RECENT DEVELOPMENT

ADMINISTRATIVE LAW GOES TO WALL STREET: THE NEW ADMINISTRATIVE PROCESS

JACOB E. GERSEN*

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INTRODUCTION

In 1938, James Landis published the now-classic book *The Administrative Process*.[1] Although the book's brilliant insights are many, Landis offered an eloquent statement on the emergence of new administrative forms in the United States bureaucracy. The book was published in the midst of a firestorm of political debate about the new bureaucracy. In a series of decisions in the mid-1930s, the Supreme Court invalidated a series of New Deal statutes. The "switch in time that saved nine" took place just a year before the book was published. Indeed, one of the book's key claims was that the structure of government bureaucracy and administrative law ought to parallel the structure of regulated industries. Why should the government structure be constrained by separation of powers principles if private industry is not? Quite apart from one's view of the merits of this argument, the underlying intuition that the structure of government regulatory institutions ought to be a function of underlying industry structure is once again vogue in politics and academia. Indeed, we are in the midst of something of an agency design renaissance—a time period of fundamental change with respect to the federal bureaucracy—deriving mainly, although not exclusively, from the emergence of new administrative forms of financial regulation.

To wit, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the legislation colloquially known as Dodd-Frank (Statute or Act), has allegedly caused a sea change in financial regulation.[2] The Statute itself is nearly a thousand pages long and not exactly beach reading. It has

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1. JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938).

2. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at scattered provisions of the U.S. Code (Supp. IV & V 2011, 2012)).

engendered hundreds of popular press articles and scholarly debate, and was a common object of criticism on the Presidential campaign trail.[3] Most of this discussion has quite reasonably focused on the necessity and wisdom of the Statute's substance. Is it desirable or feasible to regulate over-the-counter swap markets? How much oversight and control should the federal bureaucracy exercise over large bank or non-bank financial institutions? Can an administrative agency effectively regulate the offering and provision of consumer financial products? Are the extraordinary costs of a new financial regulatory structure worth the potential benefits?

All these questions and the numerous other substantive concerns that accompany debates about Dodd-Frank are of enormous practical import. Yet, they also obviate the most important and intriguing architectural elements of Dodd-Frank that sound in administrative law and agency design. Many facets of the new financial regulatory structure are either entirely novel or hybrid entities that are rarely encountered in the administrative law landscape. Both the overarching structure of Dodd-Frank and the rules and orders promulgated pursuant to that structure are sure to be challenged root and branch in litigation. My goal in this essay is to sketch some of the institutional topology and administrative law puzzles that result from recent efforts to reform financial regulation, with an eye on acknowledging the new emerging administrative process.[4]

This essay is organized around three overarching themes. First, the new administrative process creates novel public institutions most akin to "superagencies." Some of the individual elements of these agencies are familiar, but the Statute combines these bits in unusual and challenging ways. The result is a far cry from the ideal-type bureaucratic entity at which most administrative law doctrines are tailored. These superagencies are not obviously better or worse than their institutional ancestors, but the new form warrants more significant analysis. Second, the new administrative process's underlying theory of agency design is essentially a

3. During a Florida GOP debate, Mitt Romney claimed that Dodd-Frank is "just killing the residential home market and it's got to be replaced," while Newt Gingrich said, "If you could repeal Dodd-Frank tomorrow morning, you would see the economy start to improve overnight." Jim Puzzanghera, *Geithner Says 2010 Law Made Financial System 'Stronger And Safer'*, L.A. TIMES (Feb. 3, 2012) at B5, *available at* http://articles.latimes.com/print/2012/feb/02/business/la-fi-geithner-reform-20120203.

4. A number of organizations, both law firms and nonprofits have written excellent summaries of Dodd-Frank. Although my discussion draws on many of these sources, the reports themselves are quite useful independent readings. The law firm Davis Polk has an online Dodd-Frank resource center: davispolk.com/dodd-frank, which both summarizes the law and tracks regulatory progress. Morrison & Foerster has a useful summary as well: mofo.com/files/Uploads/Images/SummaryDoddFrankAct.pdf. Other useful reports and memos are available on the websites of many major law firms.

"web-of-jurisdiction" model. The regulatory framework makes extraordinary use of partially overlapping agency authority. It incorporates well-understood administrative law doctrines; yet, the statute also directly alters them. Courts often embrace the legal fiction that Congress legislates against the backdrop of existing regulatory understandings and administrative law. The new financial regulation statutes, however, take explicit account of these doctrines, purporting to direct the application or nonapplication of judicial practice to financial regulatory institutions. Third, the new administrative process makes unprecedented use of deadlines and timing rules to structure the development of new agencies and substantive regulation. Congress has used statutory deadlines sporadically to spur recalcitrant administrative agencies, but there are more deadlines in Dodd-Frank than were effected in all of the 1990s.[5] Not only is the volume of deadlines unprecedented, but they are also coming due faster and the overwhelming majority of deadlines have been missed.

Before continuing, a quick caveat is in order. The bureaucracy is forever changing, and there is a temptation to think that each new institution is novel or somehow transformative. In general, that impulse is worth resisting. That said, an important task for scholars of the administrative state is to pursue a blend of "fit" and "justification."[6] As new administrative forms arise, it is important to ask how these institutions fit into the existing administrative framework and how well the deviation from past practice is justified. Such a project requires tacking back and forth between bits of new institutional arrangements and the administrative law framework into which they are to be slotted. This can be an awkward analytic task, but, in aspiration at least, also productive and important.

I. SUPERAGENCIES

From the perspective of institutional design, Dodd-Frank creates a series of intriguing new administrative structures. Rather than glance in the direction of all of them, the current Part focuses on two of the most prominent new bureaucratic structures: the Financial Stability Oversight Council (FSOC or Council) and the Consumer Financial Protection Bureau (CFPB or Bureau). These agencies are tasked with quite different

5. A pocket of literature in administrative law addresses agency deadlines. *See generally* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008).

6. With apologies to Dworkin. *Cf.* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) (positing that decisions made in the absence of clear precedent or statutory authority are made and should be made based on principle rather than policy considerations).

substantive problems. Oversimplifying a bit, the Council is supposed to protect the integrity of the U.S. financial system, while the Bureau is supposed to protect consumers in the financial marketplace. They also have very few structural similarities. Yet, in each case, the bundle of institutional arrangements creates a sort of superagency. By superagency, I do not mean to connote a broad set of substantive powers. Both of these agencies have broad powers, but so too do a lot of other bureaucratic entities. Rather, either in function or form, both agencies operate in a way quite distinct from the typical regulatory agency.

A. Financial Stability Oversight Committee

1. Overview

One of the most prominent new bureaucratic structures created by the Act is the FSOC.[7] Membership on the Council is comprised of two groups: voting members and nonvoting members.[8] The voting members each receive one vote per member.[9] The Council is chaired by the Secretary of Treasury. The rest of the voting members are the Chairman of the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Director of the Bureau of Consumer Financial Protection, the Chairman of the Securities and Exchange Commission (SEC), the Chairperson of the Federal Deposit Insurance Commission (FDIC), the Chairperson of the Commodity Futures Trading Commission (CFTC), the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration, and an independent with insurance expertise subject to appointment by the President with the advice and consent of the Senate. The nonvoting members of the Council are made up of the Director of the Office of Financial Research, the Director of the Federal Insurance Office, a state insurance commissioner, a state banking supervisor, and a state securities commissioner.

The goals for the Council are expansive, as is the nature of its authority. A main job of the Council, however, is "to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace."[10] The specific duties of the Council are laid out in § 112(a)(2), but as a general matter the Council is

7. Dodd-Frank Act § 111 (codified at 12 U.S.C. § 5321 (Supp. IV 2011)).
8. Dodd-Frank Act § 111(b)(1)–(2) (codified at 12 U.S.C. § 5321(b)(1)–(2)).
9. *Id.*
10. *Id.* § 112(a)(1)–(A) (codified at 12 U.S.C. § 5322(a)(1)–(A)).

supposed to collect information that would allow it to identify potential threats to nationwide financial stability and to coordinate among member agencies to ensure that such risks do not arise.

Part of the significant power of the Council is the authority to determine that a U.S. nonbank financial company shall be subject to supervision by the Board of Governors if the Council determines that material financial distress at the institution, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the institution could pose a threat to the financial stability of the United States.[11] Such a determination is "nondelegable" and must be made by a vote of not fewer than two-thirds of the voting members then serving, including an affirmative vote by the Chairperson.[12] A similar rule applies to a Council's determination that a foreign, nonbank financial company must be supervised by the Board of Governors.[13]

All of these determinations are subject to judicial review and must be reevaluated annually.[14] The Council may rescind a determination by a two-thirds majority of the voting members then serving, including an affirmative vote of the Chairperson. Both the initial determination of risk and the subsequent potential determination of nonrisk are expressly guided by factors elaborated in the statute. The statute requires that the Council provide notice to a financial company of a proposed determination, including an explanation of its basis.[15] No later than thirty days after the date of the notice receipt, the nonbank financial company may request an opportunity for a written or oral hearing. If a hearing is requested, then no later than sixty days after the date of a hearing, the Council must notify the company of the final determination along with a statement of the basis for the decision.[16] If no timely hearing is requested, the Council shall notify the institution of the final determination.[17]

The above requirements are waivable for emergency necessity by the same two-thirds vote with the Chairman voting in the majority. Such a waiver of procedural requirements is itself subject to procedural requirements beyond the voting rule. The Council must allow a company to request an opportunity for a written or oral hearing to contest the waiver.[18] The Council must also consult with the primary financial

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11. § 113(a)(1) (codified at 12 U.S.C. § 5323(a)(1)).
12. *Id.*
13. § 113(b)(1) (codified at 12 U.S.C. § 5323(b)(1)).
14. § 113(d), (h) (codified at 12 U.S.C. § 5323(d), (h)).
15. § 113(e)(1) (codified at 12 U.S.C. § 5323(e)(1)).
16. § 113(e)(3) (codified at 12 U.S.C. § 5323(e)(3)).
17. § 113(e)(4) (codified at 12 U.S.C. § 5323(e)(4)).
18. *Id.*

regulatory agency if one exists for each company that is being considered for supervision.[19] As noted, the Council's determinations are subject to judicial review, either in the D.C. Circuit or in the district court for the judicial district in which the home office of the company is located.[20] The statute purports to limit judicial review to whether the final determination was "arbitrary and capricious."[21]

If any institution supervised by the Board of Governors is determined to pose a grave threat to the financial stability of the United States, the Board shall, by two-thirds supermajority vote, limit the ability of the company to merge or become affiliated with another company, restrict the ability of the company to offer financial products, require the company to terminate activities, and if those requirements are inadequate, the Board may require the company to sell or transfer assets to unaffiliated entities. Such determinations require notice and the opportunity for an oral or written hearing.[22]

To this point, Title I sets out the basic structure and composition of the Council and develops a framework for identifying potential risky institutions subject to supervision by the Board of Governors. After an institution has been identified, a range of requirements follows. First, within six months after a final Council determination, the company must register with the Board of Governors.[23] To prevent or mitigate risks to the financial stability of the United States that arise from the material financial distress, failure, or ongoing activities of large, interconnected financial institutions, the Council may make recommendations to the Board of Governors concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to companies supervised by the Board of Governors.[24]

This is only a partial and already too dense overview of the Council, but it should suffice for purposes of discussion. Although the substance of these requirements is, of course, a main, if not the main, concern for industry and policymakers, for current purposes, the general structure of decisionmaking, rather than the specific details of policy recommendations, is the key consideration.

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19. § 113(g) (codified at 12 U.S.C. § 5323(g)).
20. § 113(h) (codified at 12 U.S.C. § 5323(h)).
21. *Id.*
22. § 121 (codified at 12 U.S.C. § 5331(a)–(b)).
23. § 114 (codified at 12 U.S.C. § 5324).
24. § 115 (codified at 12 U.S.C. § 5325(a)(1)).

