

ARTICLES

DUPLICATIVE DELEGATIONS

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INTRODUCTION

The United States Code is riddled with “duplicative delegations”—delegations in separate statutes or statutory provisions that may reasonably be construed as granting the same regulatory authority to different agencies. For example, the Food and Drug Administration’s (FDA’s) authority under the Food, Drug, and Cosmetic Act¹ duplicates the Department of Agriculture’s authority under the Meat Inspection Act.² The Environmental Protection Agency’s (EPA’s) authority under the Safe Drinking Water Act³ duplicates the FDA’s authority under its statute.⁴ The Department of Labor’s (DOL’s) authority under the Occupational Safety and Health Act⁵ duplicates the EPA’s authority under the Clean Air Act (CAA).⁶ And so on.

Duplicative delegations pervade our regulatory and legal systems. For a recent example of duplicative delegations that gained public attention, consider the reform of financial regulation. Before 2010, the Office of Thrift Supervision oversaw savings and loan associations, and the Office of the Comptroller of the Currency oversaw national banks. Because some financial products are issued by both banks and savings and loans, the two agencies had authority to oversee some of the same financial products.⁷ For decades, politicians had called for the consolidation of the agencies to eliminate inefficient duplication and streamline oversight.⁸ But it was not until after the 2008 financial crisis—when several major savings and loans

1. 21 U.S.C. §§ 301–399 (2006).

2. *Id.* §§ 601–695. For a discussion of the overlap between these two Acts, see generally Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61 (2000).

3. 42 U.S.C. §§ 300f–300j (2006).

4. *See* 21 U.S.C. § 321(f) (2006) (defining “food” broadly to include drink).

5. 29 U.S.C. §§ 651–678 (2006).

6. 42 U.S.C. §§ 7401–7671q (2006).

7. *See, e.g.*, SPGGC, LLC v. Blumenthal, 505 F.3d 183, 188 (2d Cir. 2007).

8. *See New Congress More Likely to Realign Banking Agencies*, BANKING POL’Y REP., Jan. 2, 1995, at 10.

collapsed⁹—that there were enough votes on Capitol Hill to eliminate the duplicative delegations between the two agencies. Thus, the 2010 financial reform legislation abolished the Office of Thrift Supervision and transferred many of its functions to the Office of the Comptroller of the Currency.¹⁰

Questions regarding some duplicative delegations have reached the Supreme Court. For example, both the EPA and the Atomic Energy Commission (AEC) asserted authority to regulate radioactive emissions from nuclear facilities under their respective authorizing statutes. To avoid duplicative and conflicting regulations, the White House's Office of Management and Budget (OMB) mediated an interagency agreement that left the AEC with sole authority to set emission limits for nuclear facilities.¹¹ However, because the EPA was seen as the more stringent regulator,¹² a public advocacy group sued the EPA, arguing that the agency was compelled to regulate nuclear emissions under the Clean Water Act.¹³ The case landed before the Supreme Court, which effectively endorsed the terms of the interagency agreement by narrowly interpreting the word *pollutant* in the EPA's authorizing statute to exclude pollutants from nuclear facilities.¹⁴

High profile cases aside, agencies must deal with duplicative delegations on a routine basis. As the regulatory system continues to grow in size and complexity, so too will the duplicative delegations. Although duplicative delegations pervade our legal and regulatory system, their causes and effects have gone largely unexamined. In this Article, I conceptualize and analyze the significant phenomenon that I call duplicative delegations. I look at real-world regulatory dynamics to determine how duplicative delegations arise, how they impact the design of legal and regulatory institutions, and how they affect the balance of powers among the branches of government.

This Article tells two stories about duplicative delegations. One is about the fight against interagency duplication. Here, I argue that because the costs of avoiding duplicative delegations *ex ante* are too great, Congress and the White House should rely on comparatively cheaper *ex post* institutions to screen out duplication among agencies. However, because these *ex post*

9. Binyamin Appelbaum, *Onetime Cop, Out of Business: Financial Bill Will Close Regulator of Fading Industry*, N.Y. TIMES, July 14, 2010, at B1.

10. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 312, 124 Stat. 1376, 1521-23 (2010).

11. See, e.g., Richard Goldsmith, *Nuclear Power Meets the 101st Congress, a "One-Act" Comedy: Regulation of Nuclear Regulatory Commission Licensees Under the Clean Air Act*, 12 VA. ENVTL. L.J. 103, 105-06 (1992) (describing how this regulation progressed).

