a starting point to consider how to set the "optimal" boundaries of a public agency's mandate.[82] The polar solutions are obviously silly: no one creates an agency and gives it nothing to do, and there are no takers for a "Department of Everything." In between there are many options, with few obvious reasons for choosing one over another. Which factors should determine whether a department has one, several, or many policy duties? Does it make sense to expand an agency's portfolio? Expansion pleases legislators (especially members of oversight and appropriations committees) and makes it possible to realize important synergies across different policy domains. Expansion may also reduce the risk of capture by individual business constituencies.[83] But, expansion can overload an agency's capacity—particularly if the new responsibilities do not come with a commensurate budget increase or involve tasks that do not match the

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81 The formal study of the forces that affect the boundaries and structure of business firms originated with Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). For a discussion of some of the principal subsequent literature, see HAROLD DEMSETZ, OWNERSHIP, CONTROL, AND THE FIRM (1988).

82 *See* Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306 (1999) (discussing similarities in issues surrounding the design of public and private institutions); *see also* Francesco Parisi, Norbert Schulz & Jonathan Klick, *Two Dimensions of Regulatory Competition*, 26 INT'L REV. L. & ECON. 56 (2006) (same).

83 *Cf.* Barkow, *supra* note 71 (discussing how policy diversification can increase an agency's resistance to capture).

training, expectations, and priorities of the agency's street-level operators.

To sharpen the point, suppose an existing agency already performs part of the policy function at issue. Should we expand the incumbent's duties, or place a second public institution in the same policy space? If we give two or more agencies similar tasks, how should the law define the relationship among them? Should the statute require agencies with related duties to coordinate their affairs or simply allow them to decide whether, when, and how to cooperate?

B. Constructing the Regulatory Portfolio

Four basic processes serve to allocate regulatory tasks to public agencies. The first is *direct assignment by statute*. Complications arise even here, as direct assignment can take several forms. Congress can give an agency exclusive authority, allocate concurrent power to two or more agencies, or establish shared authority, where two or more bodies have related but dissimilar powers to regulate specific transactions.[84]

A second source of regulatory authority is *accident or fortuity*. An agency with regulatory capabilities originally designed to serve one purpose may be drawn, in exercising those capabilities, into contiguous policy areas that were not part of Congress's original expectations. For example, in 1914, Congress created the Federal Trade Commission ("FTC") to deal with competition problems by, inter alia, prohibiting "unfair methods of competition."[85] From its first years, the FTC received complaints from firms that rivals had unfairly attracted customers using false advertising.[86] In challenging this distortion of competition, the agency set the foundation for a consumer

84 Merger control illustrates varied possibilities for overlapping competence. The DoJ and the FTC have concurrent power to enforce Section 7 of the Clayton Act, antitrust law's chief merger control mechanism. DoJ and the Federal Communications Commission both have power to review the competitive effects of mergers of telecommunications firms, but under dissimilar substantive standards. *See* AM. BAR ASS'N SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES (Robert S. Schlossberg ed., 2d ed. 2004).

85 *See About the FTC*, FED. TRADE COMMISSION, http://www.ftc.gov/about-ftc (last visited Nov. 19, 2014); *see also* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 929–30 (2010).

86 Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 148–49 (2010).

protection mission—which is why the FTC now polices deceptive advertising and marketing practices.[87]

A third process is *deliberate expansion into an unoccupied policy domain.* Technological dynamism creates new regulatory issues—and an opportunity for ambitious regulators to expand their domain.[88] The FTC's emergence as the principal U.S. privacy and data protection regulator illustrates the phenomenon. Modern advances in information technology have boosted the ability of firms to collect data about consumer preferences and, among other uses, deliver targeted advertising. The absence of an omnibus privacy and data protection statute[89] created a policy vacuum that enabled the FTC to use its wide-ranging powers (including the power to ban unfair or deceptive acts or practices) to play the leading federal regulatory role in the field.[90] The emergence of regulatory *terra nova* sets off a policy land rush, with various public agencies racing to stake their claim. Privacy and data collection also exemplifies this dynamic; Commerce has sought to claim the area as well—triggering a behind-the-scenes battle with the FTC.[91]

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87 *Id.*

88 We focus on expansions of agency activity that do not result from a specific legislative measure to address new technological developments. The emergence of powered flight led Congress to establish a new aeronautics branch in the Commerce Department—a forerunner of the Federal Aviation Administration. THERESA L. KRAUS, U.S. DEP'T OF TRANSP., THE FEDERAL AVIATION ADMINISTRATION: A HISTORICAL PERSPECTIVE, 1903–2008, at 3 (2008), *available at* http://www.faa.gov/about/history/historical_perspective/media/historical_perspective_ch1.pdf.

89 The United States has a number of sector-specific controls on data collection and use. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2012); Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506 (2012).

90 Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585 (2014).

91 *See* Press Release, U.S. Dep't of Commerce, Commerce Department Unveils Policy Framework for Protecting Consumer Privacy Online While Supporting Innovation (Dec. 16, 2010), *available at* http://www.commerce.gov/news/press-releases/2010/12/16/commerce-department-unveils-policy-framework-protecting-consumer-priv. Other examples of this phenomenon abound. The deployment of broadband has triggered a struggle between the Federal Communications Commission and the FTC over which agency will exercise regulatory authority for this technology. *See Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of William E. Kovacic, Comm'r, Fed. Trade Comm'n), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-ftc-jurisdiction-over-broadband-internet-access-services/p052103commissiontestimonyrebroadbandinternetaccessservices06142006senate.pdf.

Similar contests take place outside the realm of economic regulation. The development of nuclear weapons in the 1940s fostered a race among the armed services for supremacy in controlling deployment of this capability. Each service (Air Force, Army, and Navy) designed delivery systems based upon its historical areas of experience. The inter-agency competition gave the DoD and Congress a range of delivery options. The competition sometimes focused on dissimi-

The fourth way to allocate regulatory tasks is *divestiture or dissolution by statute.* A divestiture involves the transfer of discrete functions from one agency to another body. Dissolution is the dismantling of a regulator accompanied by the transfer of its functions to other institutions or the abandonment of the incumbent's regulatory tasks altogether. In some instances, divestiture takes place for reasons that do not involve the failure of the incumbent regulator. Congress sometimes has used divestiture to transfer functions from an agency that has served, in effect, as an incubator for a new regulatory regime. After an initial period of development by one agency, Congress may spin the function off to a newly created entity, if it concludes that the function deserves or requires a separate agency. In the 1920s and early 1930s, the FTC established a forerunner of modern securities regulation, by challenging deception in the marketing of securities. When Congress passed national securities regulation legislation in the early 1930s, it designated the FTC to act as a transitional enforcement body until the Securities and Exchange Commission ("SEC") was founded in 1935.[92]

Dissolution sometimes occurs after Congress has concluded that the regulatory function in question is no longer necessary. Domestic regulation of airline routes and fares provides an example. From 1938 to 1978, the Civil Aeronautics Board ("CAB") regulated entry and pricing by airlines engaged in interstate transportation.[93] In 1978, Congress abandoned controls on entry and pricing and disbanded the CAB.[94]

In most cases, the cause of divestiture or dissolution is a perceived catastrophic failure of the incumbent regulator. In these cases, divestiture or dissolution functions as the equivalent of bankruptcy or liquidation. Divestiture is the more common approach, yet Congress at times has dismantled the incumbent and allocated its functions elsewhere—sometimes by building a new regulator from the ground up.[95] The few instances in which agencies have been entirely dismantled

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lar delivery techniques (e.g., aircraft versus missiles), while in other instances, each service developed variants of the same delivery method (with each service developing its own ballistic missile systems). On inter-services rivalry to control the deployment of nuclear weapons delivery systems after World War II, see JAMES BAAR & WILLIAM E. HOWARD, POLARIS! 18–36 (1960); THOMAS L. MCNAUGHER, NEW WEAPONS OLD POLITICS: AMERICA'S MILITARY PROCUREMENT MUDDLE 38–39 (1989).

92 Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 12.

93 On the adoption of the 1933 and 1934 statutes and the reassignment of implementation duties, see THOMAS K. MCCRAW, PROPHETS OF REGULATIONS 259–63, 293 (1984).

94 *See id.* at 293.

95 *See* Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 12.

provide a credible threat to coax better performance from underachieving agencies.[96]

Two general trends stand out. First, due to changes in technology, business practice, and the political environment, an agency's portfolio is rarely static. Most agencies undergo continuing adjustment—some from new statutes, others from agency initiative—in their policy duties. An agency might start with a single policy function, but it seldom stays that way. Second, competition with other government bodies plays an important role in reshaping any one agency's portfolio. Fueled by the impulse for empire building, agencies sometimes ask legislators to deed them title to previously uninhabited policy terrain or to annex part of a rival's portfolio.[97]

III. WHO SHOULD DO WHAT: SEVEN CRITERIA

Against the backdrop of the phenomena sketched above, it helps to consider why some specific combinations succeed and others fail. Based on our earlier work, we highlight seven criteria that affect agency design, location, and performance and help illuminate who should do what.[98] We believe the factors are helpful, even though they are "squishy," inter-related, and framed at a high level of generality. We offer them in the spirit of Professors Weisbach and Nussim: even "relatively crude ideas . . . can help policymakers muddle through the problems they face."[99]

A. The Seven Criteria

1. Policy Coherence

Greater policy coherence improves the prospects of success for a specific combination of functions. Synergies and efficiencies are more

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96 *Cf.* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 590–91 (1982) (discussing Congress's threats to shutter the FTC when that agency was insufficiently aggressive).

97 Some agencies share policy areas with other government bodies—in effect, a public policy equivalent of tenancy in common. In other cases, two agencies share a common boundary. Shared boundaries often yield, as they do in real property matters, disputes about the location of the property line—especially when technological change alters the nature of the regulatory problem to be resolved. In some ways, technology change affects existing policy portfolios in the way that the change in a river's course can affect ownership interests that a deed defines by reference to a river's course.

98 We analyze each factor at the level of the agency/department, rather than any subdivision or bureau, because "even facially absurd combinations can look sensible if you drill down far enough into each agency/department's organizational chart." Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 13 n.25.

99 Weisbach & Nussim, *supra* note 69, at 997.

likely to result if their functions have commonalities—e.g., whether derived from a common client population, type of regulated entity, common inputs and/or outputs, or simply a shared intellectual framework regarding means and ends.[100] When these linkages are lacking, the justifications for combining dissimilar functions in one agency become less compelling—such as the claim that agency leaders are such good managers that they can run anything. Similar arguments were made during the 1960s for the amalgamation of dissimilar business units into diversified conglomerates.

Deviations from the coherence principle occur in two basic scenarios. In one set of cases, agencies become, to a great extent, a collection of odds and ends.[101] The uneven performance of diverse policy conglomerates such as Commerce and Interior can be traced to the shifting, grab-bag array of functions Congress has given them. Over

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100 In economic terms, we can ask if the functions are complements or substitutes. Combinations of complements promise greater synergies and efficiencies than combinations of substitutes, which degrade overall performance if they trigger internal disagreements over which function deserves primacy. The CIA provides a useful case study of how a single agency has managed these dynamics over time. The CIA is currently organized around four major directorates (the National Clandestine Service, the Directorate of Intelligence, and directorates focused on science and technology and logistics for operations abroad). But, as this Article goes to press, the CIA is considering "rebuilding its sprawling bureaucracy around a model that relies on 'centers' that combine analysts, operators, scientists and support staff." Greg Miller, *CIA Director John Brennan Considering Sweeping Organizational Changes*, WASH. POST (Nov. 19, 2014, 8:54 PM), http://www.washingtonpost.com/world/national-security/cia-director-john-brennan-considering-sweeping-organizational-changes/2014/11/19/fa85b320-6ffb-11e4-ad12-3734c461eab6_story.html. The reorganization will "create hybrid units focused on individual regions and threats to U.S. security." *Id.* Strikingly, the Directorate of Intelligence was previously reorganized in the early 1980s "to eliminate offices that focused on politics and economics, replacing them with units modeled on the geographic divisions used in the clandestine service." *Id.* And there are risks with a wholesale move toward centers, including fixation on the "operational challenges of the moment," and "the potential for analysts' judgment to be clouded by working so closely with the operations side." *Id.* (internal quotation marks omitted). It remains to be seen how the CIA will handle these issues, and how long the latest reorganization (whatever form it ultimately takes) will stick. Stay tuned.

101 The Interior Department's origin in 1849 illustrates the problem. The new department absorbed the General Land Office from the Treasury Department, the Patent Office from the State Department, the Indian Affairs Office from the War Department, and the military pension offices of the War and Navy Departments. Later additions included conducting the census, regulation of territorial governments, exploration of the western United States, management of the jail and water systems in the District of Columbia, management of hospitals, universities, and public parks, and the colonization of freed slaves in Haiti. *History of Interior*, U.S. DEP'T OF INTERIOR, http://www.doi.gov/whoweare/history.cfm (last visited Nov. 19, 2014). Interior later relinquished the census to the Commerce Department, whose duties also include patents and trademarks, weather forecasts, weights and standards, and fishing. Jim Kuhnhnen, *Commerce Cuts Coming in Obama's Reorganization?*, CHI. SUN-TIMES, Jan. 30, 2011, http://www.suntimes.com/news/nation/3561829-418/department-obama-daley-administration-commerce.html#.VG1FM75FNv0.

time, the assignment of diverse tasks has made Interior "the Department of Everything Else," the "Great Miscellany,"[102] a "slop bucket for executive fragments,"[103] and a "hydra-headed monster."[104] John C. Calhoun memorably predicted that "[e]verything upon the face of God's earth will go into the Home Department."[105]

Unrelated policy diversification can also have self-reinforcing tendencies. As a department's functions lose coherence, it becomes easier for Congress to add still more "not-elsewhere-classified" duties to the portfolio. By this process, some departments become a misshapen collection (or, less charitably, garbage cans) of disconnected policy assignments.

In a second scenario, coherence suffers because the elements of the portfolio, while related, conflict with one another. Acute internal tensions or outright schizophrenia may arise if the aims of various functions clash.[106] Before the Deepwater Horizon oil spill, the Interior Department's Minerals Management Service ("MMS") collected revenue for the Treasury from oil and gas drilling on federal lands and, at the same time, approved the drilling permits.[107] The mixed motives embedded in these assignments left the MMS "torn between whether to be a regulator or friend to industry."[108]

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102 ROBERT M. UTLEY & BARRY MACKINTOSH, THE DEPARTMENT OF EVERYTHING ELSE: HIGHLIGHTS OF INTERIOR HISTORY 5 (1989).

103 HORACE SAMUEL MERRILL, WILLIAM FREEMAN VILAS: DOCTRINAIRE DEMOCRAT 134 (1954).

104 *Id.* at 139.

105 Henry B. Learned, *The Establishment of the Secretaryship of the Interior*, 16 AM. HIST. REV. 751, 768 (1911).

106 We focus on inconsistencies in ends or goals, but there may also be inconsistencies in preferred means, even when there is agreement on ends, at least at a high level of generality.

107 Mark Jaffe & David Olinger, *Drilling Overseer Dysfunctional from the Start*, DENV. POST, June 6, 2010, at A1.

108 *Id.* These criticisms and intense congressional disapproval after the Deepwater Horizon disaster led Interior Secretary Salazar to reorganize MMS into three separate entities. *See* Press Release, U.S. Dep't of Interior, Salazar Divides MMS's Three Conflicting Missions (May 19, 2010), *available at* http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm. Similar dynamics help explain the spin-off in 1974 of the National Transportation Safety Board from the DoT, and the separation of the Atomic Energy Commission into the Energy Research and Development Administration and the Nuclear Regulatory Commission. *Atomic Energy Commission*, U.S. NUCLEAR REG. COMMISSION, http://www.nrc.gov/reading-rm/basic-ref/glossary/atomic-energy-commission.html (last updated Nov. 18, 2014); *History of the National Transportation Safety Board*, NAT'L TRANSP. SAFETY BOARD, http://www.ntsb.gov/about/history.html (last visited Nov. 19, 2014).