2. An Agency-of-Agencies

The leadership of many administrative agencies is structured as a multimember board. The Federal Election Commission (FEC), Federal Communications Commission (FCC), National Labor Relations Board (NLRB), not to mention the Appalachian Regional Commission, are all examples. What is somewhat less common—but certainly not unheard of—is to craft a multimember board itself made up of the leadership structure of other agencies, as Dodd-Frank does. In recent memory, the Endangered Species Act (ESA) Exemption Committee, or "god-squad," is another prominent case.[25] Although the ESA precludes government action that would result in the extinction of a species, it also contains an appeals provision. If the Secretary of the Interior finds that a proposed agency action would violate the statute, the agency may apply to the Committee made up of the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and one individual from each affected state appointed by the President.[26] By regulation, the collective representatives of affected states have one vote.[27] After some threshold findings and a hearing, the Committee makes a final determination on whether or not to grant an exemption from the ESA, the grant of which requires a supermajority of five of the seven members of the Committee.[28]

There are standard accounts of why to structure a decisionmaking body as a multimember board of a committee. On Condorcetian grounds, a collective body made up of individuals with modest competence is very likely to make a correct decision when judgments are aggregated using majority rule.[29] Furthermore, a multimember board allows for a representation of divergent interests in a way that a single decisionmaker simply cannot. Both these rationales are perfectly coherent justifications for a multimember decisionmaking body representing diverse views (with

25. *See generally* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993). *See also* Endangered Species Act (ESA), 16 U.S.C. § 1531 (2006)).

26. 16 U.S.C. § 1536(e)(3).

27. 50 C.F.R. § 453.05(d) (2012).

28. 16 U.S.C. § 1536(h)(1).

29. Such arguments have become mainstream in modern legal theory. *See, e.g.*, CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE (2009); CASS SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006); Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009); *see also* David Austin-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POLIT. SCI. REV. 34 (1996).

uncorrelated errors). To be sure, in both the Council and god-squad contexts, each of these informational considerations is relevant.

Yet, another confusing impulse exists pertaining to the desirability of insulation or anti-insulation. In the ESA context, one lodestar idea was that the Committee should be insulated from the ordinary give and take of politics. For example, the main issue in *Portland Audubon Society v. Endangered Species Commission*[30] was whether ex-parte contacts between representatives of the White House and the Committee during a period of deliberations violated the Administrative Procedure Act (APA).[31] In the Committee's adjudicatory role, insulation from politics is critical. By the same token, by composing the Committee with leaders of other agencies, the vast majority of which are appointed by the President and not insulated by "for cause" removal restrictions, the ESA ensures some degree of political control.

At one level then, the composition of the Council is intuitive and perhaps even obvious. Pick representatives of the relevant agencies with regulatory authority and presumably substantive expertise and put them all on a committee. Where the composition of FSOC and the god-squad differ, however, is in the nature and degree of insulation of the membership. Membership on the Council is made up in part by chairpersons of other commissions like the SEC, CFTC, and the Federal Reserve Board (Fed. Board). At least some of these chairpersons are, by statute or norm, insulated from at-will presidential removal.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[32] the Supreme Court assumed that SEC Commissioners were insulated from at-will removal by the President and could be removed only for "inefficiency, neglect of duty, or malfeasance in office."[33] This insulation, combined with subsequent insulation of the Accounting Oversight Board, is unconstitutional according to the Supreme Court.[34] The Court's method of assuming a statutory fact based on agreement by the parties and then holding that stipulated agreement unconstitutional—without deciding that the statutory interpretation was correct—is unusual, as explained by Justice Breyer in dissent.[35] Nevertheless, if the statutory and constitutional analysis

30. 984 F.2d 1534 (9th Cir. 1993).

31. 984 F.2d at 1538; *see also* Administrative Procedure Act (APA), 5 U.S.C. §§ 500–596 (Supp. V 2012).

32. 130 S. Ct. 3138 (2010).

33. *Id.* at 3148–49 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office, and we decide the case with that understanding.'") (citations omitted).

34. *Id.* at 3143–44.

35. *Id.* at 3182–85.

is correct, the voting members of FSOC are insulated as well. The new agency-of-agencies is therefore facially much less subject to any short-term political control than, for example, the ESA Exemption Committee.

To this point then, we have a working model of an "agency-of-agencies"—an administrative structure composed of the heads of other agencies that is built on grounds of information, expertise, and (intentionally or not) a fair measure of structural political insulation. To this basic structure, a series of procedural and jurisdictional characteristics are added, which together form one variant of superagency.

3. Voting Rules and Timing Rules

The Statute makes use of a series of voting rules and timing rules to guide different determinations by the Council. Both the internal decisionmaking procedures and the interaction with other administrative institutions are extensively regulated by the Statute. These procedural and jurisdictional requirements overlay the institutional architecture. Consider first a handful of voting rule and timing requirements.

When one of the voting member posts is not occupied by a confirmed individual, "acting officials" may serve in the unoccupied post.[36] The Council must meet at least once a quarter and adopt its own rules for conducting business, except that the default voting rule is majority vote of the "voting members then serving."[37] First, note the presence of *nonvoting* members of the Council. The Statute requires that these nonvoting members not be excluded from any of the proceedings, meetings, discussions, or deliberations except that the Chairperson may on an affirmative vote of the member agencies exclude the nonvoting members "when necessary to safeguard and promote the free exchange of confidential supervisory information."[38] The nonvoting members serve terms of two years, and the independent member of the Council serves for a term of six years.[39]

The use of nonvoting members is something like designing an implicit committee to advise the explicit committee. Given that the nonvoting members have only persuasive authority, it is unclear precisely what the impact on voting member behavior will be. There is also a curious conceptual awkwardness to the design. Nonvoting members presumably represent viewpoints that are important enough to be heard and integrated

36. Dodd-Frank Act, Pub. L. No. 111-203, § 111(c)(3), 124 Stat. 1376, 1392–93 (2010) (codified at 12 U.S.C. § 5321(c)(3) (Supp. IV 2011)).

37. § 111(e)–(f) (codified at 12 U.S.C. § 5321 (e)–(f)).

38. § 111(b)(3) (codified 12 U.S.C. § 5321(b)(3)).

39. § 111(c) (codified at 12 U.S.C. § 5321 (c)(1)).

into Council decisions, but not important enough to constitute a vote. Compare the members of the ESA Exemption Committee from each affected state, who together get one vote to represent all their interests.

Second, the Statute makes extensive use of supermajority voting requirements. The characteristics of sub, simple, and super majority voting rules have been extensively canvassed elsewhere.[40] However, two familiar points are worth reiterating here. The supermajority rule, of course, gives greater weight to the status quo ante. And, majority rule is generally superior on informational grounds.[41] Consider the requirement of a supermajority to classify a financial institution as qualifying for supervision by the Fed. Board. On the one hand, given the significant new regulatory obligations that would be generated, it seems right that the Council should be *really* sure that supervision is required. By the same token, this is a setting of judgment aggregation, not preference aggregation. There is a right answer to whether supervision is necessary in any given case even if there is extensive uncertainty about what that answer is. From the perspective of efficient information aggregation, the supermajority rule is almost certainly inferior to a simple majority rule.[42]

Third, the FSOC supermajority voting requirements sometimes—but not always—require that the Chairperson be in the majority to carry. In effect, this is an asymmetric weighted voting rule. The Chairperson is given significantly more weight in determining the outcome than any of the other voting members *if* the Chairperson is in the minority. Indeed, by construction, all other voting members could favor the proposal and it would not pass if the Chair did not favor it. Most commission voting rules are not structured in this way, and, at first glance, the procedure fits awkwardly into existing administrative practice.

In an effort at justification, we might understand the weighted voting rule to be an attempt to add political control. The Chairperson of FSOC is the Secretary of Treasury, an office not insulated by any "for cause" removal provision. Thus, notwithstanding the apparent insulation of the

40. *See generally* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007); Peyton Young, *Optimal Voting Rules*, 9 J. ECON. PERSP. 51, 54 (1995).

41. DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); Austin-Smith & Banks, *supra* note 29; Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POLIT. SCI. 617 (1992). *But see* Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952); Kenneth A. Shepsle & Barry R. Weingast, *Institutionalizing Majority Rule: A Social Choice Theory with Policy Implications*, 72 AM. ECON. REV. 367 (1982).

42. *See generally* Mark Fey, *A Note on the Condorcet Jury Theorem with Supermajority Voting Rules*, 20 SOC. CHOICE & WELFARE 27 (2003).

Council, the weighted voting rule helps correct for this. So understood, the design of the Council is a blend of membership selection, voting rules, insulation, and political control.

Nevertheless, imagine a comparable voting rule for the Supreme Court or even a majority rule with a requirement that the Chief Justice always be in the majority. Criminal appeals could always be resolved in favor of the State unless a majority of the Justices, including the Chief Justice, voted otherwise. Or, in administrative law, the agency's statutory interpretation would prevail unless a majority of justices including the Chief votes otherwise. This proposal seems facially absurd, in part because it fits terribly into our existing practice, and in part, because it gives inordinate weight to the views of one individual of a multimember panel that should value each vote with roughly equal weight. An open query, then, is whether there is something wrong with our intuitions about judicial panels or whether the FSOC voting rule is out of kilter.

Fourth, these supermajority rules are combined with a series of timing rules.[43] A timing rule imposes a specific timeframe for a decision, specifies a delay before implementation of a decision, or requires reconsideration of a decision either with or without a sunset of the prior decision. In the context of the FSOC, many determinations have to be revisited annually and those requirements are paired with a subsequent supermajority requirement. Thus, while it is costly to classify an institution as requiring supervision, it is equally costly to remove that classification. There is something appealing about the symmetry of the rule. However, note that the rule biases outcomes toward two necessarily different status quo antes, first the nonclassification and then the classification. Given that one of them was clearly incorrect, it is not clear why a biased procedure is better than a simple majority rule (on informational grounds).

Fifth, there are other settings in which a supermajority vote is required, but the Chairperson need not be in the majority for the proposal to carry, for example, § 119 of Title I. The Council shall seek to resolve a dispute among two or more member agencies if (1) there is a dispute about jurisdiction over a particular entity or activity or product; (2) the disputing agencies cannot resolve the dispute in good faith without intervention; and (3) notice is provided to the disputants of the intent to request dispute resolution by the Council.[44] After consideration of relevant information, the Council may issue a recommendation in writing with an explanation of

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43. *See generally* Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007).

44. Dodd-Frank Act, Pub. L. No. 111-203, § 119(a), 124 Stat. 1376, 1408 (2010) (codified at 12 U.S.C. § 5329(a) (Supp. IV 2011)).

reasons and approval by an affirmative vote of two-thirds of the voting members of the Council then serving.[45] Thus, for a subset of decisions, the Chairperson must be in the majority, suggesting both are intentional design elements.

4. Regulating the Regulators

A final element of the Council worthy of consideration is that it often functions as a regulator of regulators. Much of its authority is actually overseeing other oversight agencies.[46] In one instance, the Council is given the authority to issue recommendations to the primary financial regulatory agencies to apply new or heightened standards and safeguards to regulated entities.[47] Such recommendations must be preceded by notice and opportunity for comment.[48] That is, it seems the Council recommendations must rely on informal rulemaking procedures as specified by the APA.[49] Such recommendations *must* take costs to long-term economic growth into account and may include prescribing or prohibiting the activity or practice entirely.[50] Note that this provision is both a restriction and expansion of the range of regulatory alternatives. The recommended outcome must be cost-benefit justified, but it may also include outright prohibition or bans, a rarity. Once a standard has been recommended, the primary financial regulatory agency has nondiscretionary duties. The primary regulatory agency (receiver of the recommended rules) "shall impose the standards" or shall explain in writing to the Council within ninety days why the agency has determined not to follow the recommendation.[51]

Many statutes contain recommendation or consultation requirements prior to agency action.[52] Four sorts of administrative practice are relevant. First, sometimes one agency promulgates a rule and another agency

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45. § 119(b)–(c) (codified at 12 U.S.C. § 5329(b)–(c)). Note the slightly different voting rule: the affirmative supermajority need not include the Chairperson to carry. *See id.*

46. Eric Biber discusses agency authority of this sort as the "agency as regulator." Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 6 (2009).