12. See *id.* at 105 (pointing to the Environmental Protection Agency's (EPA's) "vigor").

13. *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976).

14. *Id.* at 9-10, 23-25.

institutions also have their costs, it is efficient to let some duplication persist. The other story is about balance of powers. Here, I show that duplicative delegations afford the Executive significantly more discretion than it usually has to determine which agencies perform particular tasks. Descriptively, the President and agencies routinely divvy up tasks and set jurisdictional metes and bounds among agencies with duplicative delegations. Normatively I argue that, because the Executive is better than the Judiciary at allocating tasks among agencies, courts should defer to executive arrangements reconciling duplicative delegations.

Both of these stories begin with an understanding of the causes of duplicative delegations. In the few instances in which scholars have puzzled over cases that involve the delegation of the same authority to more than one agency, they have sometimes assumed that Congress created the duplication to spur agency competition.¹⁵ However, I show that duplicative delegations are largely either unintentional or incidental to other legislative aims. Duplicative delegations typically emerge as the by-product of the political, ad hoc process through which agencies are designed. Congress's reliance on blunt drafting tools such as savings clauses and broad, ambiguous delegations also produces duplicative delegations.

Although duplicative delegations are indeed largely incidental and unintentional creations, they are pervasive and critically important to the design of the regulatory system. If all agencies availed themselves of the duplicative authority delegated to them, ceaseless duplication and interagency conflict would plague the regulatory system. Duplication would drain government coffers, interagency conflict would undermine coherent regulatory goals, and overlapping oversight would burden regulated entities. To avoid such a scenario, the Legislative and Executive Branches—and to a lesser extent the Judiciary—have crafted what I call “antiduplication institutions” designed to screen out interagency duplication and conflict. On the legislative side, these institutions include statutory commands that agencies must consult with each other before acting, entire statutory schemes that require agencies to consider whether their proposed regulatory actions duplicate or conflict with other agencies' actions, public hearings on duplication, and agency consolidation. On the executive side, antiduplication institutions include centralized review of proposed agency regulations, centralized resolution of interagency jurisdictional disputes, interagency bodies that allocate tasks among agencies, the designation of a “lead agency” in regulatory matters involving multiple agencies, and White House czars who coordinate agencies' actions. Courts also screen for duplicative or conflicting actions when they

15. See discussion *infra* Part I.B.

review agency decisions. Although these institutions have been discussed separately in legal literature, they have not previously been recognized for their common antiduplication qualities. By grouping these institutions together in this way, I show how they collectively screen out duplication and shape agency behavior by providing strong incentives for agencies to coordinate and collaborate and thus avoid duplication and conflict.

Indeed, duplicative delegations and antiduplication institutions have a significant impact on agency behavior. If agencies with duplicative delegations are to avoid duplication, they cannot simply regulate as they see fit within the reasonable boundaries of their delegated jurisdiction. Rather, they must coordinate with other agencies to ensure that their actions are neither duplicative nor conflicting. I show that the primary way that agencies with duplicative delegations avoid duplication is by abdicating their authority to perform tasks that other agencies already perform or are better suited to perform. Agencies abdicate either by narrowly interpreting the scope of their jurisdiction or by deciding not to exercise authority under their discretion. An agency may unilaterally abdicate a regulatory task to another agency. Or, abdication may take place as part of a larger interagency negotiating process during which agencies divide tasks among themselves.

Although abdication is a prevalent agency practice, duplication and conflict do still persist. One significant source of persistent duplication comes from what I call “blurred boundary disputes.” These disputes arise when previously clear jurisdictional dividing lines between agencies are unsettled by changes in the regulated environment or by the introduction of new agencies or new regulatory schemes. As agencies jockey for position in the shifting jurisdictional spaces, multiple agencies with duplicative delegations sometimes stake claims to the same tasks. However, given the top-down pressure on agencies to avoid duplication and conflict, blurred boundary disputes are unlikely to drag on for too long before new expectations about which agencies should perform which tasks are adopted.