Such splits can have the unintended side effect of making the separated agency more susceptible to capture than was the case when it was part of a larger entity with a more diversified portfolio. *See* Barkow, *supra* note 71, at 50; *cf.* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464–65 (1999) (ex-

Other agencies with dual mandates confront similar problems. Since 1977, the Federal Reserve has been responsible for "promot[ing] effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."[109] The inconsistency of the mandate has made the Fed less predictable and more susceptible to political interference.[110] Similarly, for years the Federal Aviation Administration ("FAA") was responsible both for "foster[ing] commercial aviation" and for safety.[111] Congress modified the FAA's dual mandate after this combination of functions attracted criticism, but the change reportedly had only a limited impact on FAA culture.[112]

Although we generally favor adherence to the coherence principle, there are several situations in which departures may be appropriate. To make sound policy, agencies often must reconcile competing interests. For example, in banking regulation, solvency must be balanced against consumer protection. A regulatory regime in which different bodies handle solvency and consumer protection may lead each agency to focus on its own mandate without regard for competing considerations (i.e., "tunnel vision"). Someone must eventually referee any disputes that arise between competing single-mandate regulators, and decide how to reconcile their distinct policy interests. If both functions reside in the same agency, the agency's leadership can make the decision. If not, an external body must choose when the competing single-mandate agencies cannot agree. As we discuss below, the CFPB's mission and location raise exactly these issues.

In a related scenario, the balancing must reconcile the competing views of agencies with different and incommensurate goals, priorities, and substantive areas of concern.[113] How should disputes between the

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plaining that singular focus and backgrounds leave agencies susceptible to special interest capture).

109 12 U.S.C. § 225a (2012); Press Release, Bd. of Governors of the Fed. Reserve Sys. (Jan. 25, 2012), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20120125c.htm.

110 *Compare* George F. Will, *The Fed's Dual Mandate Trap*, BUFFALO NEWS, Nov. 18, 2010, at A9, *with* Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Cato Institute 25th Annual Monetary Conference: Federal Reserve Communications (Nov. 14, 2007), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20071114a.htm.

111 MARY SCHIAVO, FLYING BLIND, FLYING SAFE 51, 65 (1997) ("If outsiders viewed the FAA as encumbered by a divided loyalty and hamstrung by its dual mandate, the FAA didn't seem to share that confusion. The tombstone mindset made plain its loyalty to the cost-conscious interests of the aviation industry.").

112 *Id.* at 203–04, 206.

113 *See* SEIDMAN, *supra* note 49, at 144 ("If agencies are to work together harmoniously, they must share at least some community of interests about basic goals. . . . Senator Frank Moss ascribed the conflict between the National Park Service and the Army Corps of Engineers over

DoD and EPA be resolved? The identity of the "decider" will determine when "disputes" exist, and shape the outcome. For example, in disputes involving the environmental effects of military training, DoD has emphasized the value of military readiness, and EPA has focused on the benefits of cleaning up hazardous waste on military bases.[114]

In a third situation, an agency might accept a function with no connection to its portfolio in anticipation of a substantial budget increase. In the 1990s, the government of Australia assigned the Australia Competition and Consumer Commission ("ACCC") responsibility for monitoring implementation of a new value-added tax. The ACCC had no particular expertise in the area, but the Australian Parliament gave the agency a substantial budget increase to carry out its new responsibilities. When the monitoring responsibility ended, the budget increase remained part of the base of the ACCC's annual funding.[115] In effect, the ACCC accepted an unrelated policy mandate in the expectation that the mandate would expire in the relatively near term and in the hope that it would gain a lasting budget uplift from the temporary mandate.

2. *Branding and Credibility*

Like nongovernment institutions such as private firms, public agencies have "brands."[116] For a public agency, a brand conveys information about the agency's goals and priorities and serves as a signal of its reputation. The assignment of policy functions affects the clarity and strength of the agency's brand. Excessive diversification or the combination of conflicting duties can confuse or dilute the brand. A confused or diluted brand gives poor guidance to agency personnel about which projects to pursue, what theories to rely upon, and what rules to use to resolve disputes.[117] To outsiders, agencies with diluted

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the Florida Everglades to 'uncoordinated activities.' Park service officials complained that the engineers drained the Everglades National Park almost dry in their efforts to halt wetlands flooding and reclaim glade country for agriculture. The Army Corps of Engineers argued that wetlands were 'for the birds' and flood control for the people.").

114 Lyndsey Layton, *Pentagon Fights EPA on Pollution Cleanup*, WASH. POST, June 30, 2008, at A1.

115 The authors are grateful to Allan Fels, former Chairman of the ACCC for bringing this point to our attention.

116 William E. Kovacic, *Creating a Respected Brand: How Competition Agencies Signal Quality*, GEO. MASON L. REV. (forthcoming 2015).

117 *See* Janice Revell, *Interview with John Taylor*, MONEY MAG., Aug. 2012, at 93, 96 ("The Fed needs to focus on a single goal of long-run price stability. We should remove the Fed's dual mandate of maximum employment and stable prices, which was put into effect in the 1970s. From 2003 to 2005, the Fed held interest rates too low for too long. A primary reason was its

or confused brands are more likely to appear unreliable, because they are aimless, disoriented, or erratic.

Poor branding also weakens the agency's credibility in the eyes of important external decisionmakers. An agency with a strong brand stands a better chance of persuading legislators and their staffs that it is a worthy recipient of additional funding or powers. A brand also reduces an agency's vulnerability to intrusive oversight or other forms of second-guessing or reversal. A good brand also improves the agency's stature when it appears before the courts. As the agency's brand improves, so too increase its prospects of getting deference when courts review its work.[118] Finally, a well-respected agency probably enjoys an advantage in dealing with regulated firms and their advisors. For example, parties know that well-branded agencies receive more respect from the courts. Consequently, in negotiations over alleged infringements, a well-branded agency may be able to obtain better settlement terms and, perhaps, gain better compliance with its policy positions.[119]

Combining functions also affects the size of an agency's political capital. In our experience, regulatory bodies are always accumulating or spending political capital. When agencies make policy choices and initiate specific matters, they are either spending or accumulating political capital. Combining functions that build political capital with

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concern that raising rates would increase unemployment. . . . More recently, the Fed has cited concerns over employment to justify its interventions, including quantitative easing. *Removing the dual mandate would take away that excuse.*" (emphasis added)).

The problem is not unique to the Fed. *See* WILSON, *supra* note 34, at 55–59 (describing how the Economic Cooperation Administration and the Central Intelligence Agency were profoundly affected by the personnel they acquired from other agencies, given the open-ended nature of the original mandate (i.e., the brand) for each agency). Indeed, as Wilson concisely observes, "if a new agency has ambiguous goals, the employees' prior experiences will influence how its tasks get defined." *Id.* at 55; *see also* SEIDMAN, *supra* note 49, at 125–26 ("Government officials have an instinctive drive to reproduce the organizations, systems, and procedures with which they are most familiar. When asked to develop a self-financing plan for the rural electrification program, the Agriculture Department inevitably proposed an exact duplicate of the farm credit banks.").

118 Erica Teichert, *Breyer Gives Antitrust Agencies Top Marks for EU Ties*, LAW360 (Apr. 3, 2014, 7:31 PM), http://www.law360.com/articles/524851 (subscription required).

119 Senator Elizabeth Warren memorably grilled federal regulators at her inaugural Senate Banking Committee hearing for their failure to take financial institutions to trial. Jim Puzzanghera, *Elizabeth Warren's First Grilling of Regulators Is a YouTube Hit*, L.A. TIMES, (Feb. 18, 2013), http://articles.latimes.com/2013/feb/18/business/la-fi-mo-elizabeth-warren-bank-regulators-jail-20130218. The grilling sparked applause, and became a YouTube sensation—but the premise of the questions is mistaken. Taking a case to trial and losing doesn't help the agency's brand—and successful agencies don't need to take their cases to trial to accomplish their regulatory objectives.

functions that run political capital deficits may help an agency to perform functions that are important to the economy but are unpopular. In effect, one function cross-subsidizes the other. Conversely, an agency with policy duties whose implementation chronically yields political capital deficits will find it difficult to establish political allies, and blunt political attacks that threaten its effectiveness.[120]

Branding considerations also help explain why agencies sometimes resist the assignment of new responsibilities, even when the new function would be accompanied by more resources or greater visibility.[121] For the same reason, agencies seek to divest responsibilities that are seen to collide with their core responsibilities.[122]

3. *Capacity and Capability*

Successful agencies attain a good fit between their policy duties and the means at their disposal to fulfill them. Assigning *N +1* functions to an agency with the people, powers, knowledge, and credibility to handle only *N* duties invites failure.

Effective implementation requires two basic ingredients: capacity and capability. Capacity is the necessary critical mass of human talent and supporting resources to perform the assigned functions well. As the number of assigned policy functions grows, there is a danger that the agency will have too many things to do relative to the human skills and administrative resources (e.g., good information technology systems) that it has available. Overburdened public agencies display a remarkable ability to function effectively.[123] Nonetheless, as the num-

120 *See* Susan E. Dudley, *Lessons Learned, Challenges Ahead: Is There a Constituency for OIRA?*, REG., Summer 2009, at 6 ("OIRA's mandate is to advance the general public interest . . . . Hence there is no concentrated constituency for OIRA . . . .").

121 *See* WILSON, *supra* note 34, at 180 ("For years members of Congress tried to persuade J. Edgar Hoover that the FBI should take over federal responsibility for investigating drug trafficking.").

122 *See id.* at 108–09 (noting that twice in the 1970s, the Department of Agriculture tried to get rid of responsibility for the food stamp program, because it viewed itself as being in the "food business"—not the "welfare business"); *The Accuracy of the FTC Tar and Nicotine Cigarette Rating System: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 110th Cong. (2007) (statement of William E. Kovacic, Comm'r, Fed. Trade Comm'n), *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=b0dddad5-bded-45d7-a787-856de5577b3f.

123 WILSON, *supra* note 34, at 378 ("[W]e live in a country that despite its baffling array of rules and regulations and the insatiable desire of some people to use government to rationalize society still makes it possible to get drinkable water instantly, put through a telephone call in seconds, deliver a letter in a day, and obtain a passport in a week. . . . One can stand on the deck of an aircraft carrier during night flight operations and watch two thousand nineteen-year-old boys faultlessly operate one of the most complex organizational systems ever created. There are not many places where all this happens. It is astonishing it can be made to happen at all.").

ber of functions grows, the possibility for disabling mismatches between commitments and means rises as well. Confronted with major gaps between policy duties and means, agencies must engage in policy triage. Forced to choose among possible projects, agency employees will expend effort according to their ambition and enthusiasm.[124] Some policy areas will flourish, and others will languish—even if budgets keep pace with new responsibilities (which they almost never do).[125] The agency must perform triage to survive, but the process of regulatory triage is often only weakly observable or completely shrouded. This nontransparent decisionmaking means that "law in action" can diverge greatly from "law on the books." In performing regulatory triage, the agency also runs the risk of legislative recriminations if a sidetracked issue blows up.[126]

Capability refers to whether an agency has statutory powers (e.g., effective remedies), organizational structure, and quality control mechanisms to make good decisions and apply its authority effectively. In routine operations, an agency can err in essentially two ways. It can intervene when it should not (a false-positive, or Type I error), or it can take no action when it should intervene (a false negative, or Type II error). An institutional design question related to capability is whether an agency with multiple (and potentially competing) functions and purposes is likely to make more or fewer mistakes—and perhaps, of which type.

Expanding an agency's substantive mandate can degrade capability by warping the agency's judgment. Broader authority can cause the agency's leaders and staff to overestimate the institution's ability

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124 MARK MAZZETTI, THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH 14 (2013) ("Hundreds of CIA analysts were now working on terrorism, which was understandable in the aftermath of an attack that killed nearly three thousand Americans. *But it became immediately obvious to the analysts that the path to career advancement at the CIA was to start working on terrorism, with the goal of producing something that might be read to the president early one morning inside the Oval Office.*" (emphasis added)).

125 *See, e.g.*, Ladd Wiley & Steven A. Grossman, *Does FDA Have Enough Funding to Fulfill Its Critical Role in Protecting the Public Health?*, FDLI'S FOOD AND DRUG POLICY F. (Food & Drug Law Inst., Washington, D.C.), July 12, 2011, at 1 (discussing increasing responsibilities without increasing resources). There is always competition between and within agencies for resources, regardless of how many functions an agency performs. Combining functions in a single department means that resource allocation issues will be resolved in a less transparent setting. Such decisions tend to be less visible when made within a single agency. Barring a whistleblower, external constituencies will never learn the details of who wanted what—and what is no longer being done with the same enthusiasm, if at all.

126 *See, e.g.*, *Risks of Tainted Food Rise as Inspections Drop*, NBCNEWS.COM (Feb. 26, 2007, 9:13 PM), http://www.nbcnews.com/id/17349427/ns/health-infectious_diseases/t/risks-tainted-food-rise-inspections-drop (reporting food safety crises and misses by the FDA).

to perform effectively, and to pay inadequate attention to whether the agency's commitments match its means for effective implementation. This miscalculation can induce the agency to promise too much and deliver too little.

Congress sometimes is a willing participant in this exercise in unrealistic estimation. As an agency's mandate expands, so too do the legislature's expectations. It does not take long before the enlarged policy portfolio invites legislative demands for the agency to address every apparent commercial anomaly, regardless of whether the matter in question plays to the agency's strength. In this way, an agency with expansive powers becomes an attractive default option to handle every pressing and intractable economic problem, regardless of whether the agency has the means (capacity and capability) to achieve a good solution.[127]

An agency's attainment of greater capability requires acceptance of a norm that encourages agency personnel to self-critically assess both means and ends. When one agency has an exclusive, significant mandate, group-think and tunnel vision pose greater hazards. When two or more agencies share policy responsibility, the multiplicity operates as a feedback loop that surfaces problems and resolves disagreements, at the cost of having disputes sometimes spill into public view.[128]

4. *Resilience: Is the Existing Assignment of Functions Adaptable and Sustainable?*

Statutes often assign policy duties based on assumptions about the technology that is used to make or deliver a product, or the supplier's organizational status. What happens when the technology changes or new forms of supplier organizations emerge? These forces can cause regulatory jurisdictional boundaries to shift over time, much in the way that the movement of a river will sometimes alter real property rights defined by reference to the river's course.[129] When such changes occur, multiple agencies may argue that their authority now governs the reconfigured industry. A sustainable assignment of functions anticipates these changes and establishes principles that re-

127 As we have detailed elsewhere, the FTC has periodically run afoul of this dynamic.

128 The controversy over drone strikes in Pakistan displays this dynamic. *See* Mark Bowden, *The Killing Machines*, ATLANTIC, Sept. 2013, at 58, 65–66 (describing ongoing conflicts between the Department of State and the CIA and Department of Defense over the merits of specific drone strikes and the larger policy, as well as whether the CIA or State Department would decide such matters); *see also* MAZZETTI, *supra* note 124, at 291–93.

129 *See supra* note 97.

allocate regulatory tasks and resolve interagency quarrels expeditiously. A nonsustainable assignment cannot adapt, with the result that extended bureaucratic warfare becomes the means by which rival agencies adjust to the new environment.[130]

Examples of this phenomenon are easy to find. The SEC and Commodity Futures Trading Commission ("CFTC") fought for years for primacy in regulatory oversight over technologically dynamic services that arose at the interface of their respective policy domains.[131] The problem of adaptability often arises in financial services regulation, where jurisdiction hinges upon the type of entity being regulated, and not the type of products being sold.[132] Regulatory turf battles are costly, because they divert the agency's attention away from the performance of regulatory tasks, especially where rival agencies perceive that the dispute at hand will reshape regulatory boundaries for the long term. An adaptive regulatory framework would clearly allocate regulatory authority over a particular area to one regulator, instead of forcing personnel at multiple agencies to spend precious resources in disputes over the division of responsibility.

Resilience is less significant than some of our other factors, because problems will emerge over time, if at all. Yet, the absence of properly defined jurisdictional boundaries and cost-minimizing adjustment mechanisms is a recipe for border wars between agencies and departments, and turf wars among congressional committees. Creating an adaptable and sustainable grant of regulatory authority helps avoid or mitigate these conflicts.