47. Dodd-Frank Act, § 120(a) (codified at 12 U.S.C. § 5330(a)).

48. § 120(b)(1) (codified at 12 U.S.C. § 5330(b)(1)).

49. *See generally* APA, 5 U.S.C. § 553 (2006)).

50. Dodd-Frank Act, § 120(b)(2) (codified at 12 U.S.C. § 5330(b)(2)).

51. § 120(c)(2) (codified at 12 U.S.C. § 5330(c)(2)).

52. For example, the ESA requires all federal agencies to consult with the National Marine Fisheries Service or the Fish and Wildlife Service, if the agencies are proposing an action that may affect listed species or their designated habitat. 16 U.S.C. § 1536(a)(2) (2006)); *see also* Bennet v. Spear, 520 U.S. 154 (1997).

enforces it—so called split-enforcement regimes.[53] Second, sometimes a statute requires an action by one agency prior to an action by another agency. For example, § 7 of the ESA requires that the Fish & Wildlife Service make a "no jeopardy" finding before the "action" agency can move forward.[54] Third, and most relevant here, occasionally one agency gets to direct action by another agency or at least specify the terms of that action. The Federal Power Act[55] allows the Fish & Wildlife Service or the National Marine Fisheries Service to direct the Federal Energy Regulatory Commission (FERC) to adopt a binding restriction for fish passage in a hydropower project. The permit may not be renewed without compliance. The Secretary of Energy can also propose rules, regulations, and statements of policy in areas that fall under the jurisdiction of FERC.[56]

Note that the recommendation regime in Dodd-Frank is not quite identical to any of these settings. It is the Council that proposes the rule, takes comments on the rule, and replies to those comments. Once the Council has issued the recommendation, however, the primary regulatory agency must adopt it or explain in writing why it is not adopting the recommendation. It is hard to know whether this will constitute a great deal of discretion or virtually none, but one may assume that the agencies with primary regulatory authority will be unlikely to reject the FSOC recommendation. If the primary agency adopts the recommendation and the rule is challenged in litigation, to what extent is the primary agency's view relevant and to what extent the Council's view relevant? For example, at least in the context of *Skidmore* deference,[57] courts regularly ask about the relevant institutional expertise of the agency defending the rule. Yet, when the primary agency did not propose the rule or take comments on the rule, it places the court in a somewhat difficult position.

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53. *See* George Robert Johnson, Jr., *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987); *see also infra* Part II.A.1–2.

54. 16 U.S.C. § 1536 (2006).

55. 16 U.S.C. § 803(j)(1) (2006).

56. 42 U.S.C. §§ 7171–7173(a) (2006). *See generally* Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 51 n.199 (2010); Biber, *supra* note 46, at 6.

57. Skidmore v. Swift & Co., 323 U.S. 134 (1944). *See generally* Michael Herz, *Judicial Review of Statutory Issues Outside of the* Chevron *Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 125 (John F. Duffy & Michael Herz eds., 2005); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 750–56 (2002); Richard W. Murphy, *A "New" Counter-Marbury: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1 (2004); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105 (2001).

B. Consumer Financial Protection Bureau

1. Overview

Whereas FSOC pulls much of its membership and structure from existing administrative agencies, the Bureau of Consumer Financial Protection is part new agency and part reconstituted agency. Subtitle A of Title X establishes the Bureau of Consumer Financial Protection as "an independent bureau which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[58] The Bureau is established "in the Federal Reserve System" but it is "independent" and "shall be considered an Executive agency."[59] Needless to say, this is a somewhat puzzling series of descriptive phrases to string together.

The Director of the Bureau must be a U.S. citizen and shall be appointed by the President, by and with the advice and consent of the Senate.[60] The Deputy Director is appointed by the Director and serves as Acting-Director in the absence or unavailability of the Director.[61] The Director's term is five years and the President "may remove the Director for inefficiency, neglect of duty, or malfeasance in office."[62] This is essentially a restriction that prevents the President from removing the Director at will. The Bureau's principal office must be in Washington, D.C., but regional offices may also be established, much as the Environmental Protection Agency (EPA) and other agencies have regional field offices. The Bureau has near-unilateral authority to set up shop, including its own policies, employees, seal, contracts, and so on. The Bureau also may subdelegate any of its authority to a selected employee or agent.[63]

The Bureau is given extensive powers and responsibilities, but consider only a handful. First, the Bureau is given general rulemaking and adjudication authority.[64] The Act lays out specific standards that the Bureau must consider when prescribing a rule under the federal consumer financial laws. The Bureau must consider the potential costs and benefits to consumers and "covered persons"[65] and the impact of proposed rules on

58. Dodd-Frank Act § 1011(a) (codified at 12 U.S.C. § 5491(a) (Supp. V 2012)).
59. *Id.*
60. § 1011(b)(2)–(3) (codified at 12 U.S.C. § 5491(b)(2)–(3)).
61. § 1011(b)(5) (codified at 12 U.S.C. § 5491(b)(5)).
62. § 1011(c)(3) (codified at 12 U.S.C. § 5491(c)(3)).
63. § 1012(b) (codified at 12 U.S.C. § 5492(b)).
64. § 1022(a)–(b) (codified at 12 U.S.C. § 5512(a)–(b)).
65. § 1022(b)(2)(A)(i) (codified at 12 U.S.C. § 5512(b)(2)(A)(i)).

"covered persons" and on consumers in rural areas.[66] The Act also imposes a consultation requirement with the appropriate prudential regulators and other federal agencies *prior* to proposing a rule and during the comment process for consistency with prudential, market, or systemic objectives administered by such agencies.[67]

2. *Independence, Dependence, and Nondependence*

It is not quite clear what it means to be an "independent bureau" established "in the Federal Reserve System" that is "considered an Executive agency." What is clear is that Dodd-Frank offers up a second model of superagency. In constitutional law scholarship, "independence" is a legal term of art, generally signaling solely that the head of an agency is insulated from at-will removal by the President.[68] As noted, that is certainly true of the Bureau, but independence in this setting is really a bundle of institutional features that far outpace whatever insulation at-will removal provides.

a. *Funding*

Consider first the funding mechanism for the Bureau. Rather than direct appropriation from Congress, the operating budget of the Bureau is transferred from the Board of Governors at a level between the amount "determined by the Director to be reasonably necessary to carry out the authorities of the Bureau"[69] and ten, eleven, and twelve percent of total operating expenses of the Federal Reserve system in 2011, 2012, and 2013 respectively. Nor is the provision of these funds reviewable by congressional appropriations committees.[70] At first glance, a provision that makes the Bureau reliant on the Board for funding might be understood to increase accountability of the Bureau to the Board. The nondiscretionary nature of the funding, however, means that this is not a plausible account. Moreover, the exclusion of Bureau funds from the congressional appropriations process means that one commonly cited mechanism of controlling agency behavior is not available. The NLRB, for example, is funded through the ordinary congressional appropriations process, which has rendered it the subject of political disputes. The mechanism of funding

66. § 1022(b)(2)(A)(ii) (codified at 12 U.S.C. § 5512(b)(2)(A)(ii)).

67. § 1022(b)(2)(B) (codified at 12 U.S.C. § 5512(b)(2)(B)).

68. *But see* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013) (arguing that "for cause" removal protection is neither a necessary nor sufficient condition for operational independence).

69. § 1017(a) (codified at 12 U.S.C. § 5497(a)(1)).

70. § 1017(a)(2)(C) (codified at 12 U.S.C. § 5497(a)(2)(C)).

combines with the removal insulation provision to generate even more independence than would otherwise be produced.

b. Parent Agencies

Absent either the threat of removal or funding as ways of controlling the Bureau, the precise relationship between the Bureau and the Board is unclear. After all, the Bureau is established *within* the Board of Governors. For many other bureaus operating within other agencies, there is a natural tether of responsiveness and oversight that runs from the parent agency to the bureau. What of the Bureau and the Board?

The Act goes to quite extensive lengths to specify the permissible relationship between the Bureau and the Board of Governors. The Board may itself delegate to the Bureau the authority to examine the compliance of any person subject to its jurisdiction with federal consumer financial laws.[71] However, the Board may not intervene in any matter or proceeding before the Bureau. The Board may not appoint, direct, or remove any officer or employee of the Bureau. Nor may the Board merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors of the Federal Reserve banks.[72] That is, the Board may neither intervene wholesale or retail in decisions of the Bureau, nor may the Board attempt to add layers of control.

Similarly, the rules and orders of the Bureau may not be subject to approval or review by the Board.[73] Nor may any:

> [O]fficer or agency of the United States have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony or comments to the Congress, if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the Director or such officer, and do not necessarily reflect the views of the Board of Governors or the President.[74]

All of this is as far away from strong-form parental agency oversight as one can imagine.

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71. § 1012(c)(1) (codified at 12 U.S.C. § 5492(c)(1)).
72. § 1012(c)(2)(A)–(C) (codified at 12 U.S.C. § 5492(c)(2)(A)–(C)).
73. § 1012(c)(3) (codified at 12 U.S.C. § 5492(c)(3)).
74. § 1012(c)(4) (codified at 12 U.S.C. § 5492(c)(4)).

Notwithstanding all of the structural and financial independence of the Bureau, there are some intriguing constraints on the Bureau's regulations. First, in some settings, "the Council *may* set aside a final regulation prescribed by the Bureau."[75] The procedure is carefully elaborated in the Statute. Within ten days of the publication of a Bureau rule in the Federal Register:

> [A]n agency represented by a member of the Council may petition the Council . . . to stay the effectiveness of, or set aside, a regulation if the member . . . has in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system.[76]

Any petition would have to be published in the Federal Register itself and transmitted to the respective Senate and House committees.[77]

"Upon the request of any member agency, the Chairperson may stay the effectiveness of a regulation" to allow the Council to consider the petition, but only for ninety days or less.[78] "The decision to issue a stay of, or set aside, any regulation . . . shall be made" by two-thirds of the Council members then serving.[79] (Note that the Chairperson need not be in the majority to set aside the regulation). The Act does, however, utilize a supermajority voting requirement to insulate Bureau decisions, and imposes a substantive limitation on the reasons that may lawfully justify the vote.

> A member . . . may vote to stay the effectiveness . . . only if the agency or department represented by that member has--
>
> (i) considered any relevant information provided by the agency submitting the petition and by the Bureau; and
>
> (ii) made an official determination, at a public meeting where applicable, that the regulation which is the subject of the petition 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.[80]

If the Council sets aside a regulation, it is unenforceable. Although the Council must publish a decision to set aside a regulation, the decision is not

75. § 1023(a) (codified at 12 U.S.C. § 5513(a)) (emphasis added).
76. § 1023(b) (codified at 12 U.S.C. § 5513(b)(1)).
77. § 1023(b)(2) (codified at 12 U.S.C. § 5513(b)(2)).
78. § 1023(c)(1)(A)–(B) (codified at 12 U.S.C. § 5513(c)(1)(A)–(B)).
79. § 1023(c)(3) (codified at 12 U.S.C. § 5513(c)(3)(A)).
80. § 1023(c)(3)(B) (codified at 12 U.S.C. § 5513(c)(3)(B)).

subject to notice-and-comment rulemaking procedures.[81] It is, however, subject to judicial review. All told, the ability to set aside a Bureau regulation constitutes some constraint, but it seems fair to say that it does not significantly undermine the rest of the insulation measures.

c. Sibling Agencies

What of the Bureau's relationship with sibling agencies? Many of the Bureau's authorities come from preexisting institutional entities. The Bureau receives some authority from the Board of Governors, FDIC, the Federal Trade Commission (FTC), the National Credit Union Association (NCUA), the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development (HUD). By and large, the Statute simply says that the Bureau gets, for example, "all powers and duties that were vested in the Board of Governors, relating to consumer financial protection functions, on the day before the designated transfer date."[82] That said, sometimes authority is not crisply allocated.[83] In the case of the FTC, for example, the Bureau may enforce a FTC rule or the FTC may enforce a Bureau rule, respectively, as they pertain to deceptive trade practices.[84] The FTC still gets judicial deference on interpretation of the Federal Tort Claims Act, and the Bureau on all other consumer financial regulations.[85]

Bureaucratic reorganizations like this are not new, of course. Large-scale reorganizations were undertaken by President Carter in the late-1970s and also in the aftermath of September 11.[86] Yet, the result is often—as is the case here—a web of ambiguously overlapping jurisdiction by related agencies. To Dodd-Frank's credit, it addresses most of these issues explicitly. Nevertheless, whether focusing on the Bureau, the Council, SEC, CFTC, or FDIC, it is clear that there is a good deal of shifting jurisdiction and authority, some of which is simply changing hands, but some of which is exercised concurrently by multiple agencies.