After describing the causes and effects of duplicative delegations, I discuss their implications for fighting interagency duplication and for balance of powers. I first address the commentary that calls for Congress and the White House to do significantly more to reduce duplication among agencies.¹⁶ I show that the costs of preventing duplicative delegations *ex ante* are prohibitive and that *ex post* antiduplication institutions—while comparatively cheaper—also have significant costs. Ultimately, I argue

16. See, e.g., Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1470–75 (2009) (arguing that the Executive in particular should reduce duplicative delegations).

that the proper course of action for Congress and the Executive is one close to the status quo. Because it is too costly for Congress to avoid drafting duplicative delegations *ex ante*, Congress should leave it to existing *ex post* institutions to screen out duplication as best they can. I then respond to the literature that stresses the benefits of duplication from healthy agency competition and bureaucratic redundancies that guard against regulatory failure.¹⁷ Some scholars embracing this view argue against antiduplication efforts because such efforts squelch these benefits.¹⁸ However, I show that competition and redundancy among agencies with duplicative delegations are generally not cost-effective, and thus there is little reason for Congress and the White House to reform their antiduplication efforts to focus more on fostering these beneficial forms of duplication.

Next, I analyze duplicative delegations from a constitutional separation of powers perspective. When Congress delegates to a single agency, the President must act through that particular agency.¹⁹ By contrast, when Congress delegates directly to the President, the President has maximum discretion to assign decisionmaking authority within the Executive because, under the President's subdelegation power,²⁰ the President may subdelegate to the agency of his choosing. There are significant benefits to according the President maximum discretion to empower agencies as he sees fit, but there are significant costs too—in particular, the risks of arbitrary decisionmaking and abuse of power. As it turns out, duplicative delegations provide the Executive a level of discretion to allocate responsibilities among agencies that is less than the discretion accorded through delegation to the President but greater than the discretion accorded when Congress clearly names a specific agency to act. With duplicative delegations, the Executive has discretion to select which agency should perform which tasks. But that discretion is limited to the few agencies with duplicative delegations and to the set of tasks covered by those delegations. This intermediate level of discretion captures some of the key benefits of delegating directly to the President but with fewer of the costs. Indeed, although duplicative delegations are largely unintentional or incidental creations, I suggest that,

17. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324 (2006); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006) (arguing that delegating the same function to two agencies may benefit both).

18. See, e.g., Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 710–12 (2006). See generally Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2007) (explaining how the Executive power fits into this framework).

19. See *infra* notes 276–77 and accompanying text.

20. 3 U.S.C. §§ 301–303 (2006).

in some regulatory contexts, they are a happy accident because this intermediate level of discretion is beneficial under some conditions.

Finally, I consider how courts should reconcile duplicative delegations. Because of the Executive's comparative advantage at allocating tasks among agencies according to their expertise and policymaking interests, I propose an interpretive default rule under which courts would defer to executive arrangements reconciling duplicative delegations. As a constitutional separation of powers matter, I show that the default rule is not constitutionally problematic and is consistent with precedent on executive powers. As a doctrinal matter, whether agencies' positions will warrant *Chevron* deference or a lesser form of deference will depend on context-specific factors.

This Article proceeds as follows. Part I sharpens the definition of duplicative delegations and then discusses the root causes of duplicative delegations. Part II lays out the antiduplication institutions that the three branches have put in place to prevent duplication and conflict. It then discusses how duplicative delegations lead to agency abdication and blurred boundary disputes. Part III discusses implications. Part IV concludes.

I. THE DEFINITION AND CAUSES OF DUPLICATIVE DELEGATIONS

A. *Defining Duplicative Delegations*

Duplicative delegations are delegations in separate statutes or statutory provisions that may reasonably be construed as granting the same regulatory authority to different agencies. In this section, I sharpen this definition by showing how duplicative delegations arise through any combination of broad and narrow delegations. I then clarify the scope of duplicative delegations by distinguishing them from less problematic or better understood statutory arrangements that direct multiple agencies to address the same regulatory problem.

Some duplicative delegations arise because of overlap created between two broad delegations to two different agencies. For example, the CAA gives the EPA broad authority to regulate emissions of toxins into the environment,²¹ and the Occupational Safety and Health Act gives the DOL broad authority to regulate the use of toxins in workplaces.²² Under the

21. 42 U.S.C. §§ 7401–7671q (2006). For analyses of the Clean Air Act, see generally Thomas O. McGarity, *The Clean Air Act at a Crossroads: Statutory Interpretation and Longstanding Administrative Practice in the Shadow of the Delegation Doctrine*, 9 N.Y.U. ENVTL. L.J. 1 (2000), and Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999).