5. *Cohesion*

Agencies assigned multiple policy tasks usually create separate operating units for each function. Over time, these operating units can become more autonomous and insular. Each unit soon develops distinctive norms, goals, priorities, and specialized skills. Each unit builds a staff, whose interests, training, and abilities focus narrowly on

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130 *Cf.* DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 2 (1997) ("As with nations and hunting groups, poorly defined boundaries lead to wasteful skirmishes.").

131 *See* Bd. of Trade v. SEC, 677 F.2d 1137, 1138 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982); SEC v. Am. Commodity Exch., 546 F.2d 1361, 1365 (10th Cir. 1976); SEC v. Univest, Inc., 410 F. Supp. 1029, 1030 (N.D. Ill. 1976).

132 ANNE M. KHADEMIAN, CHECKING ON BANKS: AUTONOMY AND ACCOUNTABILITY IN THREE FEDERAL AGENCIES 126–27 (1996) (describing how the idea of a "bank" has expanded). The formation of the CFPB provides an obvious counterexample, which we discuss in Part IV below.

the unit's duties. It is common for each team to have a very limited understanding of the backgrounds and activities of other units in the same agency. Individual units come to see each other not as teammates, but as rivals for prestige, personnel, office space, and funding.

Intramural rivalry can be beneficial or destructive.[133] Rivalry improves performance when it presses each team to excel in carrying out the agency's duties. At the same time, such rivalry hurts performance when individual teams strive foremost to succeed in credit-claiming or other measures to raise the unit's visibility as an end in itself. Rivalry also hurts when it leads individual units to ignore the existence of the other units and fail to realize the synergies that would result from deeper cooperation. Issues of culture and history loom large in determining which outcomes—good or bad—will result.

The difficulties described here can arise within a single agency or across multiple agencies that are expected to cooperate. And, such difficulties can exist within a single department.[134] Yet the tensions that arise across divisions within a single agency can be singularly debilitating. Consider one episode from the legendary conflicts among the armed services within the DoD:

> It was the late 1950s and General Curtis LeMay was the Chief of Staff of the Air Force. The Air Force and the Navy at that time were vying for who would have the primary mission of the strategic defense of the country. The Air Force was advocating its land based strategic bombers and intercontinental ballistic missiles. The Navy was advocating its ballistic missile submarines and putting nuclear capable aircraft aboard aircraft carriers. The debate was heated and there was not enough money to do both. The future missions of both services were at stake. An Air Force Colonel was briefing General LeMay on the Soviet threat versus the strategic requirements funded in the budget. The Colonel told General LeMay that the Russians, our enemy, were capable of . . . and at that point General LeMay stopped him. LeMay

133 Rivalry will be beneficial if it results in synergies that serve the larger aims of the agency. Rivalry will be destructive if it manifests itself in credit-claiming or other measures that enhance the visibility of the operating unit as an end in itself.

134 For example, in the U.S. Navy, there are at least three distinct organizational cultures: one for aircraft carriers and carrier-based aircraft; another for battleships, cruisers, and destroyers; and a third for submarines. More colloquially, these are referred to as the brown shoe, black shoe, and felt shoe Navy. WILSON, *supra* note 34, at 106; *see also* ROGER THOMPSON, U.S. NAVAL WAR COLL., CTR. FOR NAVAL WARFARE STUDIES, BROWN SHOES, BLACK SHOES AND FELT SLIPPERS: PAROCHIALISM AND THE EVOLUTION OF THE POST-WAR U.S. NAVY (1995).

> was quoted as saying, "The Russians are our adversary. The Navy is our enemy."[135]

One need not search far to find other examples of sour inter-service attitudes and their consequences. The Air Force is assigned to provide close air support for ground troops, yet the Air Force culture is "based on flying high-performance fighters and long-range bombers, especially the latter."[136] Thus, the Air Force gives

> minimal attention to close air support and buys just enough attack aircraft to protect its claim to the close-air-support mission. Meanwhile, the Army, unsure that it can rely on Air Force support when it is needed, purchases a vast fleet of attack helicopters which, while more expensive than attack planes and potentially far more vulnerable, can be placed under direct Army command.[137]

As we suggest above, combining previously separate bureaus into one department by itself does not ensure that the units will coordinate functions or work well together to accomplish agency goals.[138] As each bureau strives to build *esprit de corps* and an elite reputation, the attainment of genuine "jointness" becomes more difficult. Intramural tensions have long impeded attempts to deploy integrated special ops teams assembled from the different armed services—particularly because the "regular military" tends to regard special ops suspiciously. When one adds the intelligence agencies into the mix, it is easy to see why jointness has been elusive.[139]

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135 John Melchner, *Managing the Budget Process*, J. PUB. INTEGRITY, Fall/Winter 1998, at 11, 13, *available at* https://www.ignet.gov/sites/default/files/files/jpifw98.pdf.

136 WILSON, *supra* note 34, at 186–87.

137 RICHARD A. STUBBING, THE DEFENSE GAME: AN INSIDER EXPLORES THE ASTONISHING REALITIES OF AMERICA'S DEFENSE ESTABLISHMENT 142 (1986).

138 *See, e.g.*, DENNIS D. RILEY & BRYAN E. BROPHY-BAERMANN, BUREAUCRACY AND THE POLICY PROCESS 21 (2006) ("A specialist in marine biology may in some sense work for the Department of Commerce, but in his or her mind, the job is not with the Commerce Department, or even with [NOAA]. It is with the National Marine Fisheries Service.").

139 Greg Miller & Julie Tate, *Since Sept. 11, CIA's Focus Has Taken Lethal Turn*, WASH. POST, Sept. 2, 2011, at A1 ("Osama bin Laden was killed by U.S. Navy SEALs, but the operation was carried out under CIA authority, planned in a room at agency headquarters and based on intelligence gathered over a period of years by the CTC. The assault was the most high-profile example of an expanding collaboration between the CIA and the U.S. Joint Special Operations Command, which oversees the nation's elite military teams. Their comingling at remote bases is so complete that U.S. officials ranging from congressional staffers to high-ranking CIA officers said they often find it difficult to distinguish agency from military personnel."); *see also* Marc Ambinder, *The Secret Team That Killed Bin Laden*, NAT'L J. (May 2, 2011), http://www.nationaljournal.com/whitehouse/the-secret-team-that-killed-bin-laden-20110502.

Other examples indicate that the problem goes beyond the armed forces and intelligence agencies. The U.S. Forest Service has experienced similar difficulties as it has expanded from an agency comprised solely of foresters to one with a more diversified staff.[140] In many settings, destructive rivalry can mean that 2+2 = 1, instead of 4.

6. *Collateral Effects on the Regulatory Ecosystem*

The landscape of the federal government is thick with different institutional species—bureaus, agencies, task forces, inter-agency working groups, departments, and commissions. Many of these institutions have overlapping mandates, a condition which usually inspires some coordination by the agencies with shared duties.[141] Agencies seldom cooperate because they like each other.[142] Rather, despite jealousies and suspicions, agencies generally realize the need to avoid destructive duplication and invest in joint activities. In ways that external observers often cannot see, agencies have created a vibrant ecosystem of cooperation.[143]

When Congress reallocates regulatory tasks, inserts a new agency into the mix, or gives new powers to an existing agency, the moves disrupt the regulatory ecosystem. A new regulator may siphon off money and personnel, diminishing the means for other agencies to perform their duties. A reallocation of authority can fracture long-standing relationships and understandings that facilitated fruitful inter-agency engagement. The law creating the entrant may use language that appears in the substantive mandates of other agencies. Judicial interpretations of the entrant's statute may affect the meaning given to the statutes of other regulators.

Congress unquestionably has the authority to shutter an agency, trim regulator budgets, or rein in powers. The legislative realignments

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140 WILSON, *supra* note 34, at 65 ("[F]oresters dislike the tendency of engineers to elevate mechanical soundness over natural beauty, of biologists to worry more about endangered species than about big game, and of economists to put a price on things foresters regard as priceless.").

141 As noted above, this duplication has several sources. Congress sometimes creates duplication to experiment with alternative ways to achieve a desired policy result. *See* William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 518–19 (1996). On other occasions, Congress exploits interagency rivalry to improve performance. *See id.* at 510. Finally, as noted previously, technological change and market developments can create regulatory overlaps.

142 Rivalry among agencies to be preeminent in a given field is perhaps inevitable. Perceptions of primacy affect budgets, recruiting, and morale.

143 The means of cooperation and coordination range from the formal exchange of written memoranda of understanding to the creation of interagency working groups to less formal (but still important) personal interaction among agency heads, senior managers, and case handlers.

of authority we have in mind here, and the effects they produce in the regulatory ecosystem, for the most part do not arise from punitive intentions. The damage caused to the regulatory ecosystem is often inadvertent—the consequence of failing to understand the interdependencies that run throughout the regulatory environment and to anticipate how the introduction of a new body or a realignment of powers might upset valuable features of the system. For example, a decision to establish a new body with a salary scale greatly above the civil service pay scale will cause personnel to migrate to the higher-paying institution. The gain to the new agency comes at the cost of permanent blight to the larger regulatory ecology. To obtain a net policy improvement, the creation of a new institution, or a reallocation of regulatory authority, must proceed on the basis of a sophisticated understanding of the existing regulatory ecology.

7. *Political Implications*

Politics is crucial to agency design because decisions about *where* to place authority can determine *who* will resolve certain disputes and, in many cases, shape *what* the outcome will be.[144] As the House of Representatives considered a climate change bill in 2009, the chair of the House Agriculture Committee made clear he would kill the bill if it gave EPA authority to determine whether farmers would receive credit for "tilling and conservation practices that keep carbon dioxide stored in the soil."[145] The committee chairman said he would let the bill proceed if the USDA were to perform the relevant tasks.[146] The choice of agency for what might at first glance seem to be a merely ministerial function had real significance: "[E]nvironmentalists and the bill's main sponsors feared that the Agriculture Department might use lax standards, which would blow a hole through the nationwide cap on carbon dioxide emissions."[147] When Franklin Roosevelt's reorganization committee proposed to consolidate all federal loan programs under the Treasury Department, FDR rejected the idea,

144 *See* SEIDMAN, *supra* note 49, at 137 (detailing how user organizations lobbied to have the Army Corps of Engineers placed in charge of the St. Lawrence Seaway, because they expected it would adhere to its longstanding policy that inland waterways were "public highways open to use of the public generally without restriction," and would accordingly not impose user charges (internal quotation marks omitted)).

145 Steven Mufson, *Vote Set on House Climate Bill: Cap-and-Trade Legislation Advances Despite Some Resistance*, WASH. POST, June 24, 2009, at A3.

146 *See* Derek Thompson, *The Collin Peterson Climate Change Compromise*, ATLANTIC (June 24, 2009, 2:13 PM), http://business.theatlantic.com/2009/06/the_collin_peterson_climate_change_compromise_1.php.

147 Mufson, *supra* note 145.

observing: "That won't work. If they put them in the Treasury, not one of them will ever make a loan to anybody for any purpose. There are too many glass-eyed bankers in the Treasury."[148] More recently, some privacy advocates have criticized the Obama Administration's Internet privacy proposals because Commerce would be taking the policy lead, instead of the more pro-consumer FTC.[149]

Once regulatory boundaries are set, congressional committees aggressively police the perimeter. To some extent, this is a defensible effort to see that the lawmaking process benefits from expertise that individual members have acquired about an agency. A transfer of regulatory authority to an agency overseen by a different committee might lose the benefit of this investment in building intellectual capital. Legislators also may resist losing custody of "their baby" to successors who do not share their priorities. Finally, members of Congress derive important advantages from committee assignments. These include campaign contributions from firms regulated by agencies subject to the committee's oversight. Oversight of a regulator creates a revenue stream from the affected industry to a committee's members. A realignment that alters an agency's powers can reduce or stop the revenue stream to members serving on a given committee. It is easy to see why Congress closely monitors realignments of regulatory power.[150]

Agencies understand this dynamic and usually avoid organizational changes that might create political difficulties.[151] When agen-

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148 A.J. WANN, THE PRESIDENT AS CHIEF ADMINISTRATOR: A STUDY OF FRANKLIN D. ROOSEVELT 103–04 (1968). For a similar observation about the Federal Housing Authority ("FHA"), see RILEY & BROPHY-BAERMANN, *supra* note 138, at 71–72. There, the authors note that the FHA was initially staffed by "real estate people and mortgage bankers," and the "values and prejudices" of those individuals resulted in a definition of agency success tied to "the number of loans made and the repayment record"—leading it to spend most of its resources on loan guarantees for newly constructed single-family, owner-occupied homes—which resulted in the suburbs. *Id.* (internal quotation marks omitted).

149 *See* Edward Wyatt, *White House, Consumers in Mind, Offers Online Privacy Guidelines*, N.Y. TIMES, Feb. 23, 2012, at B1 ("A concern is that the administration's privacy effort is being run out of the Commerce Department." (internal quotation marks omitted)).

150 *See generally* KING, *supra* note 130, at 2 ("For individual legislators, the payoffs for winning in turf wars include expanded power, greater prestige, opportunities to make a personal mark on important legislation, and improved services to voters.").

151 *See* Steven Eli Schanes, *Creating NOAA—The Coast Guard*, MAKING OF AN AM. PUB. SERVANT (May 24, 2008, 7:36 PM), http://schanes.wordpress.com/2008/05/24/creating-noaa-the-coast-guard (detailing rejection by Commerce of a proposed "swap" of the Coast Guard (from DoT to Commerce) in exchange for the Maritime Administration (from Commerce to DoT), because of the likely political blow-back).

Agencies clearly understand this dynamic, but administrative law scholars have historically given it short shrift. *See* Jerry L. Mashaw, *Mirrored Ambivalence: A Sometimes Curmudgeonly*

cies overlook these dynamics, legislators tend to respond quickly. We observed this dynamic first-hand in 2002, when the FTC and DoJ jointly proposed to change the way they handled antitrust cases in which both agencies shared jurisdiction. Among other features, the agreement would have given DoJ exclusive jurisdiction over mergers involving telecommunications companies and media firms. The proposal collapsed in the face of vehement opposition from Senator Ernest Hollings, who argued that the FTC should continue to review media mergers. As chairman of the Commerce Committee, Hollings had oversight authority over the FTC, but not over the DoJ. Hollings threatened the budgets of both agencies if they proceeded with their agreement. Why was Hollings so upset? Presumably, he feared that the plan would cut the flow of campaign contributions he received from telecommunications and media corporations.[152]

Similar considerations suggest why the reorganization that formed the Department of Homeland Security was so politically contentious.[153] These dynamics tend to entrench existing regulatory configurations and disable reforms that would redistribute authority. These political forces might be taken to indicate that existing distribution of agency power is largely immutable. Yet, from time to time, major exogenous shocks make change possible, at which point all the factors described in this Article become useful in considering how to allocate regulatory power across the U.S. government. Finally, the evident continuing demand for and interest in reorganization puts these issues in play. In the contest of government reorganization, few players ever permanently surrender, and no final judgment rule binds the disputants.[154]

Comment on the Relationship Between Organization Theory and Administrative Law, 33 J. LEGAL. EDUC. 24, 26 (1983) ("We should by no means scoff at the Niskanen and post-Niskanen literature. For one thing, it focuses our attention on congressional-bureau relations as an important determinant of agency behavior; an insight that is hardly novel for a Washington lawyer but that is virtually ignored by administrative law doctrine and scholarship.").

152 This episode is described in greater detail in William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097, 1111–12 (2012); *see also* Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 35.

153 Even after the politics made reorganization inevitable, individual congressional committees insisted on retaining regulatory oversight of "their" part of DHS. *See* Tumulty & O'Keefe, *supra* note 42 ("[T]he members of Congress overseeing [the agencies that were merged into DHS] were loath to give up any authority. That is why DHS gets marching orders from more than 100 congressional committees and subcommittees—a number that has grown in the past seven years, despite the 9/11 Commission's recommendation that those tangled lines of authority be consolidated.").