Indeed, this problem, or at least situation, has been the subject of a

81. § 1023(c)(7) (codified at 12 U.S.C. § 5513(c)(7)).

82. § 1061(b)(1)(B) (codified at 12 U.S.C. § 5581(b)(1)(B)).

83. *See infra* Part II.

84. § 1061(b)(5)(B)–(C) (codified at 12 U.S.C. § 5581(b)(5)(B)–(C)).

85. § 1061(b)(5)(E) (codified at 12 U.S.C. § 5581(b)(5)(E)).

86. The Homeland Security Act of 2002, Pub. L. No. 107-296, 117 Stat. 2135 (2002) (codified at 6 U.S.C. §§ 101–596 (2006)), reorganized much of the federal bureaucracy under the aegis of the Department of Homeland Security, a new agency charged with managing domestic security risks. President Carter's bureaucratic reorganization plans in the late-1970s were also expansive. *See* Reorganization Plan No. 3, 92 Stat. 3788 (1978) (transferring administrative responsibilities pursuant to Executive Orders 12127 and 12148).

handful of recent papers in administrative law[87] and discussed in a recent Supreme Court case.[88] Given the central importance of these shared authority regimes to Dodd-Frank, Part II offers a more elaborate discussion of shared authority in general and in the new financial regulation. For the moment, note simply that these regimes do nothing to undermine the basic view that the Bureau occupies an unusual terrain when it comes to agency independence.

d. Office of Information and Regulatory Affairs

A final possibility is that the regulatory review process of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) would constrain the Bureau. FSOC rules have been submitted to OIRA for review and finalized.[89] However, no CFPB rule has been submitted to OIRA, and the conventional understanding is that there is no requirement to participate in the centralized regulatory review process.[90] The justification for that view is straightforward. By its terms, Executive Order 12866 does not apply to independent agencies and historically has not applied to the Fed. Board. If the CFPB is either an independent agency or a unit of the Board, then no participation in regulatory review is required. Alternatively, if the "for cause" insulation of the CFPB head "amounts to" the creation of an independent agency, then perhaps that too would insulate the Bureau from OMB.

While these arguments may be plausible, the conclusion is certainly not inevitable. After all, the Statute also clearly indicates that the CFPB is an "executive agency" and executive agencies are within the stated jurisdictional scope of Executive Order 12866. Thus, while all or at least most parties seem to agree that the CFPB need not submit rules to OIRA for review, the Statute nowhere expressly exempts the Bureau and need not be read to implicitly exempt the Bureau. Regardless, if the conventional

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87. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *Overlapping & Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2006).

88. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1883–84 (2013) (Roberts, J., dissenting) (citing Dodd-Frank's web-of-jurisdiction model and its attendant uncertainties to help illustrate how the Court supposedly erred in holding a court must defer to an agency's interpretation of a statutory ambiguity that concerns the scope of an agency's jurisdiction).

89. *See, e.g.*, 12 C.F.R. § 1310 (2013).

90. *See, e.g.*, *Who's Watching the Watchmen?: Hearing Before the Subcomm. On TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 43–52 (2011) (statement of Todd Zywicki, Professor, George Mason University).

wisdom is correct, it is yet another mark in favor of the superagency thesis.

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Together then, the Council and Bureau constitute new bundles of institutional architecture, regulatory authority, and procedural mechanisms that do not fit neatly into the existing administrative landscape. Whether one considers the agencies hybrid agencies or superagencies, it seems clear that more work analyzing the conceptual foundations and practical implications is required.

II. WEBS OF AGENCY AUTHORITY

In addition to offering new models of superagencies, Dodd-Frank also builds upon and generates new webs of agency jurisdiction. The result is a complex set of task assignment and administrative authority. By and large, however, this web is crafted by design rather than accident. This is not a case of unnecessary duplication, but rather the adoption of overlapping authority as a principal organizing principle for financial regulation. Even as regulatory duplication is targeted in political commentary, the web-of-authority model is seemingly becoming the new norm for new administrative structures. As one court recently noted, "we live in an age of overlapping and concurring regulatory jurisdiction."[91] Such regimes have many variants, however, and each can receive different treatment in the courts. Part of what is interesting about Dodd-Frank's use of overlapping jurisdictional regimes is that the Statute expressly builds upon existing judicial treatment of regimes and then modifies those doctrines by statute.

A. Background

By way of conceptual background, suppose Congress is considering enacting a new statute to address policy space X, that there are only two governmental units, A and B, and that Congress wishes to allocate some authority to one entity and some authority to the other. Conceptually, Congress might allocate authority along two dimensions: exclusivity and completeness. With respect to exclusivity, Congress might grant authority to one agency alone or to both. With respect to completeness, Congress might delegate authority to act over the entire policy space or only a subset

91. FTC v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001) (quoting Thompson Med. Co. v. FTC, 791 F.2d 189, 192 (D.C. Cir. 1986)); *see* FTC v. Texaco, Inc., 555 F.2d 862, 881 (D.C. Cir. 1977); *see also* FTC v. Cement Inst., 333 U.S. 683, 694–95 (1948) (allowing two separate agencies with statutorily prescribed jurisdiction to conduct simultaneous enforcement proceedings against one party for the same offense).

of the space.

Combining the dimensions of exclusivity and completeness yields four potential statutory schemes. (1) Congress could delegate complete and exclusive jurisdiction. In the complete and exclusive regime, there is no policy authority held simultaneously by both agencies, and the combination of the policy space regulated by both agencies is the entire policy space. (2) Congress could delegate incomplete and exclusive jurisdiction. This statutory scheme excepts a subset of the policy space from the jurisdiction of either agency. The remainder of the space is exclusively within the jurisdiction of either agency A or agency B. The important difference between regimes (1) and (2) is that some potential authority in the policy field that could have been given to an agency is not given to either agency. (3) Congress could delegate complete authority to agencies A and B, but with nonexclusive jurisdictional assignments. The concurrent authority might be perfectly coterminous or, more likely, only partially overlapping. (4) Lastly, Congress might generate a nonexclusive shared jurisdiction scheme in which the grant of authority is incomplete (or nonexhaustive). At least some portion of each agency's authority would be shared with the other agency. What differentiates regime (4) from regime (3) is that there is also some subset of the policy space not clearly given to either agency, although, of course, the scope and existence of this pocket will usually be ambiguous.[92]

Dodd-Frank makes use of most, if not all, of these potential regimes. Sometimes a task is clearly given to a single institution. Elsewhere one statutory or regulatory provision may be enforced by multiple agencies. Sometimes one agency may enforce another agency's rules. Elsewhere one agency may "recommend" a rule to another agency that the second agency must adopt. In other settings, one agency's rule may be set by a second agency. To give a slightly more robust sense of the details, consider two web-of-authority mechanisms on display in Dodd-Frank.

1. Either-Or Enforcement

The *either-or* mechanism is a variant of the split-enforcement model, in which one agency is given the authority to issue rules and another agency is given the authority to enforce those rules.[93] The Occupational Safety and Health Act (OSHA) delegates rulemaking authority for workplace safety standards while granting the Occupational Safety and Health Review

92. *See generally* Gersen, *supra* note 87.

93. *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991).

Commission adjudicatory authority for violations.[94] In other settings, multiple agencies have the authority to enforce the same statute, but each against different regulated parties.[95]

The either-or enforcement scheme is distinct. In the context of the SEC and the CFTC, *either* Commission may enforce the rules promulgated by the *other* Commission. In effect, for any given set of rules implementing these portions of the statutes, there are two institutions that may opt to enforce or decline to enforce. One might think about this regime in a number of different ways. At first cut, the regime increases the probability of enforcement. Adding another agent who may choose to enforce if the promulgating agency declines would seem to strictly increase the probability of a rule's enforcement. At second cut, this is not so clear. A problem with overlapping authority is the risk of free riding. Because all enforcement actions are costly, it might be the case that agency A would prefer that a rule be enforced, but would also prefer that some other agency bear the costs of enforcement. In a world where only one agency may enforce a rule, enforcement will occur in this scenario because the agency prefers enforcement to no enforcement. In a world where multiple agencies could enforce, however, things are less certain. Either agency may attempt to free ride on the other agency and be less likely to pursue the enforcement action. Adding multiple enforcers does not inevitably imply more enforcement.

2. Mother-May-I

The *either-or* enforcement regime generates multiple bites at the same rule, but the enforcement decision is always at the option of the agency pursuing the enforcement. That is, either agency may decide not to enforce the rule and either agency may alone decide to enforce the rule. In other portions of the statute, the enforcement scheme differs. One agency is given the authority to mandate that another agency enforce a given rule. For example, upon an affirmative vote by a majority of the Council, the Council "may require the Supervisory Agency to—(A) exercise the enforcement authority referenced in subsection (c); and (B) take enforcement action against the designated financial market utility."[96]

94. *See* 29 U.S.C. § 661 (2006); *see also* Freeman & Rossi, *supra* note 87, at 18.

95. Freeman & Rossi, *supra* note 87, at 18. For example, the Federal Deposit Insurance Act operates in this way. *See* Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246 (D.C. Cir. 2003).

96. Dodd-Frank Act § 807(e)(4)–(f) (codified at 12 U.S.C. § 5466(e)(4)–(f) (Supp. IV. 2011)) (dealing with examination and enforcement actions against designated financial market utilities).

Under limited circumstances then, the Council may dictate to another agency that it *must* enforce its rules against a specific regulated party. This regime is one variant of a set of administrative rules in which one agency dictates the terms of action by another agency. Such regimes push the boundaries of accountability by reducing the clarity about which institution is responsible for which actions.

B. Understanding Shared Jurisdiction Schemes

If shared jurisdiction schemes generate nontrivial difficulties for courts and private actors, why utilize them? There are at least two standard reasons. First, shared jurisdiction schemes might allow Congress to take advantage of the informational expertise of multiple agencies. To illustrate, even if the SEC is the "best" agency to generate and enforce rules pertaining to a given financial product, if the CFTC also has some expertise, the shared jurisdiction regime allows information from both agencies to be aggregated in the policy domain. There is nothing fancy at work here; just as the collective judgment of a reasonably competent group of individuals may outperform a sole expert, so too may the collective judgment of several agencies outperform a single expert agency. Relatedly, it may simply be that one agency has better institutional competence at promulgating rules, for example, and a different agency has more ability to effectively pursue enforcement actions.

A second possibility is that shared jurisdiction schemes are a way to manage the principal–agent problem generated when Congress delegates to the bureaucracy. By crafting a regime in which multiple agents compete with each other, Congress might encourage the development and accurate revelation of information by agencies. Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent.[97] For example, if agencies prefer to increase jurisdiction rather than decrease it, assigning overlapping jurisdiction could give agencies an incentive to invest in information at time 1, so that their jurisdiction is not eliminated at time 2.[98] If Congress wants to take advantage of agency knowledge, but is concerned that agencies will shirk and fail to invest heavily enough in the development of expertise, manipulating jurisdiction can help manage that possibility. If one agency invests in developing

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97. *See* Gersen, *supra* note 87.