22. 29 U.S.C. §§ 651–678 (2006). For analyses of this Act, see generally Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L.

two broad delegations, both agencies have authority to regulate the use of the same toxins by some of the same regulated entities. Other duplicative delegations arise because a broad delegation to one agency may reasonably be construed as encompassing the authority granted to another agency in a narrow delegation. For example, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has authority under the Federal Alcohol Administration Act to regulate the labeling of alcoholic beverages,²³ while the FDA has broad authority under the Food, Drug, and Cosmetic Act to regulate all food and beverage labeling.²⁴ The latter power includes the former—thus both agencies have the statutory authority to regulate the labeling of alcoholic beverages. Duplicative delegations also occur even when both agencies have relatively specific delegations—mostly because of complexities in the regulated environment. For example, the EPA has authority under the Toxic Substances Control Act to regulate new genetically modified microorganisms,²⁵ while the United States Department of Agriculture (USDA) has authority under the Plant Protection Act to regulate “plant pests.”²⁶ However, some new microorganisms are also plant pests.²⁷ Thus, both agencies have authority to regulate some of the same microorganisms.

In all of these examples above, the duplicative delegations emerged in separate statutes. Duplicative delegations may also arise from separate provisions in the same statute, though. For example, § 402 of the Clean Water Act authorizes the EPA to permit discharges of pollutants other than dredged or fill materials into waterways,²⁸ while § 404 of the Clean Water Act authorizes the Army Corps of Engineers to permit the discharge of dredged or fill materials into waterways.²⁹ However, because it is unclear in the statute whether “fill materials” include solid waste, either agency

REV. 587 (1996) (analyzing attempts to improve the Occupational Safety and Health Act’s effectiveness), and Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (2008) (discussing whether the grants of broad power to the Occupational Safety and Health Administration (OSHA) violate the nondelegation doctrine).

23. 27 U.S.C. § 215 (2006).

24. 21 U.S.C. § 343 (2006). For an analysis of this Act, see generally Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Structures)*, 93 CORNELL L. REV. 901 (2008) (examining the methods by which the Food and Drug Administration (FDA) exercises its powers).

25. 15 U.S.C. § 2602, §§ 2601–2629 (2006).

26. 7 U.S.C. § 7702(14), §§ 7701–7786 (2006).

27. See 7 C.F.R. §§ 340.1–340.2 (2010) (listing taxonomical groups of microorganisms that the EPA may regulate as plant pests).

28. 33 U.S.C. § 1342(a) (2006).

29. *Id.* §§ 1344(a), (d).

could reasonably claim authority to permit the discharge of solid waste.³⁰

Under my definition, duplicative delegations are distinct from several similar but less problematic or better understood jurisdictional arrangements. Duplicative delegations grant the same authority to more than one agency without providing clear instructions about the division of responsibility among the agencies. By contrast, with joint delegations Congress grants the same authority to multiple agencies but clearly directs those agencies to work together and share responsibility for a jointly prepared agency action.³¹ Joint jurisdictional arrangements are less problematic than duplicative delegations because there is less ambiguity about what Congress expects of the agencies.

Furthermore, duplicative delegations are distinct from jurisdictional arrangements in which Congress directs one agency to consult with another agency before acting.³² With these consultative arrangements, the consulted agency's role is "merely advisory."³³ Thus, unlike with duplicative delegations, the two agencies do not have the power to perform the same tasks. Congressional commands that agencies consult with each other are not a focus of this Article, but as I show later, they are a tool that Congress uses to prevent duplicative efforts among agencies with duplicative delegations.

Finally, duplicative delegations are distinct from, but sometimes coincide with, fragmented delegations. Fragmented delegations grant multiple agencies the authority to address a regulatory problem, but each agency is responsible for its own piece of that problem.³⁴ These fragmented delegations may arise in separate statutes or in a single statutory scheme that allocates regulatory tasks to multiple agencies. For example, various statutes divide oversight of offshore energy projects among several agencies—the Department of the Interior (Interior), Army Corps of

30. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467–68 (2009) (analyzing which agency has statutory authority to regulate discharge, thus precluding the other from acting).