154 *Cf.* WILSON, *supra* note 34, at 299–300 ("Policy making in Europe is like a prizefight: Two contenders, having earned the right to enter the ring, square off against each other for a

B. What Matters Most?

We believe three factors best predict the long-term success of an agency design proposal/functional combination: coherence, capacity and capability, and political implications. Of these, the level of political support is paramount. An agency cannot operate effectively if it lacks a supportive constituency, or if the effort to implement its duties arouses debilitating political opposition.[155]

Policy coherence ranks second on our list. As coherence increases, the agency is likely to define its aims more clearly, set sensible priorities, design programs wisely, and develop a well-respected brand. Coherence helps attract qualified staff and helps form the capacity needed to realize the agency's priorities. Policy coherence also gives an agency greater credibility with external observers, including the legislators who approve funding requests and otherwise oversee agency operations.

Third most important is the agency's capacity and capability to perform its duties. Serious mismatches between policy commitments and the means to deliver tend to yield highly visible failures, which destroy political capital, and increase the risk that Congress will place the agency into the public administration/agency equivalent of bankruptcy. Agencies with inadequate talent and frail resources are prone to devise faulty programs or execute tasks ineffectively. If policy commitments badly outrun the means of implementation, the agency is forced to cope chiefly through regulatory triage. It carries out some duties and ignores others, hoping that no policy disaster occurs in a policy domain the agency has chosen to ignore. An underpowered, underfunded agency that tries to cover all the assigned duties is likely to find that it does nothing particularly well.

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prescribed number of rounds; when one fighter knocks the other one out, he is declared the winner and the fight is over. Policy making in the United States is more like a barroom brawl: Anybody can join in, the combatants fight all comers and sometimes change sides, no referee is in charge, and the fight lasts not for a fixed number of rounds but indefinitely or until everybody drops from exhaustion. To repeat former Secretary of State George Shultz's remark, 'it's never over.'").

155 *See, e.g.*, Norton E. Long, *Power and Administration*, 9 PUB. ADMIN. REV. 257, 257 (1949) ("There is no more forlorn spectacle in the administrative world than an agency and a program possessed of statutory life, armed with executive orders, sustained in the courts, yet stricken with paralysis and deprived of power. An object of contempt to its enemies and of despair to its friends. The lifeblood of administration is power."); *see also* Maureen K. Ohlhausen, Comm'r, U.S. Fed. Trade Comm'n, Address at the ABA Section of Antitrust Law Fall Forum: How to Measure Success: Agency Design and the FTC at 100 (Nov. 6, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/597191/141106ftcat100fallforum.pdf (discussing importance of political support to agency effectiveness).

To be sure, these factors are interdependent. Consider the linkage of political support to the other two factors. Strong political support makes it more likely that an agency will gain the means it needs to function effectively. By the same token, an agency that engages in triage without explicit or implicit backing from its congressional oversight committee is effectively playing Russian roulette with its future. Finally, without policy coherence, an agency is unlikely to attract and maintain political support in the first place.

Embedded in each of our factors are further levels of complexity.[156] Are the factors scalable? Can an agency offset weakness in one factor with strength in another? Does an agency require a minimum quantum of positive factors to get underway? These issues must await better data and require further research. We now apply our framework to the CFPB.

IV. APPLICATION OF OUR FRAMEWORK TO THE CFPB

Before Dodd-Frank, numerous federal and state agencies shared regulatory responsibility for financial services.[157] The regulatory status quo resembled a century-old house that had passed through several owners. Each made changes to suit her tastes in architecture, and every new modification took place without apparent concern for the quality of the entire structure. The result was a jarring collision of styles that combined a colonial frame, some Victorian turrets, a Cape Cod extension, and a modernist wing of glass and steel.

The fragmentation of regulatory authority may have helped cause (and may even have worsened) the 2008 financial crisis.[158] Reform could have taken several different paths. The least disruptive approach would have given existing agencies new authority and created

156 For example, capacity is obviously affected by the allocated budget, but does it make a difference if the agency is funded with user fees versus dedicated taxes versus general appropriations? To what extent does the mix of funding among these choices reflect the impact of other factors—most importantly, political support?

157 The federal regulators were the Commodities Futures Trading Commission, two Treasury Department entities (the Office of the Comptroller of the Currency and the Office of Thrift Supervision), the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Federal Trade Commission, the National Credit Union Administration, and the Securities and Exchange Commission. *See* David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 7, 2010, 9:15 AM), https://blogs.law.harvard.edu/corpgov/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation.

158 FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xxi (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

stronger inter-agency coordination mechanisms.[159] A bolder solution would have enhanced substantive regulatory controls and consolidated regulatory functions into one public entity. Many observers who had studied the existing regulatory framework and its failings preferred to replace the existing regime with a clean design—or at least merge the SEC and CFTC.[160]

Dodd-Frank did more than simply give existing agencies more powers, but it rejected a complete simplification of the regulatory status quo. The 2010 reforms took a minimalist path. Dodd-Frank retained all but one existing financial services regulator (OTS was shuttered and its responsibilities reallocated), while creating a new entity focused on consumer credit (the CFPB).[161] Even this partial renovation provoked divisive debate.[162]

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159 On this possibility, see William E. Kovacic, *The Consumer Financial Protection Agency and the Hazards of Regulatory Restructuring*, LOMBARD STREET, Sept. 14, 2009, at 19.

160 *See, e.g.*, Steven Rattner, *Regulate, Don't Split Up, Huge Banks*, N.Y. TIMES, Aug. 1, 2012, at A23 (criticizing Dodd-Frank's limited simplification of the financial services regulatory framework). *But see* David Zaring, *With the Volcker Rule, the More Regulators the Merrier*, N.Y. TIMES DEALBOOK (Dec. 9, 2013, 5:54 PM), http://dealbook.nytimes.com/2013/12/09/with-the-volcker-rule-the-more-regulators-the-merrier/?_r=2 (noting that "even historical accidents have their merits").

161 12 U.S.C. § 5412 (2012); *see* John E. Villafranco & Kristin A. McPartland, *New Agency, New Authority: An Update on the Consumer Financial Protection Bureau*, ANTITRUST SOURCE, Feb. 2012, at 1, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb12_villafranco_2_27f.authcheckdam.pdf; John E. Villafranco & Kristin A. McPartland, *New Agency, New Authority: What You Need to Know About the Consumer Financial Protection Bureau*, ANTITRUST SOURCE, Dec. 2010, at 1 [hereinafter Villafranco & McPartland, *New Agency, New Authority*], *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Villafranco12_21f.authcheckdam.pdf.

162 *See* Daniel Carpenter, *Institutional Strangulation: Bureaucratic Politics and Financial Reform in the Obama Administration*, 8 PERSP. ON POL. 825, 826 (2010) (describing struggles over design of new financial services consumer protection institutions); Damian Paletta & Deborah Solomon, *Geithner Vents as Overhaul Stumbles*, WALL ST. J., Aug. 4, 2009, at A1 (recounting Treasury Secretary Geithner's criticism of various financial regulators for their opposition to plans to simplify regulatory framework); *Treasury Plans Under Fire*, WASH. POST, Aug. 10, 2009, at A12 (noting that President Obama left most regulators in place to avoid a protracted battle with existing institutions); *see also* TIMOTHY F. GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES 400–01 (2014) ("Just about everyone agreed that the current oversight regime was a ludicrously balkanized mess, but the same tribal warfare that hobbled the regulatory system would hobble our efforts to rationalize it. For example, we thought one obvious fix would be to merge the Securities and Exchange Commission and the Commodity Futures Trading Commission, two market regulators whose overlapping mandates routinely produced duplication and confusion. But the CFTC, through a quirk of history, was under the jurisdiction of the congressional agriculture committees, which did not want to surrender their power over a slice of the financial system—or their access to campaign donations from financial interests. I asked House Financial Services Chairman Barney Frank whether he thought we could round up the votes. 'Sure, you can merge the SEC and the CFTC,' he said. 'You just can't do it in the United States.'").

The CFPB originated in a 2007 article by then-Professor and now Senator Elizabeth Warren, who proposed creating a Financial Product Safety Commission.[163] The article expressed no opinion about the new agency's optimal location and simply observed that "[w]hether it is housed in a current agency like the [Consumer Product Safety Commission] or stands alone, the point is to concentrate the review of financial products in a single location, with a focus on the safety of the products as customers use them."[164] A second article made a similar recommendation, while cautioning that agency capture was the "main regulatory design challenge."[165]

Although most controversy focused on the CFPB's desirability, a parallel debate took place over where to locate the agency in the administrative state. Should the CFPB be an independent commission (similar to the FTC and CFTC)? If not, where did it belong—Treasury, DoJ, or the Federal Reserve? If located inside an existing public body, how independent should the CFPB be from traditional forms of oversight?[166]

Dodd-Frank put the CFPB inside the Fed, but insulated it from oversight by almost everyone in the federal government.[167] The CFPB's head is a single director appointed to a five-year term by the President and confirmed by the Senate.[168] The President may remove the director for "inefficiency, neglect of duty, or malfeasance in office."[169] The CFPB operates outside the congressional appropriations process; it funds its operations with fees collected by the Federal Reserve—up to twelve percent of all fees the Fed receives.[170] CFPB

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163 *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 8, *available at* http://www.democracyjournal.org/pdf/5/Warren.pdf.

164 *Id.* at 18.

165 Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 99 n.325 (2008).

166 For a treatment of these issues, see Kovacic, *supra* note 159.

167 On these features, see Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 899 (2013). Dodd-Frank protects the CFPB from interference by its host institution, the Federal Reserve. Under Title X of Dodd-Frank, the Fed shall not intervene in CFPB examinations or enforcement actions; appoint, direct, or remove any CFPB officer or employee; combine the CFPB or any of its functions with any other Federal Reserve unit; review, approve, or delay any CFPB rule or order; or review or approve any legislative testimony, recommendations, or comments of the CFPB director. *See* 12 U.S.C. § 5492(c) (2012).

168 *Id.* § 5491; *see* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 901 (2012).

169 12 U.S.C. § 5491(c)(3).

170 *Id.* § 5497. For Fiscal Year 2013, the CFPB will receive nearly $600 million. CONSUMER

rulemaking is overseen by the Financial Stability Oversight Council ("FSOC"), which consists of representatives from several government agencies, including the Fed.[171] The FSOC can overrule the Bureau's rules by a vote of two-thirds of its members, but it cannot influence or limit testimony by CFPB personnel or overrule a decision by the CFPB to bring an enforcement proceeding.[172]

Many individual features of the CFPB are not unique. Other regulators with broad powers, such as EPA, are led by a single administrator.[173] For some regulatory bodies headed by one person, the director is appointed to a fixed term and may be removed only for cause.[174] Various financial services regulators also enjoy substantial autonomy from the budgetary appropriation process.[175] However, the combination of protections afforded by Dodd-Frank makes the CFPB unique. The bundle of autonomy mechanisms, along with the independent-agency-within-an-independent-agency structure, gives the CFPB unmatched insulation from the accountability devices that apply to all other federal regulators.

The CFPB enforces numerous existing statutes (e.g., Equal Credit Opportunity Act, Fair Credit Reporting Act, Federal Debt Collection Practices Act, Home Ownership and Equity Protection Act, and Truth in Lending Act) that govern financial services for consumers.[176] The Bureau also received new statutory authority to challenge "unfair, deceptive, or abusive acts or practices" involving consumer financial services.[177]

FIN. PROT. BUREAU, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 13 (2013). If the CFPB wishes to exceed the ceiling set in Dodd-Frank, it must seek a congressional appropriation. 12 U.S.C. § 5497.

171 The FSOC has ten voting members: Treasury, the CFPB, CFTC, FDIC, Federal Housing Finance Agency, the Fed, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the SEC. 12 U.S.C. § 5513. The FTC is not on the FSOC. *Id.* § 5321.

172 15 U.S.C. § 8305(l).

173 *Current Leadership*, U.S. ENVTL. PROTECTION AGENCY, http://www2.epa.gov/aboutepa/current-leadership (last visited Nov. 19, 2014).

174 The Office of the Comptroller of the Currency is led by a single individual, the Comptroller of the Currency, who is appointed by the President for a five-year term, with the Senate's advice and consent. 12 U.S.C. § 2.

175 *See* RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, THE LAW OF BANKING AND FINANCIAL INSTITUTIONS 62 (4th ed. 2009) (describing funding mechanism for the Office of the Comptroller of the Currency).

176 Dodd-Frank defines "Federal consumer financial law" to include Title X of Dodd-Frank, eighteen federal consumer protection statutes enumerated in Dodd-Frank, and certain other laws. 12 U.S.C. § 5481(14); *see also* Villafranco & McPartland, *New Agency, New Authority*, *supra* note 161, at 1 & n.5.

177 12 U.S.C. §§ 5512(b), 5531(a).

In this Part, we benchmark the CFPB against the institutional factors set out above.

A. *Policy Coherence*

The CFPB has substantial policy coherence.[178] All CFPB policy assignments seek to protect consumers in financial services transactions.[179] Its jurisdiction is broad and covers the extension of credit, the servicing of loans, the taking of deposits, real estate settlement services, check-cashing, stored payment card systems, collection services, financial advisory services, debt collection, and consumer credit reports.[180] Congress gave the CFPB expansive authority to enforce the law, issue prescriptive trade rules, conduct on-site examinations, provide guidance to firms and consumers, gather data, and issue reports.[181]

Benefits can accrue from giving one regulator a wide array of related policy measures and implementation tools. At the same time, the breadth of tasks and tools creates its own perils. Each function, even when performed by employees with common training and values, creates a distinctive regulatory personality: prosecutor (enforcement actions), cop on the beat (auditing and examinations), teacher (consumer and business education), scholar (preparation of research reports), information clearing house (credit card complaint database), or philosopher-king (rulemaking).[182]

These discrete functions are likely to give rise to distinct intra-bureau cultures, whose differences create internal tensions. Enforcement involves selective, ex post intervention and the identification of wrongdoers. Auditing entails continuing oversight and monitoring more akin to the operation of a public utility commission. The collection of industry data and preparation of reports draws upon the skills of researchers and provides a decidedly more indirect (and in some cases more time-consuming) way of shaping policy than filing cases

178 *See id.* § 5531(a). For a review of the CFPB's authority under Dodd-Frank, see Michael B. Mierzewski, Beth S. DeSimone, Jeremy W. Hochberg & Brian P. Larkin, *The Dodd-Frank Act Establishes the Bureau of Consumer Financial Protection as the Primary Regulator of Consumer Financial Products and Services*, 127 BANKING L.J. 722 (2010).

179 *See* 12 U.S.C. § 5531(a).

180 *Id.* § 5481(5), (15).

181 *Id.* §§ 5492(a)(10), 5511(a)–(b), 5512(b)–(c), 5531(b), 5532(a); 31 U.S.C. § 714(f)(2).

182 The CFPB's power to issue regulations appears in Sections 1022(b), 1031(b), and 1032(a) of Dodd-Frank. *See* 12 U.S.C. §§ 5512(b), 5531(b), 5532(a). The agency's law enforcement powers are enumerated in Sections 1002(12), 1031(a), 1036(a)(1)(B), and 1052 to 1055. *See* 12 U.S.C. §§ 5481(12), 5531(a), 5536(a)(1)(B), 5562–5565. The CFPB's examination and supervision mandates are set out in Section 1026. *See* 12 U.S.C. § 5516(b)–(c).

and issuing rules.[183] The challenge for the CFPB is to develop and maintain an internal structure and culture that maximizes the complementarities across this range of policy tools while minimizing the possible inconsistencies. Other agencies have had difficulty managing this dynamic.[184]

The CFPB's placement within the Fed scores less well on policy coherence grounds. The Fed focuses on macroeconomic policy; the CFPB focuses on consumer financial services. The Fed mostly attracts attention when it changes monetary policy; the CFPB is likely to attract attention with every major case it brings and every major rule it announces.[185] External observers will have frequent reason to question the coherence and relatedness of Federal Reserve and CFPB programs considered as a single package.