98. Even this is not obvious. James Q. Wilson sought to explain why expansionist bureaucracies often shun new responsibilities. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989). Agencies might lose a sense of mission, or jurisdictional expansion might introduce additional opportunities for failure.

expertise and the other does not, Congress can shift from regime 2 to regime 1, giving the agency that invested in expertise exclusive authority. The threat of jurisdictional loss is a sanction for the failure to produce desirable informational expertise. So understood, concurrent-authority regimes are one potential mechanism to manage agency problems in political institutions.

C. Problems and Puzzles

The potential downsides of concurrent-authority regimes are genuine. First, when Congress observes only outcomes and not effort, overlapping jurisdiction can incentivize both agencies to shirk their duties.[99] Second, bureaucratic redundancy can create waste and duplicative monitoring as well.[100] Third, concurrent-authority regimes can generate a lack of clarity about which institution is responsible for policy success or failure.[101] Such clarity is generally taken to be a prerequisite for accountability in government. Fourth, coordinating agencies can be costly. Fifth, one needs a mechanism for resolving inter-agency conflicts. Sixth, that mechanism often requires judicial intervention of one sort or another.

Just by way of illustration, Freeman and Rossi recently argued that coordination across agencies with overlapping or duplicative authority in the same policy domain is the central problem for concurrent-authority

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99. *See* CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES 332 (1999); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 286–87 (2003); Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1 (1994); *see also* JONATHAN B. BENDOR, PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT 244–45 (1985); Dan S. Felsenthal & Eliezer Fuchs, *Experimental Evaluation of Five Designs of Redundant Organizational Systems*, 21 ADMIN. SCI. Q. 474, 474 (1976); Rowan Miranda & Allan Lerner, *Bureaucracy, Organizational Redundancy, and the Privatization of Public Services*, 55 PUB. ADMIN. REV. 193 (1995).

100. *See* Andrew B. Whitford, *Adapting Agencies: Competition, Imitation, and Punishment in the Design of Bureaucratic Performance*, in POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY (George A. Krause & Kenneth J. Meier, eds. 2003); Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297, 310 (1983). *But see* William A. Niskanen, *Bureaucrats and Politicians*, 18 J. L. & ECON. 617, 637 (1975) (arguing that competition decreases cost of monitoring).

101. *See* Ethan Bueno de Mesquita & Dimitri Landa, Working Paper, *Does Clarifying Responsibility Always Improve Policy?* (2012), *available at* http://home.uchicago.edu/~bdm/PDF/clarity.pdf; G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 50–52 (2000); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010); Margit Tavits, *Clarity of Responsibility and Corruption*, 51 AM. J. POL. SCI. 218, 219–21 (2007).

statutory schemes.[102] Focusing mainly on the environmental context, they argue that the risk of multiple agencies working at loggerheads is quite significant and they survey a wide range of coordination mechanisms, both descriptively and normatively.[103] Properly understood, the coordination problem is about two agencies, each of which has clear and exclusive authority, acting in such a way as to produce inconsistency or negative externalities across their respective jurisdictions. Coordinating these different agencies entails taking into account the respective information, goals, and methods that each agency is otherwise entitled to use.

Closely related, but conceptually distinct, is the problem of inter-agency conflict resolution. Here, there are two distinct sorts of potential agency conflicts. The first involves a concurrent-authority regime in which both agencies clearly have authority to act. In this case, there is no dispute about which agency is authorized to act. Rather, the two agencies disagree, for example, about the proper interpretation of a statutory provision relevant to each agency's authority. A distinct form of agency conflict entails a jurisdictional dispute, which arises most often in settings where the statute is not clear about which agency, if any, is authorized to act in some policy domain.

In any of the above settings, courts must often decide to *which* agency to defer in the context of *Chevron*, *Skidmore*, or other doctrinal deference regimes. When a statute is administered by multiple agencies, do agency views about statutory meaning receive deference in the *Chevron* framework?[104] Some shared jurisdiction statutes are "general" statutes, which no agency truly "administers." For statutes like the Freedom of Information Act (FOIA) or National Environmental Policy Act (NEPA), "it is universally agreed that no single agency with enforcement power has been charged with administration of these statutes, and hence that *Chevron* does not apply."[105] Congress should not be taken to have implicitly delegated law-interpreting authority to any agency simply because no agency administers the statute.[106] In *Professional Reactor Operator Society v.*

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102. Freeman & Rossi, *supra* note 87.

103. *Id.*

104. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 851 (2001); *see also* Sutton v. United Airlines, 527 U.S. 471, 478–80 (1999); Bragdon v. Abbott, 524 U.S. 624, 642 (1998). As Merrill and Hickman point out, in the pre-*Chevron* case law, the fact that a statute was administered by multiple agencies was sometimes cited as a factor for giving reduced deference. *See* New Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 144–45 (1976).

105. Merrill & Hickman, *supra* note 104, at 893.

106. The Supreme Court has never conclusively said that interpretations of statutes administered by multiple agencies do not qualify for *Chevron* deference, but Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 136–37 (1997), is probably the closest. *See also*

Nuclear Regulatory Commission,[107] the D.C. Circuit refused to give *Chevron* deference to the Nuclear Regulatory Commission's interpretation of the APA, because the "Supreme Court has indicated . . . that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer."[108]

Dodd-Frank, of course, is not a general nonadministered statute in the FOIA or APA sense. Rather, it is a statutory regime in which *multiple* agencies are expressly given overlapping administrative authority. In similar cases of concurrent jurisdiction, courts have sometimes concluded no agency was given law-interpreting authority in the relevant sense, but have more often sought to identify which of the multiple agencies is the primary agency to which law-interpreting authority was granted. For example, in *Martin v. Occupational Safety & Health Review Commission*,[109] the Supreme Court was faced with a conflict between the Secretary of Labor and the Health Review Commission, both of which have responsibility for implementing OSHA.[110] The Court rejected the Commission's interpretation, holding that the Secretary was the agency entitled to deference, not the Commission.[111] The Supreme Court appeared to reason that Congress delegates law-interpreting or "force of law" authority to a single agency.[112] Said the Court:

> Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative

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Merrill & Hickman, *supra* note 104, at 893 n.289.

107. 939 F.2d 1047 (D.C. Cir. 1991).

108. *Id.* at 1051.

109. 499 U.S. 144 (1991).

110. *See generally* Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35 (1991); George Robert Johnson, *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987). *See also* Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133 (D.D.C. 2012) (stemming from a split of authority under Clean Water Act § 404 between the Environmental Protection Agency (EPA) and the Army Corps of Engineers, which led to noncooperation and legal action), *overruled* by 714 F.3d 608 (D.C. Cir. 2013) (reversing and holding that the EPA, not the Army Corps, had authority).

111. *Martin*, 499 U.S. at 157.

112. This idea is even implicit in the way the Court phrased the issue presented: "The question before us in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this 'interpretive' lawmaking power under the OSH Act." *Id.* at 151.

actor in the best position to develop these attributes.[113]

ETSI Pipeline Project v. Missouri[114] is similar. The case involved a dispute over whether the Flood Control Act of 1944[115] created overlapping or exclusive agency jurisdiction. The Flood Control Act granted authority to the Federal Power Commission, the Department of Agriculture, the Department of Interior, and the Secretary of War.[116] Both the Secretary of Interior and the Secretary of War asserted the authority to enter into contracts respecting use of certain reservoirs.[117] In a unanimous opinion, Justice White concluded that the plain language of the Act granted exclusive authority to the Secretary of War, rather than the Secretary of Interior who claimed concurrent authority.[118]

It is against this backdrop that Dodd-Frank's provisions must be understood. Judicial practices like those discussed above risk giving statutory authority to the wrong agency; in the face of conflicting agency judgments, courts may resolve that conflict by giving decisionmaking authority to a different agency than Congress would have preferred. They also constitute a significant doctrinal problem to which Dodd-Frank provides a solution.

D. Solutions

There are two main types of design mechanisms used to manage problems generated by the web-of-authority structure. The first is a set of coordination mechanisms, very much of the sort recently emphasized by Freeman and Rossi.[119] The second, more conceptually interesting mechanism is a series of "directive deference" provisions in the Statute that incorporate and modify existing administrative law doctrine.

1. Coordination Old and New

To start with, Dodd-Frank relies on a series of mechanisms to manage the coordination problem across agencies. In some settings, the Statute

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113. *Id.* at 153.

114. 484 U.S. 495 (1988); *see also* Timothy K. Armstrong, Chevron, *Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203, 246–48 (2004).

115. Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified as amended at 33 U.S.C. §§ 701–710 (2006).

116. *Id.*

117. *See* ETSI, 484 U.S. at 502–05; *see also* Flood Control Act of 1944 at 890, 903–07.

118. *See ETSI*, 484 U.S. at 497 (explaining that Justice Kennedy took no part in the consideration or decision).

119. *See* Freeman & Rossi, *supra* note 87.

relies on inter-agency memoranda of understanding rather than litigation. The CFTC and FERC are required to "negotiate a memorandum of understanding to establish procedures for . . . resolving conflicts concerning overlapping jurisdiction between the [two] agencies."[120] Addressing potential conflicts between the Bureau and the Attorney General, the Statute requires that "to avoid conflicts and promote consistency regarding litigation of matters under Federal law, the Attorney General and the Bureau shall consult regarding the coordination of investigations and proceedings, including by negotiating an agreement for coordination . . . ."[121] However, "nothing in this paragraph shall be construed to limit the authority of the Bureau . . . to interpret Federal consumer financial law."[122] To "avoid duplication of or conflict between rules" of the Bureau and the Federal Trade Commission (FTC), the agencies shall negotiate an agreement for rulemaking including a consultation requirement prior to rule proposal.[123] The inter-agency consultation requirements that are such are a major theme in Freeman and Rossi's recent work are on extensive display in Dodd-Frank.[124]

2. *Directive Deference*

The Statute's primary and more innovative approach, however, is to adopt a series of provisions that purport to direct the application or nonapplication of administrative law doctrines—most often concerning whether and when courts should defer to agency judgments. Dodd-Frank's solution to these problems is elegant in its simplicity. The Statute simply tells the court exactly what to do. This possibility was raised by Elizabeth Garrett about a decade ago in a somewhat different context,[125] but at that time it was exceedingly rare for Congress to say much of anything clear about judicial deference and administrative agencies.[126]

Chevron famously sets out a framework for judicial review of agencies' statutory interpretations. At "Step One" of *Chevron*, judges ask whether the statute speaks to the "precise question at issue;" if so, then the judges simply

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120. Dodd-Frank Act, Pub. L. No. 111-203, § 720(a)(1), 124 Stat. 1376, 1657–58 (2010) (codified at 15 U.S.C. §8308(a)(1)(A)–(C) (Supp. IV 2011)).

121. § 1054(d)(2)(B) (codified at 12 U.S.C. § 5564(d)(2)(B)).

122. § 1054(d)(2)(C) (codified at 12 U.S.C. § 5564(d)(2)(C)).

123. § 1061(b)(5)(D) (codified at 12 U.S.C. § 5581(b)(5)(D)).

124. Freeman & Rossi, *supra* note 87, at 1158 (distinguishing discretionary consultation from mandatory consultation and citing the National Environmental Policy Act (NEPA) as a prime example of the latter); *see also* NEPA, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321–4370(h) (1970)).

125. Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637 (2003).

126. *Id*. at 2640.

enforce its commands. If the statute contains a gap—if it is silent or ambiguous on the relevant question—the judges are to proceed to "Step Two," at which they ask whether the agency's interpretation is "reasonable," or, in other words, whether the agency's interpretation falls within the scope of the statute's ambiguity.[127] In *United States v. Mead Corp.*,[128] the Court, following recent commentary,[129] suggested that *Chevron* rests on an "implicit congressional delegation" of law-interpreting authority to agencies.