31. See, e.g., 6 U.S.C. § 596a (Supp. III 2009) (acknowledging that the agencies are being asked to work toward a common objective in the context of global nuclear detection architecture).

32. For a discussion of the value of consultation among agencies, see J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005), and Eric Biber, *Too Many Things To Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009).

33. *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 267 (D.C. Cir. 1993).

34. For analyses of regulatory fragmentation, see William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323 (2005), and Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005).

Engineers, EPA, Federal Aviation Administration, and Coast Guard.³⁵ For the most part, the agencies' oversight comes in a fragmented form with each agency overseeing its own piece of the project. But the Corps—under the Rivers and Harbors Act³⁶—and Interior—under the Outer Continental Shelf Lands Act³⁷—both have authority to consider the project's impact on navigation. Thus, although the oversight authority as a whole is fragmented among many agencies, at least one small piece of the review process—the navigation piece—is subject to review by more than one agency. For this small piece, the delegations to the agencies are duplicative.

B. *The Causes of Duplicative Delegations*

Having defined the phenomenon of duplicative delegations, I now explore the root causes of duplicative delegations. Some scholars have adopted models of legislative behavior that assume Congress delegates the same task to more than one agency because it intends to spur agency competition or capture the benefits of bureaucratic redundancies.³⁸ But there is no evidence that Congress intends to trigger agency competition or build redundancies via duplicative delegations with any frequency. Indeed, the two political scientists who have looked at the issue empirically have separately concluded that “most of the duplication, fragmentation, and overlap in the administrative state is not purposefully chosen to take auxiliary precautions or improve effectiveness via competition,”³⁹ and that “the intentional creation of redundancy is quantitatively of small importance when compared with the less dramatic causes.”⁴⁰ What are

35. For a list of each agency's role and authorizing statute, see MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR CAPE WIND ENERGY PROJECT § 1 (2009), <http://www.mms.gov/offshore/RenewableEnergy/PDFs/FEIS/Section1.0Introduction.pdf>.

36. 33 U.S.C. §§ 401–467n (2006).

37. 43 U.S.C. §§ 1331–1356a (2006).

38. See, e.g., Gersen, *supra* note 18, at 212–13 (describing how the use of a partial or completely overlapping jurisdictional scheme acts as an incentive to encourage agencies to develop relevant expertise), Todd Kunioka & Lawrence S. Rothenberg, *The Politics of Bureaucratic Competition: The Case of Natural Resource Policy*, 12 J. POL'Y ANALYSIS & MGMT. 700, 700–01, 721–22 (1993) (theorizing that the political motivation behind creating the U.S. Forest Service and the National Parks Service's duplicative authority over federal land administration was primarily to provide politicians with an expanded “menu of options” when solving problems), Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 274–76, 287 (2003) (developing a game theory model to help principals—such as Congress—determine how much redundancy in their agents—agencies—may create efficiency).

39. DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 7 (2003).

40. JONATHAN B. BENDOR, *PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT* 41

these less dramatic causes of duplicative delegations? In this section, I expand on the observations of those political scientists and present three systemic causes that are responsible for many if not most duplicative delegations: congressional reliance on blunt drafting techniques, ad hoc agency designs, and politically motivated agency designs.

1. *Blunt Legislative Drafting Techniques*

Congress creates duplicative delegations by using two legislative drafting practices: savings clauses, which state that statutes do not supersede earlier statutes, and broad, ambiguous delegations. Congress must use these drafting techniques to ensure that agencies have the flexibility and authority needed to regulate. Nevertheless, these techniques make it more likely that different agencies will have delegations that can be construed as granting them the same authority.

Congress relies on savings clauses because it is impossible to ensure that the statute at hand does not unintentionally duplicate any earlier statute. Every newly introduced bill that delegates some authority to an agency brings with it the risk of duplicating an earlier delegation to a different agency. It would require a Herculean effort for lawmakers to harmonize each new delegation so that it did not duplicate earlier delegations. There are simply too many agencies with too many previous delegations. Such harmonization is made even more difficult by Congress's committee structures.⁴¹ Different committees oversee different agencies. Thus, it is easy for one committee to slip a delegation to its agency into a bill and not notice when another committee later slips a similar delegation into a different bill for its agency. Even thorough attempts at harmonization to avoid duplication cannot foresee all future regulatory problems that may raise jurisdictional issues among agencies. For example, when Congress expanded the FDA's authority to regulate unsafe food additives with the Food Additives Amendment of 1958, it attempted to harmonize that statute with the USDA's Meat Inspection Act of 1906.⁴² Congress specifically

(1985).