B. Branding and Credibility

The assignment of policy responsibilities can affect the agency's "brand" and determine the respect it receives from external constituencies.[186] A strong brand assists an agency in obtaining healthier budgetary appropriations from Congress and in gaining greater deference from reviewing courts.[187] Dodd-Frank gave the CFPB a strong brand (consumer advocate against abusive financial practices), and the Obama Administration has promoted that brand and emphasized its impact for middle class consumers for the past three years.[188] The high interrelatedness of the CFPB's regulatory responsibilities and its

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183 The CFPB resembles the FTC's combination of law enforcement, rulemaking, and research functions. On the operation of the FTC's research function and its relation to the Commission's other policy implementation tools, see WILLIAM E. KOVACIC, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 91–103 (2009).

184 Experience at the FTC has demonstrated that the realization of synergies and the exploitation of complementarities do not take place automatically. *See id.* at iv–v.

185 On the public attention generated by the exercise of the Fed's macroeconomic policy role, see *Age Shall Not Weary Her: The Federal Reserve at 100*, ECONOMIST, Dec. 21, 2013, at 114; Peter Coy, *The Fed's Overexposure Problem*, BLOOMBERG BUSINESSWEEK, Sept. 9–15, 2013, at 25. On the prominence of the CFPB's policy initiatives, see Danielle Douglas, *New Rules Are Set to Curb Abuses by Mortgage Servicers*, WASH. POST, Jan. 17, 2013, at A15, which describes the announcement of proposed CFPB rules for mortgage lending.

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

187 *See* Kovacic, *supra* note 116; *supra* Part III.A.2.

188 *See* Presidential Remarks on Signing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 DAILY COMP. PRES. DOC. 2 (July 21, 2010) (describing the CFPB as "a new consumer watchdog with just one job: looking out for people—not big banks, not lenders, not investment houses—looking out for people as they interact with the financial system"); Nikki Sutton, *President Obama Nominates Richard Cordray to Lead Consumer Financial Protection Bureau*, WHITE HOUSE BLOG (July 18, 2011, 3:55 PM), http://www.whitehouse.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bu-

consistency of purpose will help the CFPB achieve a coherent, well-recognized brand.

The clarity and consistency of the brand also pose risks. The CFPB is likely to experience a steady diet of consumer protection cases involving unfair, deceptive, and abusive conduct. Repeated exposure to business misconduct, coupled with a mandate to attack apparent episodes of illegal behavior aggressively, could easily lead CFPB personnel to develop a "shoot first, ask questions later" approach to enforcing Dodd-Frank.[189]

One way to avoid this problem is to build institutional structures that counteract path-dependent habits that inflexibly incline professional staff toward intervention. At the FTC, for example, the Commission receives recommendations on consumer protection cases not only from case handlers within the Bureau of Consumer Protection, but also from the Bureau of Economics.[190] This approach discourages consumer protection case handlers from overlooking regulatory costs, and ignoring the role of competition and market-based responses in protecting consumer interests. Because FTC consumer protection attorneys know the Bureau of Economics will critique their work, they must acknowledge and address economic considerations when seeking approval to proceed with litigation.[191]

The CFPB has created an economic research unit and has hired economists with expertise in mortgage markets and consumer borrowing decisions.[192] What role will the economists play in shaping the new agency's culture and programs? The CFPB might use economic research to discipline law enforcement and in rulemaking.[193] By doing

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reau (quoting President Obama as saying, "we are going to stand up this bureau and make sure it is doing the right thing for middle-class families all across the country").

189 *Cf.* WILD WILD WEST (Warner Bros. 1999) ("And you West—not every situation calls for your patented approach of shoot first, shoot later, shoot again—then when they're all dead, try to ask a question or two."). Similar concerns have been expressed about the IRS, where a steady diet of tax evaders can easily persuade IRS agents that everyone is a tax evader.

190 Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 32.

191 Luke M. Froeb, Paul A. Pautler & Lars-Hendrik Röller, *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569, 583–84 (2009).

192 *CFPB Hires Economist*, HOUSINGWIRE (Oct. 4, 2012, 11:58 AM), http://www.housingwire.com/articles/cfpb-hires-economist.

193 The CFPB has three principal operating units: Consumer Education and Engagement; Research, Markets, and Regulation; and Supervision, Enforcement, Fair Lending, and Equal Opportunity. *See About Us*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/ (last updated Nov. 19, 2014). There is a research group within the Research, Markets, and Regulation unit. *Id.* For a doubtful view that the CFPB will replicate the quality control provided by the FTC's economists, see Zywicki, *supra* note 167, at 899–917.

so, the agency could resist excessive exuberance for intervention.[194] By contrast, the agency might treat its economists as subordinate to the attorneys who draft rules and prepare cases. These are two notably different conceptions of the role of economists in a regulatory agency with law enforcement and rulemaking powers.

Staffing provides one indication of the future direction of the CFPB's likely approach. The CFPB hired a prominent behavioral economist (Sendhil Multainathan) as its first Assistant Director of Research.[195] Many behavioral economists believe insights from research in consumer psychology justify expansive regulatory intervention into financial services markets.[196] Those who are skeptical about the implications of behavioral economics for regulatory intervention hotly contest this view.[197] The CFPB's hiring process will determine whether such skeptics are welcome within the agency. If the agency defines the role of economists as providing support for intervention, skeptics are unlikely to apply for positions in the CFPB, and if they do, unlikely to stay long enough to influence decisions.[198] Law enforcement agencies that fail to provide a home for at least some skeptics are vulnerable to group-think, tunnel vision, empire building, and other regulatory pathologies.[199] These risks are particularly pronounced for the CFPB, given the breadth of its substantive mandate, its powerful implementation tools, and the absence or relaxation of institutional controls that constrain other regulatory bodies.[200] In these circumstances, the strong brand created by Dodd-Frank may turn out to be a weakness.

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194 The Bureau of Economics performs this quality control function at the FTC. *See* Froeb et al., *supra* note 191, at 578–79 (discussing influence of economists on FTC decisions).

195 *See Sendhil Mullainathan: Professor of Economics*, HARV. U., http://scholar.harvard.edu/mullainathan (last visited Nov. 19, 2014).

196 Not coincidentally, the prominent behavioral economist hired by the CFPB shares this view. *See* MICHAEL S. BARR, SENDHIL MULLAINATHAN & ELDAR SHAFIR, BEHAVIORALLY INFORMED FINANCIAL SERVICES REGULATION 18 (2008), *available at* http://www.newamerica.net/files/naf_behavioral_v5.pdf.

197 *See* Zywicki, *supra* note 167, at 869.

198 For a sample of critiques or analyses that could be useful to the new agency, see generally Niclas Berggren, *Time for Behavioral Political Economy? An Analysis of Articles in Behavioral Economics*, 25 REV. AUSTRIAN ECON. 199 (2012); Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905, 911; *Free to Choose Symposium*, TRUTH ON THE MARKET, http://truthonthemarket.com/free-to-choose-symposium/ (last visited Nov. 19, 2014).

199 The dangers of group-think and tunnel vision for the CFPB are discussed in Zywicki, *supra* note 167, at 875–86. The impulse of public institutions to expand their size and influence (empire building) is described in WILSON, *supra* note 34, at 179–81.

200 *Cf.* Richard H. Thaler, *Level Playing Fields, in Soccer and Finance*, N.Y. TIMES, July 25, 2010, at BU5 ("Consider the Consumer Financial Protection Bureau now being established. *Above all, I'd urge the head of this agency to devise rules under the assumption that, someday, he*

We noted earlier the potential spillover effects of the CFPB's operations on the Fed's brand.[201] The CFPB's policy portfolio and implementing tools entail departures in form and degree from the Fed's historical role in financial services. The CFPB's performance of its responsibilities, good and bad, could blur the Fed's efforts to brand its work as a monetary policy technocracy. Even if the CFPB's brand achieves great clarity and wide public recognition, the clarity of the Fed's brand may be diluted.

C. *Capacity and Capability*

As described earlier, capacity refers to the pool of knowledge and resources at the agency's disposal, and capability refers to the strength of formal powers and range of policy instruments.[202] Because the CFPB has not yet made enough substantive decisions for us to have a view on its performance, we focus on capacity and the other enabling legislative aspects of capability.

We have already observed that the CFPB possesses a formidable array of policy tools with which to accomplish its aims—meaning capability is unlikely to be a serious problem.[203] Does the CFPB have the human capital to accomplish these tasks? At first glance, it would appear that the CFPB will enjoy relatively generous resources. For fiscal year 2013, the funding formula created in Dodd-Frank makes roughly $450 million available to the new institution.[204]

One might think that the seemingly generous allotment of resources means that capacity will not be a serious problem. Dodd-Frank, however, created an extraordinary rulemaking burden at the same time the CFPB was opening its doors. In its first year alone, the CFPB was charged with issuing twenty-four rules.[205] Some rules in-

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or she will be succeeded by a nitwit." (emphasis added)). J. Mark Ramseyer has made a similar argument regarding judges. *See* J. Mark Ramseyer, *Not-So-Ordinary Judges in Ordinary Courts: Teaching* Jordan v. Duff & Phelps, Inc., 120 HARV. L. REV. 1199, 1205–07 (2007).

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

202 *See supra* Part III.A.3.

203 *See supra* Part IV.A.

204 OFFICE OF MGMT. & BUDGET, THE BUDGET FOR FISCAL YEAR 2013, at 1289, 1296 (2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/oia.pdf; *see also* CONSUMER FIN. PROT. BUREAU, PROGRAM SUMMARY BY BUDGET ACTIVITY 1 (2012), *available at* http://files.consumerfinance.gov/f/2012/02/budget-in-brief.pdf.

205 DAVIS POLK, SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, ENACTED INTO LAW ON JULY 21, 2010, at i–ii (2010). We signal out the CFPB's rulemaking mandates as only one example of the tasks confronting the new agency. We do not recount the many basic challenges a new agency faces in setting up the administrative framework for its operations. Carrying out these varied and demanding tasks can be most challenging. See U.S. GOV'T ACCOUNTABILITY OFFICE, FINANCIAL REPORT OF THE CONSUMER FI-

volve complex matters of policy and procedure.[206] Issuing this many rules during a year would place a severe strain on even the most well-established agency, but imposing that obligation on an agency during its start-up period invites disappointment. The struggle to complete a hopelessly unrealistic agenda of tasks is an invitation for error in the formulation of specific legal commands. Some rules were put off, while the deadlines for others slipped.[207] Rules that are completed are unlikely to receive the quantity and quality of attention they would get if the CFPB's rulemaking process were not as overloaded. Affected parties challenging the rules will now have additional grounds for doing so (e.g., the issued rule did not adequately consider the costs and benefits of various alternatives because the CFPB was overwhelmed).[208] The CFPB had no role in creating these impossible mandates, but the inevitable efforts to postpone implementation or to seek extensions of statutory deadlines can hurt the agency's brand.

The CFPB has fared relatively well in digging out from under the avalanche of duties imposed by Dodd-Frank. Through a form of regulatory triage, the CFPB phased in some operations immediately and delayed others. The new agency front-loaded the promulgation of procedural rules that described how it would carry out its responsibilities.[209] The agency also initiated a variety of public education programs[210] and established a database for consumer complaints

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NANCIAL PROTECTION BUREAU FISCAL YEAR 2014, at 57–61 (2014), *available at* http://www.gao.gov/assets/670/666954.pdf (reporting findings of GAO audit that revealed flaws in CFPB's system for financial accounting and controls for property and equipment).

206 *Id.*

207 *Agency Rule List—Spring 2014: Consumer Financial Protection Bureau*, OFFICE OF INFO. & REG. AFFAIRS, http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3170&Image58.x=58&Image58.y=5&Image58=Submit (last visited Nov.19, 2014); *cf.* DAVIS POLK, DODD-FRANK PROGRESS REPORT 2 (2014) (discussing progress of Dodd-Frank as a whole).

208 Our prediction here is based on experience at the FTC, where the effort to complete large numbers of complex trade regulation rules in the 1970s led to severe problems with quality control. The FTC's rulemaking experience in the 1970s is examined in Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911, 919–27 (2005).

209 *Cf.* DAVIS POLK, DODD-FRANK RULEMAKING PROGRESS REPORT: PROGRESS AS OF MAY 1, 2011 (2011).

210 Perhaps the most notable measure is the agency's "Know Before You Owe" campaign to assist consumers in understanding the consequences of incurring debt. *Know Before You Owe*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/knowbeforeyouowe/ (last visited Nov. 19, 2014).

involving credit cards and transactions associated with mortgages, student loans, and bank accounts.[211]

At first, the CFPB largely "outsourced" enforcement functions to other government bodies with shared authority to implement financial services statutes involving practices such as debt collection (such as the FTC).[212] Over the past twelve months, the agency has accelerated the tempo of its own enforcement program, announcing the prosecution of new cases (some in its own right, some in partnerships with other public agencies) and the opening of investigations.[213]

The principal early objects of CFPB enforcement have been credit card issuers. In 2012, the agency reached settlements with American Express, Capital One, and Discover to resolve charges of misleading sales tactics, and it obtained restitution totaling over $425 million.[214] Other focal points for cases and investigations within the past twelve months have included debt relief service providers, mortgage lenders and brokers, mortgage insurers, and providers of student loans.[215]

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211 Press Release, Consumer Fin. Prot. Bureau, CFPB Launches Consumer Complaint Database (June 19, 2012), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-launches-consumer-complaint-database/.

212 *Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Fin. Insts. & Consumer Prot. of the S. Comm. on Banking, Housing, & Urban Affairs*, 113th Cong. (2013) (statement of J. Reilly Dolan, Acting Assoc. Dir., Div. of Fin. Practices, Fed. Trade Comm'n); Consumer Fin. Prot. Bureau & Fed. Trade Comm'n, Memorandum of Understanding 13 (Jan. 20, 2012), *available at* http://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf.

213 *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Two Companies for Charging Illegal Debt-Relief Fees (May 7, 2013), *available at* http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-two-companies-for-charging-illegal-debt-relief-fees/; Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau and Justice Department Pledge to Work Together to Protect Consumers from Credit Discrimination (Dec. 6, 2012), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-and-justice-department-pledge-to-work-together-to-protect-consumers-from-credit-discrimination/.

214 Press Release, Consumer Fin. Prot. Bureau, CFPB Probe into Capital One Credit Card Marketing Results in $140 Million Consumer Refund (July 18, 2012), *available at* http://www.consumerfinance.gov/newsroom/cfpb-capital-one-probe/; Press Release, Consumer Fin. Prot. Bureau, CFPB Orders American Express to Pay $85 million Refund to Consumers Harmed by Illegal Credit Card Practices (Oct. 1, 2012), *available at* http://www.consumerfinance.gov/newsroom/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/; Press Release, Consumer Fin. Prot. Bureau, Federal Deposit Insurance Corporation and Consumer Financial Protection Bureau Order Discover to Pay $200 Million Consumer Refund for Deceptive Marketing (Sept. 24, 2012), *available at* http://www.consumerfinance.gov/newsroom/discover-consent-order/.

215 David Nather, *Consumer Financial Protection Bureau Branches Out*, POLITICO (Mar. 22, 2013, 4:42 AM), http://www.politico.com/story/2013/03/consumer-financial-protection-bureau-branches-out-89009.html; Jon Prior, *The Bitter Battle over Mortgage Rules*, POLITICO

In its rulemaking activities, CFPB has continued to issue rules that describe how it will exercise its authority, and more recently has begun to issue rules that elaborate substantive standards.[216] It seems likely that the CFPB will struggle with the rulemaking process for a few years and will not be fully operational, in the sense of executing all of its assigned functions, for some time.

This dynamic poses risks to the stability of the political constituency that backed the CFPB so enthusiastically in the first place. When the National Highway Traffic Safety Administration failed to deliver on the high congressional expectations that inspired its enabling legislation, the agency's supporters took the lead in savaging its performance.[217] One prominent supporter suggested that responsibility for automotive safety should be given to NASA.[218]

The CFPB's efforts to sequence the execution of its assigned duties do not affect the capabilities or capacity of the Fed. Missed deadlines, postponements, and other implementation delays, however, are ordinarily taken as signs of poor agency performance, no matter how unrealistic the initial allocation of tasks by Congress. The stigma of failed execution attaches to the agency, not the legislators who think that effective implementation consists of simply telling a bureau to "make it so." If the CFPB acquires a reputation for missing performance targets, the Fed's reputation for administrative competence could be collateral damage.