On this view, the global default rule of *Chevron*—statutory silence or ambiguity yields law-interpreting authority by agencies—derives from an implicit general instruction by Congress. Although this idea seems best characterized as a legal fiction, the idea seems to have been embraced by the modern Court. Doing so necessitates saying something about the APA, which on its face seems to require that courts are to decide all relevant questions of law.[130] Unless statutory meaning is outside the purview of law—very few, if any, hold—*Chevron* would seem inconsistent with the APA.[131] To avoid this problem, some commentary suggests that judicial doctrine regarding deference to agencies is itself among the legal rules or law that courts are to apply.[132]

If the legal foundation for the *Chevron* doctrine, which today provides a detailed roadmap of the landscape for judicial deference to administrative agencies, is implicit congressional intent, then the implicit and general legislative request could surely be eliminated, modified, or seemingly directed by Congress. Yet, efforts by Congress to direct the application of legal doctrine has always been met with mixed reviews. On the one hand, it is relatively uncontroversial that Congress may, as it has done in the APA and a host of other statutes, establish a standard of review that courts must apply, for example, the "substantial evidence" or "arbitrary and capricious" standards in the APA. On the other, critics suggest there is something unseemly or inappropriate when Congress wades into management of judicial doctrine.[133]

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127. *See* Chevron U.S.A., Inc. v. Nat'l Def. Res. Council, 467 U.S. 837, 845 (1984).

128. 533 U.S. 218, 237 (2001).

129. *See* Merrill & Hickman, *supra* note 104.

130. *See* 5 U.S.C. § 706 (2006) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . .").

131. *But see* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

132. *See generally* Ronald Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 9–14, 19–22 (1985); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

133. *Compare* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMM. 191 (2001) (contending that Congress has no constitutional

In several sections, Dodd-Frank expressly addresses judicial deference rules, purporting to tell the courts how to apply their existing deference doctrines in the context of Dodd-Frank agencies.

(1) Title VII, Subtitle A, deals with CFTC and SEC regulation of Over-the-Counter Swaps Markets.[134] The Statute imposes various consultation obligations on each agency, but it also outlines a procedure to deal with disagreements.[135] If either the SEC or CFTC determines that a final rule or order of the other Commission conflicts with the relevant part of the Statute, that Commission may sue in the D.C. Circuit.[136] The Statute requires that the D.C. Circuit "give deference to the views of neither Commission."[137] Rather, the court shall determine whether the agency judgment is in conflict with the Statute.[138] Similarly, the agencies share authority for categorization of "novel derivative products." Here too, either the CFTC or the SEC may petition the D.C. Circuit for review of a final order of the other Commission.[139] The court "shall give no deference to, or presumption in favor of, the views of either Commission."[140]

(2) Because the Bureau's rulemaking authority could be understood to overlap with the jurisdiction of other agencies, the Act goes to some length to clarify the relative priority of Bureau judgments. Such provisions are discussed elsewhere in the draft, but one such provision relies on judicial deference doctrines to accomplish this task. The Act requires that:

> [T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, or interpret, or administer the provisions of such Federal consumer laws.[141]

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authority to tell federal courts how to decide cases), *with* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000) (arguing that the "prudential" nature of *stare decisis* allows Congress to permissibly, for prospective legislation, direct the Court to decide constitutional or statutory interpretation issues without regard to prior precedent).

134. Dodd-Frank Wall Act, Pub. L. No. 111-203, § 712(a)(1)–(2), 124 Stat. 1380, 1641 (2010) (codified at 15 U.S.C. § 8302(a)(1)–(2) (Supp. IV 2011)).

135. *See id.* § 712(c) (codified at 15 U.S.C. § 8302(c)).

136. § 712(c)(1) (codified at 15 U.S.C. § 8302(c)(1)).

137. § 712(c)(2) (codified at 15 U.S.C. § 8302(c)(2)).

138. *See* § 712(c)(1)(A)–(B) (codified at 15 U.S.C. § 8302(c)(1)(A)–(B)) (providing that the test is whether an agency judgment is in conflict with subsection (a) or (b), as applicable).

139. § 719(b)(1) (codified at 15 U.S.C. § 8307(b)(1)).

140. § 719(b)(3) (codified at 15 U.S.C. § 8307(b)(3)).

141. § 1022(b)(4)(B) (codified at 12 U.S.C. § 5512(b)(4)(B)).

In cases involving conflicting judgments by multiple agencies working in the same policy domain, courts must often make a judgment about which agencies, if any, should get deference for their views. This inquiry is highly contextualized, turning on agency expertise, statutory structure, implied congressional intent, and the like. One possibility is that neither agency's views warrant deference when both have partial responsibility in a given statutory domain. Another is that there is implicitly a primary agency that a court should seek to identify and then defer to the primary agency's views. One finds strands of both views in case law. The above provision seeks to short circuit that inquiry, providing a clear statutory answer: when the Bureau is one of several agencies whose views could be given judicial deference, the courts should defer to the Bureau—pretending that the Bureau were the sole agency operating in the field, rather than one of many.

(3) Subtitle D of Title X deals with the relationship between federal and state law. The Act requires that when reviewing a determination made by the Comptroller regarding preemption of state law, a court must "assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and the other factors which the court finds persuasive and relevant to its decision."[142] This provision purports to structure and guide the deference that a court would or would not otherwise grant to agencies making judgments pertaining to preemption, an especially unsettled area of administrative law.

(4) Section 1061 addresses transfer of functions from other agencies to the Bureau. To address the residual authority that the Act does not modify, the Act adds a deference clause:

> No provision of this title shall be construed as altering, limiting, expanding, or otherwise affecting the deference that a court affords to the—
>
> (i) Federal Trade Commission in making determinations regarding the meaning or interpretation of any provision of the Federal Trade Commission Act, or of any other Federal law for which the Commission has authority to prescribe rules; or
>
> (ii) Bureau in making determinations regarding the meaning or interpretation of any provision of a Federal consumer financial law (other than any law described in clause (i)).143

142. § 1044(b)(5)(A) (codified at 12 U.S.C. § 25b(b)(5)(A)).
143. § 1061(b)(5)(E) (codified at 12 U.S.C. § 5581(b)(5)(E)).

Because the Statute modifies so much of the existing regulatory framework, there is an obvious risk that the courts might interpret the Statute as modifying the requisite deference to be given to existing agency judgments. The same idea seems to underlie § 104: "No provision of this title may be construed as altering, limiting, or otherwise affecting the deference that a court affords . . . ." A handful of other provisions echo the language used in the above examples but add nothing analytically. A preliminary search of the U.S. Code returns only forty parts of the Code in which the term deference is used at all, and the vast majority of these are not really on point. These efforts to modify judicial deference doctrine via statute,[144] are not without potential pitfalls, however.

a. Legality

Congressional authority to mandate doctrinal rules for judicial review has been prominently analyzed in the context of Thayerian deference to legislative judgments of constitutionality.[145] The Necessary and Proper Clause gives Congress the power to enact legislation for carrying into execution the judicial power, while Article III, Section Two, Clause Two gives the Supreme Court jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[146] There is robust literature on the precise powers these clauses provide to Congress.[147] Yet, short of a congressional attempt to direct the outcome of a specific case, the Constitution clearly provides Congress with some authority to regulate judicial review of agency statutory interpretation.[148] Enabling legislation

144. *See* Garrett, *supra* note 125.

145. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For more recent discussions, see Thomas C. Grey, *Thayer's Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993); Stephen B. Presser, *On Tushnet the Burkean and in Defense of Nostalgia*, 88 NW. U. L. REV. 42 (1993); Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993).

146. U.S. CONST. art. III, § 2, cl. 2.

147. *Compare* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (exploring, dialectically, the constitutional and normative limits of Congress' power vis-à-vis the judiciary), *with* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 907 (1982) (analyzing the "internal" and "external" constraints on Congress' power under the Exceptions Clause).

148. *Compare* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2086 (2002) (challenging the assumption that the judiciary is the proper branch to prescribe rules of statutory interpretation, and concluding that Congress can and

establishes quorum rules for the Supreme Court and lower courts, and codifies rules of evidence and procedure for the federal courts. Recent legislation has even precluded specific interpretations of statutes in live litigation, albeit with a general interpretive directive.[149] So long as the regulation does not undermine the "essential functions" of the Judiciary, Article III would seem not to preclude it.[150] Congress generally may not lawfully direct the outcome of a specific case,[151] but it is not controversial that Congress may mandate the use of certain rules of evidence and procedure.[152] Others have argued that Congress could and should craft general statutory requirements for statutory interpretation by courts.[153] The directive deference rules are a parallel idea. With respect to judicial review of agency actions, Congress may preclude agency actions from judicial review altogether[154] (at least to the extent that the challenge does not raise constitutional claims),[155] restrict the venue and timing of judicial review of agency action, and specify the legal standard by which courts will review agency action. So long as *Chevron* is not a constitutional doctrine, Congress remains free to modify it, and that is precisely what Dodd-Frank seeks to accomplish.

b. Judicial Implementation

Setting aside any concerns about legality, there is an additional question about how such provisions will be interpreted in the courts. Although the most likely outcome may simply be that the courts do as the Statue indicates, several pockets of existing administrative law cases give some pause. First, courts and commentary agree that the legislature has the authority to preclude judicial review of many agency decisions—subject to Due Process requirements. Nevertheless, courts have often carved out an exception for challenges to an entire decisionmaking scheme rather than a

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should exercise this power), *with* Linda Jellum, *Which Is To Be Master?*, 56 UCLA L. REV. 837 (2009) (arguing that Congress' attempts to control the process of interpretation to promote specific policy objectives are fraught with a host of undesirable and impermissible problems).

149. *See, e.g.*, Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 108-108, § 127, 117 Stat. 1241, 1263 (2004).

150. Hart, *supra* note 147.

151. *See* United States v. Klein, 80 U.S. 128 (1872).

152. *See* FED. R. EVID.; FED R. CIV. P.

153. *See* Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2102–03 (2002).

154. 5 U.S.C. § 704 (2006).

155. *See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974); Czerkies v. Dep't of Labor, 73 F.3d 1435 (7th Cir. 1995) (en banc).

specific decision[156] and have often construed limits on court jurisdiction narrowly.[157] Second, recall that some critics of *Chevron* have argued it is inconsistent with the APA dictate that courts decide all matters of law. One response to this concern is that deference doctrines are part of the "law" that judges are to decide and apply. The result could be that courts defer to agencies on some legal questions, notwithstanding a seemingly clear directive to do otherwise. The point is not that one side of this debate is right or wrong, only that judicial behavior does not always comport with seemingly clear statutory directives about interpretive practice.

c. Desirability

Suppose that implementation were costless and that courts followed whatever deference directive the legislature wrote into statutes. No doubt one's view about deference directives turns, in part, on prior views about relative institutional competence of courts and legislatures and one's characterization of the underlying judgment. If deference doctrines were merely a statement of underlying policy preference, then it is hard to see why judgments by courts would be either more democratically legitimate or better in any instrumental sense. If Congress likes strawberry ice cream better than vanilla, why are courts better situated to articulate that taste?

A better characterization is that deference is really about how much decisionmaking authority and discretion to allocate to one political institution instead of another. Deference doctrines are instrumental in a means–ends sense. In application, a legislative deference directive will tend to be more like a rule, whereas a judicial deference doctrine will tend to be more like a standard. Of course, this is not quite right because a judicial deference doctrine could be formulated as a rule and the legislative

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156. *See Czerkies*, 73 F.3d at 1435; *see also* 5 U.S.C. § 702 (2006) (waiving the federal government's sovereign immunity from actions seeking judicial review of federal administrative decisions except with respect to actions for "money damages"); Georgia v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003) (upholding the Board of Immigration Appeals' "use of the streamlining procedure in a case whose facts presented no substantial issue of law and no basis for granting asylum" albeit "without explicitly deciding the issue" of reviewability); Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670, 673 (7th Cir. 1992); Barmet Aluminum Corp. v. Reilly, 927 F.2d 289, 293 (6th Cir. 1991) (finding a statutory bar to pre-enforcement constitutional challenges in an environmental protection statute); Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988); Higgins v. Kelley, 824 F.2d 690 (8th Cir. 1987) (per curiam) (finding that a veterans' benefits law did preclude constitutional challenges). *See generally* Ronald Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011).

157. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895–97 (1984); *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010).

deference directive formulated as a standard. Yet, to the extent that the latter is inevitable ex ante and the former inevitable ex post, the two alternative ways of implementing a deference regime correspond somewhat to the typical rules–versus–standards debates.[158] The ex ante directive produces more certainty going forward, but the ex post doctrine allows for more integration of changing circumstances. The ex ante rule economizes on decision costs in the future, but risks higher error costs if facts on the ground change rapidly. Since the rules–versus–standards debate generates no clear statement that a rule is better than a standard or vice versa, it would be surprising if there was a clear winner in the congress–versus–courts deference analysis either. What is intriguing, however, is the level of granularity at which Dodd-Frank deference directives seek to utilize and to intervene in existing administrative law doctrine.

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In sum, Dodd-Frank makes extensive use of the web-of-authority model, but also offers a series of innovative solutions to problems associated with similar statutory schemes. These provisions both incorporate and make adjustments to existing administrative law doctrine as part of the more general statutory scheme. Dodd-Frank is an instance of the melding of legislation with regulation, the crafting of law that blends administrative law doctrine, statutory interpretation, and legislative drafting. In short, it is a new administrative process.

III. DEADLINES

Dodd-Frank generated significant new obligations on the agencies and it imposed roughly four hundred total rulemaking requirements. Notably, nearly three-fourths of these also contained specific deadlines for completion.[159] Approximately three-fourths of the deadlines that had been reached by the end of 2011 were not met by the agencies.[160] That is, by 2012, two hundred Dodd-Frank rulemaking requirements had passed and 149 had been missed. This state of affairs raises two sets of questions. First, how should we understand the extensive legislative use of deadlines to structure bureaucratic process? Second, what is the import of missing

158. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

159. Davis Polk, *Dodd-Frank Progress Report* (Jan. 2012), *available at* http://www.davispolk.com/files/Publication/0070db24-e562-4666-832c-03ad96defd42/Presentation/PublicationAttachment/b1836732-9b89-46be-a9e5-07c77a08d62a/Jan2012_Dodd.Frank.Progress.Report.pdf.

160. *Id.*

seventy-five percent of these statutory deadlines?[161]

Statutory deadlines are scattered throughout administrative law, but the scope and scale of their use in Dodd-Frank is unheard of. In 1998 and 1999, there were only eighty-nine and sixty deadlines respectively.[162] Dodd-Frank increases the number of annual deadlines among all other agencies by at least one hundred percent, and maybe as much as four hundred percent depending on one's choice of the baseline. Even if one takes a conservative view, Dodd-Frank used more deadlines than any other single statute or even area of policy.[163] Nor does Dodd-Frank fit the recalcitrant agency model, because the rulemaking requirements are new and many of the institutional structures fresh. At first glance, the use of so many deadlines—set at intervals many critics have perceived to be unreasonably quick—seems an odd amount of micromanagement for such a massive bureaucratic overhaul.

A. Background

Virtually all modern models of the interaction between Congress and the bureaucracy rely on a principal–agent model either implicitly or explicitly. Lacking the expertise and time to promulgate regulatory policy directly, Congress must delegate authority to a bureaucratic agent—in this case several bureaucratic agents. All potential agents exhibit some degree of

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161. A pocket of literature in administrative law addresses agency deadlines. Gersen & O'Connell, *supra* note 5; Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467 (1987); Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987); Eric Biber, *The Importance of Resource Allocation in Administrative Law: A Case Study of Judicial Review of Agency Inaction Under the Administrative Procedure Act*, 60 ADMIN. L. REV. 1, 28–36 (2008); Gregory L. Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U. DAYTON. L. REV. 71 (1979); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 72 (1997). The study of deadlines is related to the study of statutory hammers. *See, e.g.*, M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149 (1995); George A. Bermann, *Administrative Delay and its Control*, 30 AM. J. COMP. L. 473 (1982). The discussion herein draws extensively on my prior work with Anne Joseph O'Connell.

162. Gersen & O'Connell, *supra* note 5.

163. Statutorily specified deadlines are found throughout much modern environmental legislation. *See generally* ENVTL. ENERGY STUDY INST. & ENVTL. L. INST., STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT (1985). *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-669, CLEAN AIR ACT: EPA SHOULD IMPROVE THE MANAGEMENT OF ITS AIR TOXICS PROGRAM (2006) (Clean Air Act); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-613, CLEAN AIR ACT: EPA HAS COMPLETED MOST OF THE ACTIONS REQUIRED BY THE 1990 AMENDMENTS, BUT MANY WERE COMPLETED LATE (2005).

preference divergence with the principal—that is, they have policy views that differ from those of the legislature—and have better information or expertise than does the principal. As a result, the legislature or any principal may adopt a mix of substantive and procedural restrictions on bureaucratic discretion to manage the problem. Substantive restrictions on agency policy might derive from a narrow statutory mandate, from a low level of discretion (equivalently a very high level of statutory detail), express prohibition on certain policies, or a narrow bound of agency jurisdiction or authority. Yet, some degree of discretion is inevitable if the principal wants to take advantage of agency expertise.

Given the level of substantive constraint, Congress must select from a menu of familiar procedural restrictions. An agency's organic statute might require that specific decisionmaking procedures be utilized,[164] as Dodd-Frank does. Alternatively, the organic statute might trigger requirements of the APA, requiring formal rulemaking for certain types of decisions,[165] formal adjudication,[166] or informal notice-and-comment rulemaking, again, as Dodd-Frank does. Or, the organic statute might merely mandate that specifically identified actors within the bureaucracy consider evidence, consult with other institutions, and make ultimate policy decisions,[167] a by-now-familiar feature of the statute.

Statutory deadlines might be understood to fit into this framework in one of three ways. First, there could simply be a tradeoff between substantive and temporal preferences of legislators. Consider two legislators bargaining over a potential statute. One legislator prefers strong regulation immediately implemented. The second prefers no regulation ever implemented. Under plausible assumptions, the first legislator might agree to delay implementation in exchange for more regulatory authority or compromise to weaker regulatory authority with quicker implementation. Any enacted legislation can be understood as an implicit compromise along substance, process, and timing. Because many legislators in favor of new financial regulation no doubt recognized that administrative delay was a

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164. *See, e.g.*, National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

165. *See* United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

166. *Compare* City of W. Chicago v. Nuclear Regulatory Comm'n, 701 F.2d 632 (7th Cir. 1983) (finding that the Atomic Energy Act of 1954 only requires an "informal hearing" in which the Nuclear Regulatory Commission (NRC) only considers written materials), *with* Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1444–45 n.12 (D.C. Cir. 1984) (finding that the NRC could not bar the provision of a hearing prior to issuing licenses for nuclear power plants).

167. *See, e.g.*, *Fla. E. Coast Ry.*, 410 U.S. at 226–27 (construing §1(14)(a) of the Interstate Commerce Act to not require all the procedural requirements of § 556 formal adjudication).

genuine risk, one can certainly imagine a bargain across the timing and substance dimensions.

Second, statutory deadlines can be understood as one of the structure and process mechanisms used to manage the agency problem inherent in delegation. Suppose, for example, a principal is worried that given the politically controversial, not to mention challenging tasks, required to develop and implement the new financial regulatory structure, at least some of the agents may shirk. An agent can shirk either by enacting substantive regulations that are of low quality or by being too slow, holding the quality of the regulation constant. Because the agent has better information about the regulatory domain, monitoring the latter variety of shirking is quite challenging. Monitoring the former, however, is relatively easy. Simply set a deadline and then see if it is met. This does not solve the shirking problem, but if the two sorts of shirking are positively correlated, a missed deadline may be an effective way to identify other sorts of more important shirking by agencies.

Third, statutory deadlines can be understood as a way of managing the risk of legislative drift. Although for parsimony's sake, it is common to assume that the principal is a fixed institutional actor; in reality, even the median legislator changes over time. For an enacting legislative coalition, there are always at least two threats to a new statute. The first is bureaucratic drift—the risk that agencies implementing the statute will alter it or implement policy that is not quite what a fully informed principal would prefer. There is also, however, a corresponding threat of legislative drift. A future legislature might amend or repeal the statute. Decisions about the content, substantive restrictions, and procedural restrictions must reflect a balance between these two types of threats.

Statutory deadlines balance these risks in a distinct manner. When the agency is required to issue its rule during the current period Congress, the deadline guards against bureaucratic drift by ensuring that the enacting period Congress gets to see (and possibly object to or overrule) the final regulation. When a deadline comes due after the current period Congress, it increases the risk of legislative drift. The timing rule affects monitoring as well. By controlling the timing of agency action, deadlines allow legislators to ensure their presence (or absence) to respond to criticism and complaints by private parties.[168]

Consider a time period of frequent political turnover (high instability) during which Congress enacts legislation authorizing the regulation of some facet of the financial services industry. Setting a deadline for the issuance of

168. Mathew D. McCubbins & Thomas Schwartz, *Police Patrol Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POLIT. SCI. 165 (1984).

new SEC regulations prior to the next election may provide some greater degree of protection for the regulatory regime. The future legislature can always repeal or alter the program, but once regulations have been implemented, perhaps some form of status quo bias will make it marginally harder to eliminate them—especially during periods of divided government.[169] Conversely, when deadlines come due within a given electoral cycle—as many Dodd-Frank deadlines do—there is potential for the enacting coalition to exert greater control.

B. Remedies

Part of the puzzle with respect to statutory deadlines is what exactly the remedy is for breach.[170] Although statutory deadlines are common, statutory penalty clauses are rare. Consider three variants of penalties. First, Congress might respond to a missed deadline with either oversight hearings or budgetary sanctions. The deadline in this case is merely a signal about underlying agency activities; the corresponding remedy is tighter monitoring or a decrease in funding. The problem with the appropriations remedy, however, is twofold. First, for most of the agencies involved in Dodd-Frank, the promulgation of new rules is a comparatively minor part of their overall workload. Thus, while it is possible to sanction an agency with decreased resources, it is a crude sanction. Either it will reduce the agency's ability to do other important tasks or the agency may be able to reallocate resources because money is fungible.[171] Moreover, with respect to the CFPB, the adopted funding mechanism has entirely eliminated Congress's ability to sanction for missed deadlines via the appropriations process.

Second, a missed deadline might simply generate a *soft* penalty. A soft penalty is one that does not affect the agency's budget, authority, or legal status directly, but is nevertheless politically costly because the agency loses political legitimacy or reputation. Without wading into deep metaphysical waters pertaining to why citizens obey the law, for administrative institutions exercising significant regulatory authority over major financial institutions, a general perception of competence is important. Just as legislators might use a series of missed deadlines to signal something about

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169. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1999).

170. Missed deadlines may also be attributable to underfunding of the agency. *See* Joel Seligman, *Key Implications of the Dodd-Frank Act for Independent Regulatory Agencies*, 89 WASH. U. L. REV. 1, 24–25 (2011).

171. This is not quite true in the context of agency budgeting and spending. The ability of agencies to move funds across programs within a budget line or across budget lines is not entirely discretionary. Nor is it entirely precluded, however.

underlying agency competence, so too might citizens and firms make a similar inference. The Dodd-Frank deadline program presents some difficulties in this regard. If seventy-five percent of the deadlines have been missed, this could be taken to signal either bureaucratic incompetence or legislative incompetence—the enactment of a deadline schedule that is simply not feasible to meet without sacrificing quality.