D. Collateral Effects on the Regulatory Ecosystem

The CFPB's creation will have several distinct collateral effects on the financial services regulatory ecosystem. For the most part, these effects will increase the cost of carrying out Dodd-Frank's commands or impede the realization of the statute's aims. In ways that received little attention in the legislative process, these collateral effects promise to diminish the CFPB's effectiveness and degrade the

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(Mar. 24, 2013, 9:55 PM), http://www.politico.com/story/2013/03/new-mortgage-rules-battle-89008.html.

216 *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB to Oversee Debt Collectors (Oct. 24, 2012), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-oversee-debt-collectors/ (describing methods for supervision of debt collectors with more than $10 million per year in consumer debt collection); *see also* Prior, *supra* note 215 (reporting on new rules on residential mortgages issued by the CFPB).

217 *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 106 (1990) (noting that slow rulemaking process led the Senate committee that had unanimously approved of the agency to hold oversight hearings).

218 *Id.* at 108.

performance of other institutions with responsibilities for financial services regulation.

Coordination Costs. One major consequence of Dodd-Frank will be an increased need for interagency coordination. Congress consolidated some regulatory functions but left a substantially decentralized policymaking system in place.[219] As it established the CFPB, Dodd-Frank also created new supervisory machinery—the FSOC—to give other financial services regulators some control over the CFPB's rulemaking activity.[220]

Decentralization means that a significant amount of policy integration will need to take place by "contract" (inter-agency coordination) rather than "ownership" (merging all regulatory functions into one entity). As discussed earlier, coordination costs usually are hidden from sight in the adoption of statutes. Where agencies have common policy boundaries or concurrent authority, new legislation ordinarily assumes that cooperation will be frictionless and costless, but that assumption is simply wrong.[221]

The CFPB shares authority with other public agencies.[222] Shared policy domains inevitably require the agency occupants to expend resources to cooperate and coordinate policy decisions.[223] The formation of the FSOC and the exercise of its supervisory functions over the CFPB also will entail administrative expense and an expenditure of management and staff time.

To some extent, the migration of personnel from the FTC to the CFPB—discussed below—facilitates policy cooperation.[224] By absorbing FTC personnel, the CFPB will better understand the FTC's culture and operations and can use personal relationships to accom-

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219 *See* 15 U.S.C. § 6805 (2012) (outlining the division of enforcement authority among the CFPB, FTC, and other agencies under the Consumer Financial Protection Act).

220 12 U.S.C. §§ 5512–5513. Dodd-Frank bars the CFPB from promulgating any rule unless it first consults with federal banking regulators and other appropriate federal agencies about the proposed rule's "consistency with prudential, market, or systemic objectives administered by such agencies." *Id.* § 5512(b)(2)(B). The FSOC may set aside all or part of a CFPB regulation if two-thirds of the committee's members determine that "the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." *Id.* § 5513(a), (c)(3)(A).

221 *See supra* note 128.

222 For example, the CFPB shares enforcement responsibility with HUD with respect to mortgage financing for individuals with low incomes. *Compare* 12 C.F.R. § 1026.43(c) (2014) (CFPB's rules for low-income mortgages), *with* 24 C.F.R. § 221 (2014) (one of HUD's low-income mortgage programs).

223 *See* Freeman & Rossi, *supra* note 68, at 1150–51 (discussing the various costs of interagency coordination of policy).

224 *See infra* text accompanying notes 238–244.

plish coordination tasks. FTC alumni now employed at the CFPB will be able to devise common solutions to shared policy tasks. The pre-existing personal bonds can serve to build a constructive relationship between the CFPB and FTC.

Dodd-Frank directs the CFPB and its federal counterparts to enter into memoranda of understanding ("MOU") to organize their affairs.[225] In January 2012, the CFPB and the FTC signed an MOU to coordinate enforcement efforts for shared duties for consumer financial products and services,[226] and the CFPB has also negotiated MOUs with other federal agencies.[227] Under their MOU, the CFPB and the FTC have cooperated on a number of projects, including the performance of a joint "sweep" of mortgage advertisements and the preparation of a joint roundtable on debt collection.[228]

Despite these coordination initiatives, the Dodd-Frank allocation of authority seems to have created tensions between the CFPB and the FTC. Over the past year, the CFPB has announced plans to require banks to exercise greater scrutiny of loan terms for automobile purchase contracts.[229] There have been reports that the FTC has complained to the CFPB about what the Commission views as an encroachment upon its authority for automobile credit transactions.[230] It remains to be seen how smoothly such issues will be handled going forward.

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225 *E.g.*, 12 U.S.C. § 5534(d) (requiring the CFPB to enter into a memorandum of understanding with other federal agencies).

226 Consumer Fin. Prot. Bureau & Fed. Trade Comm'n, Memorandum of Understanding, *supra* note 212.

227 *See* CONSUMER FIN. PROT. BUREAU, BUILDING THE CFPB 29–30 (2011), *available at* http://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf.

228 *See* Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements (Nov. 19, 2012), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-warns-companies-against-misleading-consumers-with-false-mortgage-advertisements/. The focal points of coordination between the CFPB and FTC have been ensuring that the agencies know what each other is doing, achieving consistency in enforcement and policy, curbing needless duplication of effort, avoiding crossing wires on law enforcement investigations, and avoiding double-teaming of respondents. The agencies have committed themselves to notifying each other when opening investigations and filing cases. *See* Consumer Fin. Prot. Bureau & Fed. Trade Comm'n, Memorandum of Understanding, *supra* note 212.

229 *See* Carter Dougherty, *Consumer Bureau Said to Warn Banks of Auto Lending Suits*, BLOOMBERG PERS. FIN. (Feb. 21, 2013, 4:57 PM), http://www.bloomberg.com/news/2013-02-21/consumer-bureau-said-to-warn-banks-of-auto-lending-suits.html (reporting plans to sue four banks over vehicle loan issues).

230 We base this on discussions with FTC officials who have dealt with the CFPB on the auto-financing issue.

Dodd-Frank does not command the CFPB to enter into MOUs with state governments.[231] State governments retain considerable ability to determine the obligations that various financial services providers must fulfill.[232] Dodd-Frank contemplates that the states and the CFPB will voluntarily establish formal or informal arrangements to coordinate law enforcement and other policy measures.[233] An MOU may provide a useful platform for cooperation, but these instruments are not self-executing. Those involved will need to exert considerable effort to create and sustain cooperative relationships, which will place further pressure on the CFPB's capacity.

One seldom goes wrong in overestimating the amount of effort that agencies must devote to building collaborative mechanisms that work well in practice. Dodd-Frank reveals no awareness that this process is neither instantaneous nor inexpensive. It is hard enough to establish strong interoperability and build a sense of common cause between only two government bodies. Dodd-Frank requires the CFPB to do so with a multitude of federal and state agencies.[234]

Personnel Migration. Dodd-Frank also has a more direct impact on the regulatory ecosystem—specifically on the FTC. Dodd-Frank gives the CFPB exclusive authority to issue rules relating to the statutes it enforces, divesting the FTC of a longstanding role in this area.[235] The CFPB also has more powerful remedies for the areas where it shares enforcement responsibility with the FTC.[236] Dodd-Frank also enhanced the regulatory powers of other financial services regulators, such as the CFTC and the SEC.[237]

The FTC competes with the CFPB for the same pool of lawyers, economists, and administrative professionals with expertise in consumer protection. All of these entities need individuals with knowledge of credit practices, facility in rulemaking and litigation, experience in public education, and the ability to perform research. Before Dodd-Frank was enacted, the FTC arguably had the most expertise in these areas.[238]

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231 12 U.S.C. § 5551 (2012).

232 *Id.*

233 *Id.*

234 *Id.* § 5495.

235 *Id.* § 5512.

236 *See id.* §§ 5562–5563.

237 *See, e.g., id.* § 1851(b)(2).

238 The FTC's role in this area dates back to the 1960s, with the adoption of the Truth in Lending Act, and the early 1970s, with the adoption of the Fair Credit Reporting Act. *See* Fair

The CFPB pays substantially higher salaries than the FTC. The CFPB is not subject to the same civil service pay scale as most federal agencies, and it is able to pay significantly more than the FTC pays its professionals and administrative staff.[239] Thus, an FTC attorney whose earnings were capped at $155,000 could earn over $200,000 at the CFPB.[240]

The CFPB's mandate makes lateral moves more attractive than they previously had been to FTC officials. Dodd-Frank expanded the alternatives available to FTC professionals with financial services expertise. The CFPB gave the FTC's consumer protection attorneys and economists the opportunity to do challenging financial services work with a substantial wage increase. For senior federal employees, the higher wage scale means an immediate improvement in current income. Because federal pensions typically are calculated on the basis of an employee's top three years of earnings in the federal system, a move to the CFPB can also mean several thousand dollars more each month of retirement income.[241]

The effects of these disparities are already apparent. By our current calculations, roughly fifty FTC employees have moved to either the CFPB or the CFTC.[242] This accounts for only a few percent of the FTC's total headcount, but that modest figure does not convey the significance of the migration.[243] Those moving include some of the FTC's best personnel with skills valuable in performing financial services regulatory tasks. It is not as though the FTC is unable to hire new personnel to fill vacancies. In the current employment market, the FTC will receive hundreds of applications for each position it

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Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1128; Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968).

239 12 U.S.C. § 5493(a)(2); Richard Pollock, *Fat Paychecks for CFPB Officials, Hundreds Paid More than Fed Chairman, Congressmen, Supreme Court Justices*, WASH. EXAMINER (July 18, 2013, 12:00 AM), http://washingtonexaminer.com/fat-paychecks-for-cfpb-officials-hundreds-paid-more-than-fed-chairman-congressmen-supreme-court-justices/article/2533189.

240 *Pay & Leave: Salaries & Wages*, OPM.GOV, http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/general-schedule/washington-baltimore-northern-virginia-dc-md-va-wv-pa-annual-rates-by-grade-and-step/ (last visited Nov. 19, 2014) (2013 general schedule pay table for the Washington-Baltimore-Northern Virginia area); *see also* Pollock, *supra* note 239.

241 *FERS Information: Computation*, OPM.GOV, https://www.opm.gov/retirement-services/fers-information/computation/ (last visited Nov. 19, 2014).

242 Similar complaints were raised about the CFPB's raid on Treasury personnel. *See* GEITHNER, *supra* note 162, at 437 ("We were initially amused, and eventually a bit annoyed, when Warren, who had spent so much time bemoaning Treasury's nefarious work against the public interest, quickly began trying to hire away a bunch of our staffers.").

243 *See Careers at the FTC*, FED. TRADE COMMISSION, http://www.ftc.gov/about-ftc/careers-ftc (last visited Nov. 19, 2014).

posts. Many applicants have exceptional credentials. What cannot be replaced at will is the know-how and institutional memory specific to the implementation of the FTC's responsibilities. This knowledge can be restored over time, but this is a long and costly process. The FTC could become a farm team for recruiters from the CFPB and the CFTC.

A regulatory ecosystem perspective makes clear that we should account for both the gains to the financial services regulators and the losses to the FTC in evaluating the overall impact of Dodd-Frank. The migration of human capital was a foreseeable consequence of Dodd-Frank, yet lawmakers gave it no weight in their deliberations.[244] Dodd-Frank may degrade the FTC's performance, yet the harm will occur in ways not immediately observable. The FTC will lose cases that it would have won, or fail to rebuff a legal challenge to all or part of a rule. The agency will forego certain projects that demand the highest skills, because it lacks the means to carry them out successfully. The FTC must either accept an inevitable decline in its financial services work or reposition its program, based on the new credit practices authority granted to the FTC by Dodd-Frank and the residual authority that the FTC retains.[245]

Fed Spillovers. The CFPB's establishment also may affect the Fed. Any effect on the ecosystem will be mediated through the reputation and branding factors described previously.[246] If the CFPB formulates programs that are seen to be sensible and the political storms subside, the Fed's brand as a macroeconomic policy technocracy might be enhanced. If the CFPB's initiatives falter and political controversy persists, the CFPB may reduce its host's stature and may subject it to the political winds from which it has long been insulated.

E. Resilience: Is the Assignment of Functions Adaptable and Sustainable?

Dodd-Frank's assignment of responsibilities to the CFPB is adaptable and sustainable, as long as the CFPB does not overreach. The flexibility of the CFPB's mandate and the range of its policy tools will give the agency considerable ability to adapt to new circum-

244 One of us (Kovacic) was met with repeated indifference in attempting to press this issue with the relevant legislative committees.

245 *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1075, 124 Stat. 1376, 2068 (2010) (adding Section 920 of the Electronic Fund Transfer Act—granting authority over certain debit and credit card transactions).

246 *See supra* notes 167–71.

stances. Perhaps the most important likely source of broad "scalability" is the CFPB's authority to proscribe behavior that is "unfair, deceptive, or abusive."[247] The unfairness and deception elements of this command mirror Section 5 of the Federal Trade Commission Act,[248] which authorizes the FTC to challenge "unfair or deceptive acts or practices."[249] The CFPB's mandate to reach "abusive" conduct supplies an invitation to reach behavior beyond the prohibitions on unfairness and deception.[250]

The FTC's experience shows both the promise and peril of scalable allocations of regulatory authority. The federal courts have declared that the FTC's unfairness authority under Section 5 of the FTC Act confers power to reach conduct not previously condemned by statute or judicial decisions.[251] For example, as noted previously, the FTC's emergence as the principal federal enforcement body concerning data protection and privacy built upon the application of the Commission's unfairness authority.[252]

The FTC's history also demonstrates that the application of a highly scalable mandate can create two distinct traps. First, legislators and other external observers come to regard the agency as a solution for all problems that have an apparent connection to the expansive mandate. Congress will urge an agency with an elastic mandate—such as to forbid "unfair" conduct—to take steps to reduce prices for products such as gasoline, even though no measures within its control will be effective and efforts to intervene (e.g., to attack price rises as "price-gouging") may retard market responses that will eventually cure the problem.[253]

Second, an agency with a sweeping, adaptable mandate has incentives to extend the boundaries of its authority, in order to show it is fulfilling the goals Congress set for it.[254] Open-ended assertions of authority invite carelessness in implementation. Unless the agency exercises great discipline, it will find it tempting and easy to expand

247 *See* 12 U.S.C. § 5531 (2012).

248 Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).

249 15 U.S.C. § 45; *cf.* Wilmarth, *supra* note 168, at 903 (noting similarities between the enforcement powers granted to the CFPB and FTC).

250 *See* 12 U.S.C. § 5531 (2012).

251 Winerman & Kovacic, *supra* note 86, at 154.

252 Solove & Hartzog, *supra* note 90, at 598–99.

253 *See* William E. Kovacic, Standard Oil Co v. United States *and Its Influence on the Conception of Competition Policy*, 11 COMPETITION L.J. 89, 103–08 (2012) (discussing congressional demands that the FTC take steps to reduce gasoline prices).

254 *See* Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 17.

claimed authority without rigorously testing the logic for intervention.[255] These lapses eventually can provoke severe political backlash, as well as rebukes from reviewing courts.[256] The FTC's bruising encounters with Congress in the late 1970s and early 1980s should provide an informative example to the CFPB of what can happen when an agency with broad powers fails to exercise discipline in implementing its authority.

F. Cohesion

The CFPB's mandate involves coherent, highly interrelated policymaking tasks.[257] Were there to be intramural rivalry or tension, it likely would result from the diversity of policymaking functions the CFPB must perform—i.e., among those charged, respectively, with bringing cases, issuing rules, performing research, carrying out audits, and providing public and business education. This phenomenon occurs at multiple agencies.[258] Intramural competition for prestige and resources can cause agency officials to spend substantial effort, which would otherwise be applied to serve program needs, refereeing disputes among rival divisions.[259]

Intramural rivalry has other costs as well. Where individual operating units strive to create separate identities, personnel within those units may develop loyalty to their own unit and define success in terms of their unit's achievements. Projects requiring cooperation across units may appear relatively unimportant or contrary to each group's interests, even though greater collaboration across units would advance projects that serve the larger aims of the institution.

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255 *Cf.* SPIDER-MAN (Columbia Pictures 2002) ("With great power comes great responsibility."). A danger for an agency with broad authority and strong urging from Congress to be aggressive in implementing its powers is that the agency develops a spirit of arrogance that results in faulty policy choices. *See* Richard Pollock, *Federal Judge Tells CFPB It Must Give Depositions Even If Doing So 'Annoys,'* WASH. EXAMINER (Nov. 14, 2014, 5:00 AM) (reporting unsuccessful effort by CFPB to persuade federal district court that its employees could not be compelled to give depositions).

256 The experience of the United States's national intelligence agencies arguably illustrates this hazard. The National Security Agency relied upon an expansive mandate to embrace ever-broader interpretations of its authority to monitor telecommunications transmissions. In doing so, it appears to have failed to impose internal safeguards to ensure that surveillance programs adhered rigorously to the limits of its statutory powers. *See, e.g.*, Deirdre Walsh, *House Rejects Effort to Curb NSA Phone Surveillance*, CNN (July 24, 2013, 8:53 PM), http://www.cnn.com/2013/07/23/politics/nsa-phone-surveillance-limits/.

257 *See supra* Part IV.A.

258 *See* Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 32.

259 *See id.*

The CFPB may find it difficult to mobilize resources across units unless it can create a robust "we're all in this together" ethos.[260]

Some dynamic tension across units can be helpful. As noted, the formulation of consumer protection policy at the FTC (including financial services) has been informed by the agency's economists.[261] The Bureau of Economics ("BE") is a voice for the value of competition, for the inclusion of market-oriented strategies in the mix of regulatory tools, and for awareness of the costs of specific regulatory choices.[262] BE also performs empirical research that has yielded major insights into how consumers perceive the disclosures provided in financial services instruments.[263] BE has helped instill within the FTC a culture that encourages ex post evaluation to measure the policy results of specific initiatives. Whether the CFPB will create a similar framework—and whether a group likely to be dominated by intervention-minded behavioral economists will exercise a similar disciplining function—remains to be seen.

What of the prospects for synergy between the CFPB and the Fed? Dodd-Frank sought to insulate the CFPB from the Fed, but there are considerable overlaps in substantive knowledge and expertise.[264] The Fed has deep expertise in credit practices related to the CFPB's duties.[265] Notions of CFPB autonomy might discourage effective interaction. Similarly, if CFPB personnel view the Fed suspiciously, owing to its perceived lapses in oversight before the financial crisis, cooperation is likely to be viewed negatively. We see the possibility for considerable gains from trade, but policy impulses might discourage it.

G. Political Implications

In establishing the CFPB, Congress dispensed with many of the mechanisms it used in the past to balance agency autonomy and accountability. The CFPB is headed by a single director, not a multi-

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260 *See* WILSON, *supra* note 34, at 106 ("Some government agencies have been endowed with so strong a sense of agency-wide mission that they do a better job than others in managing the tensions among rival occupational subcultures. The National Security Agency's . . . goals are so clearly defined that its core tasks are well-understood; as a result, the cultural differences that exist among different occupational groups within NSA do not materially get in the way of coordinating activities.").

261 *See supra* text accompanying notes 190–91.

262 Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 32.

263 *Id.*

264 *See* Mierzweski et al., *supra* note 178, at 723, 725.

265 Hyman & Kovacic, *Competition Agencies*, *supra* note 16, at 15.

member board consisting of individuals of diverse political affiliations.[266] Instead of annual appropriations, the CFPB is a fee-funded body.[267] Congress also placed the CFPB within another government body (the Fed), which itself enjoys substantial insulation from the political accountability methods that constrain other regulators.[268] Dodd-Frank thus contradicted the longstanding settled practice of tying increases in an agency's power to greater accountability.

The CFPB was controversial to begin with, and the enactment of Dodd-Frank did not end debate about the wisdom of the CFPB and its peculiar institutional structure. For many months, the White House declined to nominate a director.[269] As a temporary expedient, President Obama assigned Professor Elizabeth Warren to manage the CFPB from a position located within the Department of the Treasury.[270] Warren played a central role in designing the CFPB, and had become a lightning rod for critics of the new body.[271] Republicans in Congress said they would not confirm Warren or any other nominee to be the CFPB's director without basic changes to the CFPB's institutional architecture.[272] The demands included the removal of the CFPB from the Fed, its re-creation as a stand-alone, multimember regulatory commission, and the use of annual appropriations to fund its operations.[273] In January 2012, President Obama nominated Richard Cordray, the former Attorney General of Ohio, to the post.[274] The nomination went nowhere, because it was clear there were insufficient votes to overcome the promised filibuster.[275]

President Obama sought to circumvent this obstacle by using a recess appointment.[276] This move intensified the already rancorous debate about the CFPB, and it inspired further debate about whether Dodd-Frank permitted a recess appointee to head the agency and

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266 The choice of a single director raises questions about whether the CFPB is more vulnerable to capture, because it may require only a single appointment to alter its direction (as opposed to the diversification afforded by a multimember governance structure). *See* Zywicki, *supra* note 167, at 899.

267 *See* 12 U.S.C. § 5497 (2012).

268 *See* Zywicki, *supra* note 167, at 859.

269 *Cf.* Deepak Gupta, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 947 (2013) (explaining Elizabeth Warren being assigned task of starting agency without nominating her).

270 *Id.*

271 *Id.* at 948 n.8.

272 *Id.* at 952.

273 *See id.* at 952–53.

274 *Id.* at 949, 953.

275 *Id.* at 954.

276 *Id.* at 949.

whether Congress was actually in recess when Cordray initially was appointed.[277] As part of a larger legislative deal involving the National Labor Relations Board ("NLRB"), Cordray eventually received Senate confirmation in 2013.[278]

Upon taking office with his recess appointment, Cordray immediately announced that the CFPB would apply the enforcement and rulemaking powers granted by Dodd-Frank.[279] The political dispute over the CFPB posed two dangers to the new agency. The delay in appointing a director of any sort impeded the rollout of the CFPB's program.[280] Dodd-Frank specified that the Bureau could not perform certain functions until a director took office,[281] and Cordray's delayed nomination and recess appointment led to delays in the CFPB coming on-line. This was a serious disadvantage for a body given an impossibly ambitious assignment of rulemaking and other start-up tasks.

The circumstances of Cordray's recess appointment in 2012 have also created a latent liability for work performed by the CFPB before Cordray's Senate confirmation in 2013. In *NLRB v. Noel Canning*,[282] the Supreme Court ruled that several recess appointments to the NLRB, made at the same time as Cordray received a recess appointment to the CFPB, were unlawful.[283] This decision raises serious questions about the promulgation of rules during the period of Cordray's recess appointment—although the fact Cordray was subsequently confirmed makes this an unappealing foundation for a legal challenge.[284]

There is a second danger to the CFPB if political disagreements over the future configuration and leadership of the agency are not resolved. No regulatory agency can prosper without an essential foundation of political support, and the CFPB faces an enormous challenge to build the political capital it will need to succeed. The active implementation of the CFPB's regulatory tools can be expected to create backlash of the sort that many regulatory agencies experi-

277 *Id.* at 950.

278 *Id.* at 946.

279 *Id.* at 960.

280 *See id.* at 955.

281 *Id.* at 960–61.

282 NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

283 *Id.* The challenged appointments to the NLRB were made on the same day as President Obama's recess appointment of Richard Cordray to the CFPB. Gupta, *supra* note 269, at 949.

284 Cordray's recess appointment has already been challenged on the same grounds as those advanced by the respondent in the NLRB case. Prior to the Supreme Court's decision in *Noel Canning*, a challenge to Cordray's recess appointment was dismissed in *State National Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D.D.C. 2013).

ence. On many occasions, Congress has granted broad, nominally powerful authority and then stepped forward to protect affected firms that complain about overly "aggressive" applications of that authority.[285] Without a positive political capital balance to respond to future political attacks, the CFPB will find it difficult to build and maintain an effective program.

The rancorous political debate accompanying the birth of the CFPB does not bode well for its future. We expect many Republican members of Congress will jump on every opportunity to attack the CFPB, using those opportunities to try and revisit the design choices made in Dodd-Frank.[286] Even if formal changes are not forthcoming, various forms of equilibration are possible. Courts, for example, could choose to exercise more stringent review of CFPB rules, even while professing to adhere to standards mandated by the Administrative Procedure Act.[287] Congress could choose to demand more frequent appearances by CFPB leadership to explain and defend the agency's programs. Congress also has many other ways to make life difficult for agencies that displease it, and the CFPB starts deep in the hole on that score.[288]

To date, the political brawl over the CFPB has not spilled over to the Fed. Whether disputes over the CFPB affect the Fed will depend greatly on two factors: the performance of the CFPB going forward and the skill of the Fed in creating a distance between its core brand and the brand of its involuntary tenant.

H. Scoring the CFPB

How does the CFPB do on the factors we have identified?[289] The CFPB does well on policy coherence, branding and credibility, resilience, and cohesion; fares poorly on collateral effects on the regulatory ecosystem and political implications; and presents a mixed picture on capability and capacity. On the three most important factors, the

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285 On the FTC's experience in this regard, see Kovacic, *supra* note 96, at 589.

286 *Cf.* Rob Blackwell, *Ethics Case Against Raj Date Said Weak*, AM. BANKER, Aug. 6, 2013, at 1, 4 ("'A fair number of Republicans hear the word CFPB and immediately start seeing hobgoblins and ghosts,' said Reginald Brown, vice chairman of the financial institutions practice group at WilmerHale and a former White House counsel during the Bush administration.").

287 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

288 *See* William E. Kovacic, *Competition Agencies, Independence, and the Political Process*, *in* COMPETITION POLICY AND THE ECONOMIC APPROACH 291, 294 (Josef Drexl et al. eds., 2011); Wilmarth, *supra* note 168.

289 *See supra* Part III.

CFPB does well on one (policy coherence), mixed on a second (capability and capacity), and poorly on the third (political implications).

It is far too early to draw conclusions about the performance of so young a government body, but we offer three tentative predictions. To be sure, there are no guarantees in life or in agency design—luck, history, culture, and the decisions made by senior agency personnel, both at the outset and in moments of crisis, all play important roles and will affect whether the CFPB becomes a durable part of the regulatory architecture for financial services. CFPB leaders can benefit greatly from studying the experiences of other agencies with expansive policy mandates—notably the FTC—that experienced considerable grief by failing to exercise broad authority in a self-disciplined manner.

First and most importantly, the CFPB's design builds in vulnerabilities that will likely prevent it from fulfilling the expectations of its creators. Second, the effort to insulate the CFPB from political interference will likely embroil it in recurring struggles with Congress over accountability for its policies, and may well spill over and damage the Fed. Third, the existence of the CFPB will likely undermine the effectiveness of the FTC.

V. A CASE STUDY OF THE PPACA

Dodd-Frank was not the most significant legislative initiative of President Obama's first term. Far more significant was the PPACA, which mandated dramatic changes in the financing and delivery of health care in the United States.[290] The challenges associated with the PPACA's implementation provide a useful "real-time" case study that complements our analysis of the CFPB. Because we anticipate writing another article on the subject, we only sketch out a few of the issues here.

By common consensus, the rollout of the website, www.healthcare.gov, was a complete disaster.[291] The website, which was intended to provide a seamless portal to the exchanges that were a centerpiece of the PPACA, crashed the instant it was launched.[292] Top administra-

290 Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in sections of 25, 26, 29, and 42 U.S.C.).

291 *See, e.g.*, Ezra Klein, *How the iPod President Crashed: Obama's Broken Technology Promise*, BLOOMBERGBUSINESSWEEK (Oct. 31, 2013), http://www.businessweek.com/articles/2013-10-31/obamas-broken-promise-of-better-government-through-technology#p1 (referring to the "disastrous launch" and "debacle").

292 *See, e.g.*, *id.* The PPACA requires most uninsured Americans to secure health insurance coverage by registering with publicly operated exchanges and selecting plans provided by vari-

tion officials initially attempted to portray the website's failure as a success story, resulting from high demand and a few "glitches."[293] Eventually, the Administration grudgingly acknowledged the problems and promised to make the website "work smoothly for the vast majority of users" by the end of November 2013.[294]

Since then, the performance of the front-end of the website has improved dramatically, but serious questions remain about a wide array of other issues, including the extent to which Administration officials knew the website was not ready for prime time, while making public statements to the contrary;[295] the quality of the information that is being provided to insurers after it is collected by the website;[296] continued technical problems with the website;[297] the failure to build in robust security protections for the private health care information that is collected;[298] the decision by the Administration to overrule its inter-

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ous private insurance companies—or, if they fall below an income threshold, by obtaining coverage through Medicaid. *See generally The True Cost of PPACA: Effects on the Budget and Jobs: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 112th Cong. 11 (2011) (statement of Douglas Elmendorf, Dir., Cong. Budget Office), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-Health-PPACA-Effects-on-Budget-and-Jobs-2011-3-30.pdf.

293 On October 1, 2013, Secretary Kathleen Sebelius went on network television and said: "We have had a few slowdowns, a few glitches, but it's sort of a great problem to have. It's based on the fact that the volume has been so high and the interest is so high. We're working quickly to fix that." Andrea Mitchell, *One Million Visit Health Care Site*, ANDREA MITCHELL REP. (Oct. 1, 2013), http://www.nbcnews.com/video/andrea-mitchell/53157658#53157658; *see also* Sharon Begley, *Analysis: IT Experts Question Architecture of Obama Website*, REUTERS, Oct. 5, 2013, *available at* http://uk.reuters.com/article/2013/10/05/us-usa-healthcare-technology-analysis-idUKBRE99407T20131005.

294 Klein, *supra* note 291; *see also* Amy Schatz, *Exchange Site Needs Hundreds of Fixes*, WALL ST. J., Nov. 7, 2013, at A6 ("There is no excuse for what has been a miserable five weeks . . . ." (quoting Health and Human Services Secretary Kathleen Sebelius)).

295 Stephanie Kirchgaessner, *Congress Told of Website Scramble*, FIN. TIMES, Oct. 25, 2013, at 2; Michael D. Shear & Sheryl Gay Stolberg, *In White House Pitches, Rosy View of Health Care Site*, N.Y. TIMES, Oct. 25, 2013, at A14 ("Just days before HealthCare.gov went live with disastrous results, top White House officials were excitedly briefing lawmakers, reporters, Capitol Hill staff members and Washington pundits on their expectations for the government's new health care Web site. . . . [T]he fast-paced PowerPoint briefings showed images of a shiny new Web site that was elegantly designed, simple to use and ready for what officials hoped would eventually be a flood of customers on Oct. 1. One lawmaker recalled comparisons to Travelocity, the travel booking site."); Sandhya Somashekhar, Lena H. Sun & Sarah Kliff, *Glitches Noted Ahead of Obamacare Launch*, WASH. POST, Sept. 28, 2013, at A1.

296 See Stephanie Kirchgaessner, *Contractor Blames White House for 'Obamacare' Exchange Flaw*, FIN. TIMES, Oct. 24, 2013, at 2 (raising issues about accuracy of data collected by healthcare.gov website).

297 Spencer E. Ante & Louise Radnofsky, *Three-Hour Outage Echoes Health Site's Flawed Launch*, WALL ST. J., Dec. 21–22, 2013, at A4.

298 *See, e.g.*, TRUSTEDSEC, HEALTHCARE.GOV SECURITY ANALYSIS—CONGRESSIONAL

nal privacy expert and launch the website without the necessary security protections;[299] and the refusal to release timely information on the number of people that have actually secured coverage through healthcare.gov.[300] The website launch has not been the only implementation challenge; the Administration has had to repeatedly announce delays and modifications to the PPACA (often without explicit statutory authority).[301] The states have faced implementation challenges of their own—which have been compounded by the ad hoc delays and modifications announced by the Administration.[302] Elected officials and

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HEARING NOVEMBER 19, 2013 (2013), *available at* http://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-113-SY-WState-DKennedy-20131119.pdf.

299 Sharyl Attkisson, *High Security Risk Found After HealthCare.gov Launch*, CBSNEWS (Dec. 20, 2013, 8:30 AM), http://www.cbsnews.com/news/high-security-risks-found-after-healthcaregov-launch/ ("Fryer told congressional interviewers that she explicitly recommended denial of the website's Authority to Operate (ATO), but was overruled by her superiors. . . . Fryer says she briefed Sebelius' top information officers at HHS in a teleconference on Sept. 20, recommending the website's launch be delayed for security reasons.").