Third, absent a congressionally imposed penalty (either ex ante or ex post), the courts will be the most common source of a remedy. The interaction between courts and statutory deadlines in administrative law has been somewhat unpredictable over the years. Until relatively recently, there was an active debate about whether the failure to promulgate a new rule by a statutory deadline eliminated any agency authority to promulgate the rule after the deadline had passed. In several cases, petitioners argued that the agency's authority was itself temporally limited or, put differently, contingent on the completion of the statutory assignment within the statutory timeline.[172]

For example, in *Barnhart v. Peabody Coal Co.*[173] the parties challenged the Commissioner of Social Security's untimely assignment of beneficiaries to coal companies for the payment of health insurance premiums under the Coal Industry Retiree Health Benefit Act of 1992. The Court acknowledged that the Commissioner "had no discretion to choose to leave assignments until after the prescribed date, and that the assignments in issue here represent a default on a statutory duty, though it may well be a wholly blameless one."[174] Nevertheless, the Supreme Court upheld the Commissioner's action because the Coal Act does not explicitly provide for what would happen in such a case.[175] Quoting a prior Supreme Court opinion, the Court noted, "If a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[176] Similarly, *Brock v. Pierce County*[177] involved action beyond a deadline by the Secretary of Labor. The Court was unwilling "to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency

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172. Many state administrative procedure acts put a firm, and apparently enforceable, time limit on completion of a rulemaking proceeding. Ronald Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 855, 866–71 (2011).

173. 537 U.S. 149 (2003).

174. *Id.* at 157.

175. *Id.* at 161–62.

176. *Id*. at 159 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)).

177. 476 U.S. 253 (1986).

action, especially when important public rights are at stake."[178] As the Court said, "When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act."[179]

Following the Supreme Court, lower courts have generally upheld binding agency policies enacted after a statutory deadline has passed, so long as the statute does not spell out explicit consequences for late action.[180] The natural struggle in the lower courts, then, is determining whether the statute provides such consequences.[181] Other statutes, like Resource Conservation and Recovery Act, do contain remedies in the form of "hammer" provisions that implement "a congressionally specified regulatory result" if the deadlines are not met.[182] These provisions often impose "harsh default prohibitions" to motivate quicker agency action.[183] Yet, without a clearly specified hammer, it remains unlikely most courts will impose one.

Even though the failure to meet a statutory deadline does not result in a loss of all authority, it is not necessarily the case that the failure is legally irrelevant. There is, at least, a colorable legal argument if the agency missed a mandatory deadline without justification, the late action would qualify as "an abuse of discretion" under § 706(2)(A) of the APA. For example, *International Union v. Chao*[184] held a late agency decision was not

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178. *Id.* at 260.

179. *Id.*

180. *See, e.g.*, Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 112 (8th Cir. 1997) ("Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action."); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1304 (D.C. Cir. 1991) ("We are especially reluctant to so curb EPA's substantive authority [to add sites to the National Priority Lists] in light of Supreme Court decisions declining to restrict agencies' powers when Congress has not indicated any intent to do so and has crafted less drastic remedies for the agency's failure to act.").

181. *See, e.g.*, Dixie Fuel Co. v. Comm'r of Soc. Sec., 171 F.3d 1052 (6th Cir. 1999), *rev'd* Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003). Late agency action may raise additional concerns if the agency wants its action to apply retroactively. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 216, 224–25 (1988) (Scalia, J., concurring) ("If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule despite the limitation of the APA.").

182. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 15–16 (4th ed. 2006); Magill, *supra* note 161 at 153–57; Richard C. Fortuna, *The Birth of the Hammer*, ENVTL. FORUM, 18, 20 (1990). Such provisions are more popular in divided government. *Cf. id.*

183. Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 883 (2006); *see also* Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 8 n.40 (1994).

184. 361 F.3d 249 (3d Cir. 2004).

arbitrary and capricious because, in part, the deadline was aspirational, not mandatory.[185] Nevertheless, the argument was not rejected out of hand.

Perhaps the most significant implication of all the statutory deadlines is the possible exemption of Dodd-Frank rulemakings from the ordinary requirements of the APA. Virtually all of the Dodd-Frank rules to which deadlines apply are legislative rules, for which notice-and-comment is the default procedural requirement. The APA, however, excepts notice-and-comment requirements for "good cause." Historically, agencies faced with deadlines often contend that deadlines make "notice and public procedure thereon . . . impracticable, unnecessary, or contrary to the public interest."[186] This is one of the issues raised in a recent Congressional Research Service report on the Dodd-Frank regulations timetable.[187] Thus, while the deadlines spur agency action forward, they may also preclude meaningful public participation in the rulemaking process.

Similar issues arose a generation ago in the context of the Clean Air Act.[188] In 1978, after receiving plans from states designating areas as compliant and noncompliant with national ambient air quality standards for various air pollutants, the EPA Administrator promulgated a rule without prior comment, modifying those plans and imposing various obligations under the Act. Five courts of appeals ruled that the Administrator did not have the requisite "good cause" to ignore the APA's notice-and-comment provisions;[189] two courts of appeals sustained the Administrator's choice of procedure.[190] The Supreme Court declined to decide the circuit split.[191] The five courts of appeals, in permitting challenges to the Administrator's actions, emphasized that the Administrator had sufficient time to provide notice on the proposals and to take comment before promulgating a final rule.[192] Of particular relevance

185. *Id.* at 253–54; *see also* Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991 (D.C. Cir. 1996).

186. 5 U.S.C. § 553(b)(3)(B) (2006).

187. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU (2010).

188. *See* LUBBERS, *supra* note 182, at 111; Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 125–29 (1984).

189. U.S. Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981); W. Oil & Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir. 1980); New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979); United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979); *see also* Jordan, *supra* note 188, at 127–28.

190. Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980); U.S. Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979).

191. *See* U.S. Steel Corp. v. EPA, 444 U.S. 1035 (1980) (denying certiorari).

192. As the Third Circuit explained,

to several courts was the fact that the agency published the final rule a month after the statutory deadline.[193] The Sixth and Seventh Circuits accepted the EPA Administrator's reliance on the "good cause" exemption, agreeing that the statutory deadline made prior notice-and-comment impractical. The Sixth Circuit noted that other circuits "appear to us to ignore the sense of urgency which characterized the Congressional debate preceding the passage of the Clean Air Act Amendments of 1977."[194] The Seventh Circuit held that "the 'good cause' exception may be utilized to comply with the rigors of a tight statutory schedule."[195] Unlike the other circuits, these two courts were therefore not troubled by the Agency's

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> We cannot, however, accept the Administrator's protestations that the statutory schedule precluded prior notice and comment. The Administrator received the Pennsylvania designations on December 5, 1977. As the Administrator informed this court, he modified state designations only when they were clearly incorrect. The Administrator should have been able to publish the Pennsylvania designations within ten days after December 5, 1977, offering them not as a final rule but as a proposed rule . . . . Under the circumstances here, we conclude that the period for comments established by the APA would have run by January 15, 1978. If the Administrator took about ninety days to review the comments, he could have issued a final rule on about April 15, 1978, instead of the March 3 date he achieved without notice and comments. The states would then have had until January 1, 1979, in which to draft their plans. Although this period would be about one month less than the time that the Administrator was able to give the states, the period should still have been adequate.

Sharon Steel Corp., 597 F.2d at 380 (footnotes omitted).

These courts emphasized that the Administrator gave no reason for "why it could not at least have published the . . . initial lists upon receipt and accepted comments during the time it was reviewing the lists." U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979). Such quick action "would have afforded petitioners some warning of the imminent designations and allowed them opportunity to influence the agency's action." *Id.*; *see also New Jersey*, 626 F.2d at 1047.

193. *U.S. Steel Corp.*, 595 F.2d at 213; *see also New Jersey*, 626 F.2d at 1043 n.3; *Sharon Steel Corp.*, 597 F.2d at 379 n.4. And they pointed to the agency's repeated remarks that the designations in the final rule were "preliminary" in the statute's regulatory scheme, suggesting the agency could have issued the designations as a proposed rule. *New Jersey*, 626 F.2d at 1041.

194. *Republic Steel Corp.*, 621 F.2d at 803. The Sixth Circuit did not find the issue close: "If the circumstances of this case do not justify employment of the good cause exception, we will be hard put to find any justification for its use." *Id.* *But cf.* Fla. Power & Light Co. v. United States, 673 F.2d 525 (D.C. Cir. 1982) (finding that the fifteen-day comment period was justified by statutory deadline).

195. U.S. Steel Corp. v. EPA, 605 F.2d 283, 287 (7th Cir. 1979). These two courts were therefore not troubled by the agency's provision of post-rule commenting. *Republic Steel Corp.*, 621 F.2d at 804 ("Under these circumstances, we think that the Administrator's solution of promulgating a schedule of non-attainment areas and subsequently receiving objections and comment, and thereafter effecting such changes as were required, was a reasonable approach consistent with the Administrative Procedures Act.").

provision of post-rule commenting.[196]

The old Clean Air Act cases pointedly illustrate precisely the bind for courts enforcing statutory deadlines. If the court upholds the agency action, it has essentially nullified the statutory deadline. If the court strikes down the agency action, it adds additional delay in the administrative process, an outcome manifestly inconsistent with the temporal scheme. Thus, the action most consistent with the statutory scheme is often to uphold the action, notwithstanding the legal awkwardness.[197] "Past experience has taught this court that remand means an additional two-year delay . . . ."[198] Doctrinally, there is no bright line rule on deadlines and good cause. As a result, most courts apply a multifactor analysis in assessing whether an agency can rely on a deadline to forgo traditional notice-and-comment procedures.[199] Good cause usually exists when the deadline is "very tight and where the statute is particularly complicated."[200] And, courts seem to be somewhat more accommodating when the action is "of limited scope or duration."[201] This hardly seems a fair characterization of most of the Dodd-Frank rules. This precise calculus seems likely to reappear in the context of Dodd-Frank, raising the specter of deadlines without remedies. In short, the regime is yet another example of the new administrative process.

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The deadline regime in Dodd-Frank provides something of a counterweight to the web-of-authority mechanisms. In the overlapping jurisdiction context, the statute carefully builds on judicial doctrine and

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196. *Republic Steel Corp.*, 621 F.2d at 804.

197. As the Seventh Circuit explained: "We have already noted the Congressional concern manifest in the Clean Air Act that national attainment be achieved as expeditiously as practicable. This concern was reflected in the desire that the due administration of the statutory scheme not be impeded by endless litigation over technical and procedural irregularities." *U.S. Steel Corp.*, 605 F.2d at 290.

198. *Republic Steel Corp.*, 621 F.2d at 804.

199. Most important, the mere existence of a deadline is not sufficient for establishing good cause. *See, e.g.*, Nat'l Res. Def. Council v. Abraham, 355 F.3d 179, 205–06 (2d Cir. 2004).

200. Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994). Courts have viewed forty-nine and sixty days as sufficiently "tight," but not twelve months, fourteen months, and eighteen months. Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 106–07 (D.D.C. 2006) (citing cases mostly from the courts of appeals).

201. LUBBERS, *supra* note 182, at 111. For example, interim rulemaking that precedes final rulemaking is more acceptable. Am. Transfer & Food Storage v. Interstate Commerce Comm'n, 719 F.2d 1283, 1294 (5th Cir. 1983).

adjusts it to serve underlying statutory purposes. In the context of statutory deadlines, Dodd-Frank is much less informative. Perhaps it will not prove consequential, but that remains to be seen as agency actions and failures to comply with statutory timetables are challenged in litigation.

CONCLUSION

The new administrative process presents a host of problems and puzzles for administrative law. Yet, it is equally true that financial reform statutes, perhaps more than any other administrative statute in recent memory, paint on a working canvass of existing administrative law. In some settings, the Statute acknowledges and incorporates judicial practice by reference. In other settings, the Statute seeks to direct and alter judicial practice. Whether the new administrative process endures, remains to be seen, but for the moment, it means a mismatch between many classroom discussions of administrative structures and the reality of new bureaucratic and regulatory form.