300 Instead of providing actual enrollment figures, the Administration has released information on the number of individuals who have selected a plan. It has also not released much in the way of demographic information on enrollees. There has been criticism of these strategies. *See, e.g.*, Seth Chandler, *Coverage on January 1, 2014 Matters*, ACA DEATH SPIRAL (Dec. 24, 2013), http://acadeathspiral.org/2013/12/24/coverage-on-january-1-2014-matters/ ("[I]t is difficult to tell right now whether the ACA is performing as hoped. A few things are clear, however. The first thing is that the Obama administration is not releasing the sort of information from which an objective assessment could be made. Platitudes such as 'Millions of Americans, despite the problems with the website, are now poised to be covered by quality affordable health insurance come New Year's Day,' from President Obama at his last press conference are just not a substitute for knowing how many people have enrolled in the plans in the various Exchanges, and more importantly, have paid for coverage. What are their ages? How about some real numbers as a Holiday present?").

301 *See* Timothy W. Martin & Christopher Weaver, *Insurers Rattled by Tweaks to the Affordable Care Act*, WALL ST. J., Dec. 21–22, 2013, at A4 (recounting Obama Administration's adjustments to PPACA deadlines); Robert Pear, *Sign-up Period Extended Again for Health Plan*, N.Y. TIMES, Dec. 25, 2013, at A1 (reporting Obama Administration announcement extending the application deadline for individuals who can show they missed earlier deadlines due to problems with the healthcare.gov website). Other ad hoc decisions include the one-year delay in the employer mandate and the "hardship" exemption from the individual mandate given to those who had prior coverage that was cancelled. *See* Jonathan H. Adler, *Was Delaying the Employer Mandate Legal? Did the IRS Even Check?*, WASH. POST VOLOKH CONSPIRACY (Mar. 22, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/22/was-delaying-the-employer-mandate-legal-did-the-irs-even-check/; *Exemptions from the Fee for Not Having Health Coverage*, HEALTHCARE.GOV, https://www.healthcare.gov/exemptions/ (last visited Nov. 20, 2014).

Such "government by waiver" creates obvious risks, including the perception that government policy is being set to reward political allies and punish opponents. *See* Richard A. Epstein, *Government by Waiver*, NAT'L AFF., Spring 2011, at 39, 40; Louise Radnofsky & Melanie Trottman, *Health-Fee Proposal Knocked*, WALL ST. J., Nov. 7, 2013, at A6 (describing plans by HHS to exempt labor unions and businesses from reinsurance fee imposed by the PPACA).

302 *See* Sandhya Somashekhar & Sarah Kliff, *Sebelius Assures Fixes Are Being Made*,

commentators from across the political spectrum have harshly criticized the website and the rollout of the PPACA.[303]

How did we find ourselves in this mess? The governmental design issues we analyze in this Article played an important role. Immediately after the PPACA was enacted, the Obama Administration recognized that implementation would be challenging and put together a high-level team to implement what "one insider described as an elaborate implementation plan."[304] One month later, an outside expert close to the Administration (Professor David Cutler) sent a confidential memo to a senior Administration official, warning that their implementation strategy was deeply flawed and likely to fail.[305] Cutler was very concerned that "the personnel and processes you have in place are not up to the task, and that health reform will be unsuccessful as a result."[306] Cutler stated that "the early implementation efforts are far short of what it will take to implement reform successfully."[307] More specifically, he wrote, "for health reform to be successful, the relevant people need a vision about health system transformation and the managerial ability to carry out that vision."[308] In bold-faced type, Cutler then wrote, "I do not believe the relevant members of the Administration understand the President's vision or have the capability to carry it out."[309] For the PPACA to work, the White House would have to set up "a new structure to focus on where

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WASH. POST, Nov. 7, 2013, at A3 (describing problems with state exchanges and the federal health insurance website).

303 *See, e.g.*, Editorial, *Unstable Condition*, WASH. POST, Dec. 22, 2013, at A22 (criticizing HHS for "continued tinkering" with the PPACA's requirements and noting the resulting disruption); *Going Public, and Private*, ECONOMIST, Dec. 21, 2013, at 101 (discussing "disastrous" launch of website); Somashekhar & Kliff, *supra* note 302 (quoting Senator Bill Nelson as telling HHS Secretary Kathleen Sebelius to hold accountable those responsible for failed website rollout, saying: "I want you to burn their fingers and make 'em pay for not being responsible and producing a product that all of us could be proud of.").

304 Jackie Calmes, *After Health Care Passage, Obama Pushes to Get it Rolling*, N.Y. TIMES, Apr. 18, 2010, at A16 (internal quotation marks omitted) ("Mindful that the new health care law's ability to slow rising medical costs will depend to a great extent on how it is put in effect, President Obama is assembling a high-level team to carry out key elements of the overhaul and is considering moving faster than the law requires to put them into action.").

305 Memorandum from David Cutler to Larry Summers (May 11, 2010) [hereinafter Cutler Memo], *available at* https://www.scribd.com/doc/181039999/Memo-from-David-Cutler-on-health-reform-implementation. This memo and the underlying struggle over implementation are described in detail in Amy Goldstein & Juliet Eilperin, *HealthCare.gov: How a Start-Up Failed to Launch*, WASH. POST, Nov. 3, 2013, at A1.

306 Cutler Memo, *supra* note 305, at 1.

307 *Id.*

308 *Id.*

309 *Id.*

it needs to go" and not pile "new responsibilities onto a broken system."[310] Cutler concluded with a call for urgent changes: "I strongly encourage you to make changes now, before you are too late to get the outcomes we need."[311]

Cutler's memo provides his perspective on the institutional dynamics that resulted from the assignment of implementation responsibility for the PPACA to HHS, and within HHS to the Centers for Medicare and Medicaid Services ("CMS"). Indeed, Cutler identified this decision as "a central concern."[312] Cutler painted a dismal portrait of CMS: "The agency is demoralized, the best people have left, IT services are antiquated, and there are fewer employees than in 1981, despite a much larger burden."[313] Cutler cuttingly continued: "[Y]ou have an agency where the philosophy of health system reform is not widely shared, where there is no experience running a health care organization, and where the desire to move rapidly is lacking."[314] Worse still, HHS and CMS displayed little understanding of what it would take to make the health care exchanges work properly.[315]

Cutler further observed that problems were not limited to the operational level:

> The overall head of implementation inside HHS, Jeanne Lambrew, is known for her knowledge of Congress, her commitment to the poor, and her mistrust of insurance companies. She is not known for operational ability, knowledge of delivery systems, or facilitating widespread change. Thus, it is not surprising that delivery system reform, provider outreach, and exchange administration are receiving little attention. Further, the fact that Jeanne and people like her cannot get along with other people in the Administration means that the opportunities for collaborative engagement are limited, areas of great importance are not addressed, and valuable problem solving time is wasted on internal fights.[316]

Cutler concluded his memo with recommendations for "a major change at HHS," including "a revamped and enhanced implementation group."[317] The new team would include individuals with expertise

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310 *Id.* at 3.

311 *Id.* at 4.

312 *Id.* at 1.

313 *Id.* at 2.

314 *Id.*

315 *Id.*

316 *Id.* at 3.

317 *Id.*

in managing large and complex enterprises, health care payment reform, information technology systems, and outreach to and education for health care providers and insurers, as well as state coordinators.[318]

The advice in Cutler's memo was ignored. Of course, Cutler was not focusing on the risk of website failure. Even if the Administration had heeded Cutler's advice, there is no guarantee that the same problems (or other, more severe problems) would not have materialized. It is striking that Cutler's memo highlighted two of the three factors that we have identified as most important (i.e., coherence and capacity and capability). It is equally striking that one of the proposed fixes that was considered for addressing the dysfunction of the federal health insurance marketplace was to transfer authority away from CMS to a "CEO-type figure with clear authority and knowledge of how insurance markets work."[319]

Cutler did not mention politics—the third of the three factors we have identified as most important. Politics would have created a hostile environment in which to launch the PPACA even if the best management team in the world had been in charge of its implementation—which was not the case.[320] Only naked political calculation can explain the Administration's decision to assign implementation responsibility for the PPACA to CMS; to delay many of the implementation decisions and enabling regulations until after the 2012 election (and delay the disclosure of some of those decisions, even when they had been made before the 2012 election); to give upbeat presentations promoting the rollout, hiding all evidence that things were not going well; and to defer the start of the second enrollment

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318 *Id.*

319 David Morgan, *U.S. Government Urged to Name CEO to Run Obamacare Market*, REUTERS, Dec. 29, 2013, *available at* http://www.reuters.com/article/2013/12/29/us-usa-healthcare-ceo-idUSBRE9BS04Y20131229 ("Advocates have been quietly pushing the idea of a CEO who would set marketplace rules, coordinate with insurers and state regulators on the health plans offered for sale, supervise enrollment campaigns and oversee technology, according to several sources familiar with discussions between advocates and the Obama administration. Supporters of the idea say it could help regain the trust of insurers and others whose confidence in the healthcare overhaul has been shaken by the technological woes that crippled the federal HealthCare.gov insurance shopping website and the flurry of sometimes-confusing administration rule changes that followed.").

320 *See* Goldstein & Eilperin, *supra* note 305 ("'They were running the biggest start-up in the world, and they didn't have anyone who had run a start-up, or even run a business,' said David Cutler, a Harvard professor and health adviser to Obama's 2008 campaign, who was not the individual who provided the memo to The Washington Post but confirmed he was the author. 'It's very hard to think of a situation where the people best at getting legislation passed are best at implementing it. They are a different set of skills.'").

period until after the 2014 election.[321] Remarkably enough, one prominent Democratic staffer defended such tactics:

> Some Democrats said that, given the Republican assault on the measure, the White House was right to deliver upbeat presentations promoting it. "To downplay expectations would have fed into the Republican narrative," said Jim Manley, a former top aide to Senator Harry Reid of Nevada, the Democratic leader, who attended a session in the Roosevelt Room of the White House with other allies of the administration.[322]

It is too early to tell how the political winds will affect the future of the PPACA and the agencies charged with its implementation. If the PPACA cannot deliver on the promised benefits in short order, we predict the emergence of a (likely bipartisan) coalition for retooling (and maybe even repealing) large portions of the PPACA. The probability of this occurring is significantly higher if: (1) the exchanges fail to enroll sufficient numbers of healthy individuals (which will trigger an increase in the cost of coverage, rather than the decrease repeatedly promised by President Obama); (2) large numbers of people lose their grandfathered coverage and find the new coverage unsatisfying (either because it is too expensive, or because they are unable to continue seeing their preferred doctors); or (3) there is a significant breach in the privacy of the information collected by healthcare.gov. This short and highly selective list consists only of three readily identifiable risks to the PPACA; other known and unknown risks may or may not emerge over time.

Finally, the PPACA's flawed implementation poses risks to the reputation of the regulatory state as a whole.[323] If the PPACA fails to

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321 *See id.* ("[T]he project was hampered by the White House's political sensitivity to Republican hatred of the law—sensitivity so intense that the president's aides ordered that some work be slowed down or remain secret for fear of feeding the opposition. . . . [T]he White House slowed down important regulations that had been drafted within CMS months earlier, appearing to wait until just after Obama's reelection. Among the most significant were standards for insurance coverage under exchanges. The rules for these 'essential health benefits' were proposed just before Thanksgiving last year and did not become final until February. Another late regulation spelled out important rules for insurance premiums."); *see also* Juliet Eilperin, *Politics Delayed Before Election*, WASH. POST, Dec. 15, 2013, at A1.

322 Shear & Stolberg, *supra* note 295.

323 David Brooks, Op-Ed., *The Legitimacy Problem*, N.Y. TIMES, Dec. 24, 2013, at A21 ("Over the next few years, the implementation will either go more smoothly and build faith in federal competence or go as it has been and destroy it."); Lawrence Summers, Op-Ed., *Lessons from Reform*, WASH. POST, Nov. 11, 2013, at A29 ("Even if the goal of getting the health-insurance exchanges working by Nov. 30 is achieved—and objective observers cannot regard this as a certainty—a shadow has been cast on the federal government's competence.").

meet its publicly announced goals, the decline in public confidence is likely to be generalized and will affect the functioning of the government well beyond the PPACA and health care context.

VI. Implications for Administrative Law

We have focused on describing our analytical framework and applying it to the CFPB and the PPACA. We now briefly note the implications of our analysis for administrative law. Do our findings have any implications for the endless debates over *Chevron*,[324] *Mead*,[325] and *Skidmore*[326] deference? In our view, if the basis for deference is expertise, then the details of agency design *should* matter in deciding whether an agency is, in fact, entitled to deference. Indeed, even if the stated basis for deference is democratic legitimacy (i.e., Congress delegated a task to the agency, and a court is required to defer to that delegation), that only moves the inquiry one level down—because an important reason for Congress to have delegated an issue to one agency (as opposed to another agency) is because of the first agency's expertise on the matter in question.[327]

Tying the degree of deference to the ever-changing details of agency design makes the doctrine even less predictable than it is already.[328] But, if the justification for deference is expertise, it is hard to understand why one would ignore the question of whether the agency, in fact, has such expertise.[329]

Conclusion

In previous work, we identified seven factors that we believe are helpful in determining whether the combination of particular functions or goals within a single government agency or department is likely to work out well or poorly. When we apply these seven factors to the CFPB, we find that it scores well on several factors, but exceedingly poorly on others. It remains to be seen how things will play out,

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

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

326 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

327 Of course, there can be other reasons for delegation, such as the desire by Congress to be seen as "doing something" about a problem. Such "bubble laws" often have unintended consequences. *See* Larry E. Ribstein, *Bubble Laws*, 40 Hous. L. Rev. 77, 97 (2003).

328 That said, there may be benefits in making the doctrine less predictable. *See* Jud Mathews, *Deference Lotteries*, 91 Tex. L. Rev. 1349, 1378–79 (2013).

329 *See* Cohen, Cuéllar & Weingast, *supra* note 76, at 743. Courts must already face this issue when deciding whether to give deference when two agencies share authority, but only one agency has been heard on the subject. *See* Gersen, *supra* note 66, at 355–56.

but our analysis suggests future difficulties are likely. Our brief discussion of the implementation difficulties with the PPACA suggests similar dynamics are likely to dog health care reform going forward.

In Washington, it has long been a truism that "personnel are policy." We believe that it is equally (if not more so) a truism that "placement is policy." Where an agency is located, and what its street-level operators do on a day-to-day basis, has a profound influence on the policies that will result. Time and again, one finds that the culture of a department, bureau, agency, and commission has a disproportionate impact, irrespective of the politics of the person who happens to be temporarily residing at 1600 Pennsylvania Avenue.

Former Secretary of Health, Education and Welfare Joseph Califano candidly admitted that when he served in the Johnson White House, "[o]ften we didn't know where to put a program . . . and we didn't particularly care where it went; we just wanted to make sure it got enacted."[330] For too long, legal scholars have taken an equally casual attitude toward the issue of agency design and instead focused on case studies of individual agencies and the "greatest hits" of administrative law (e.g., delegation of powers, judicial review of agency actions, and the procedural requirements of administrative rulemaking and adjudication). Every taxi driver in Washington, D.C. may know that "government organization has serious implications for policy outcomes," but the majority of legal scholarship on the administrative state demonstrates little attention to this simple point.[331]

Stated bluntly, agency design has long been the Rodney Dangerfield of administrative law: it gets no respect.[332] We think it is time for the issue of agency design to command greater attention—particularly from those who find fault with our analytical framework, or have a more optimistic spin on the CFPB and the implementation of the PPACA. Who does what matters—and sometimes it matters more than everything else combined.

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330 Timothy B. Clark, *The Power Vacuum Outside the Oval Office*, NAT'L J., Feb. 24, 1979, at 296, 298.

331 For the exceptions, see *supra* notes 68–79 and accompanying text.

332 *See* LEWIS, *supra* note 80, at 1 ("Not many people find the study of American bureaucracy a provocative or compelling subject.").