41. See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1488–90 (2003) (demonstrating, through a discussion of the congressional committee structure, the complicated oversight of various agencies); see also HAROLD SEIDMAN, *POLITICS, POSITION, AND POWER* 70 (2d ed. 1975).

42. Compare Food Additives Amendment of 1958, 21 U.S.C. § 348 (2006) (delegating to the FDA the authority to review all food additives), with Meat Inspection Act of 1906, 21 U.S.C. § 624 (2006) (delegating to the U.S. Department of Agriculture (USDA) the authority to regulate all meat products). Congress made efforts to reconcile the duplicative delegation created by passing the Food Additives Amendment. For further treatment of this issue, see *Pub. Citizen v. Foreman*, 631 F.2d 969, 971–72 (D.C. Cir. 1980).

stated in the new bill that any meat additive that the USDA had approved prior to 1958 was presumed safe and therefore exempt from FDA review.⁴³ But the question soon arose in federal court whether a meat additive approved by the USDA prior to 1958 for one purpose (color fixing) but now used for another purpose (food preservation) was exempt from FDA review and subject only to USDA regulation.⁴⁴ Thus, even with Congress's attempt to provide a bright-line rule to prevent the FDA from duplicating or interfering with the USDA's earlier work, complete harmonization between a new delegation and an earlier delegation proved out of reach.

Because complete harmonization to avoid duplication is impossible, Congress must ensure that new delegations do not have the unintended effect of stripping agencies of existing regulatory authority that they may exercise. Thus, Congress sometimes drafts savings clauses to the effect that no jurisdictional mandates in the new statute supersede jurisdictional mandates in earlier statutes. These savings clauses—while necessary to avoid unintentionally undermining agencies' authority—lead to duplicative delegations. For example, in the Clean Water Act, Congress directed the EPA to regulate the discharge of any pollutant into navigable waters of the United States.⁴⁵ Decades later, in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, Congress delegated to the Coast Guard the authority to regulate ballast-related discharges of invasive species into the Great Lakes.⁴⁶ But at the same time, Congress included a savings clause stating that the delegation to the Coast Guard “shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water” under the Clean Water Act.⁴⁷ Therefore, after passage of the 1990 statute, both the EPA and the Coast Guard had authority to regulate ballast water discharges into the Great Lakes—the EPA through a broad mandate under the Clean Water Act and the Coast Guard through a narrower mandate in the later statute.

The need for broad, ambiguous authorizing statutes in a modern, complex risk environment is the second drafting technique that contributes to duplicative delegations.⁴⁸ In theory, it is possible for Congress to draft

43. 21 U.S.C. § 321(s)(4) (2006); *see also Foreman*, 631 F.2d at 972 (discussing the “grandfather,” or “prior sanction,” exemption).

44. *See Foreman*, 631 F.2d at 975, 977 (finding that although there was duplicative jurisdiction, the USDA regulation was appropriate).

45. 33 U.S.C. § 1342 (2006).

46. 16 U.S.C. § 4711(a)–(b) (2006).

47. *Id.* § 4711(b)(2)(C).

48. For reasons why legislators may delegate in broad terms, *see* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006).

statutes that clearly delineate agencies' borders. While clear, narrow delegations would not get rid of all duplicative delegations, they would eliminate many of the duplicative delegations that come from overlap among broad delegations. But in practice, relying heavily on clear, narrow delegations would have undesirable consequences.⁴⁹ Such statutes would interfere with federal agencies' abilities to respond to new information and changing regulatory environments.⁵⁰ Agencies would have to turn to Congress every time a slight change in the regulatory environment created a new problem. Congressional committees would likely have trouble keeping up with the demand for new or amended delegations, adding exponentially to the time it would take an agency to address often rapid change in a regulated area. Given these costs, it is understandable that Congress often chooses to delegate in broad, ambiguous terms that allow agencies the flexibility to respond to changing regulatory environments. But again, by doing so, duplicative delegations result.

2. *Ad Hoc Agency Design*

Agency design is ad hoc. Agencies' missions are not crafted to fit seamlessly into the existing regulatory structure but rather to respond to particular regulatory problems as they arise. Because of this ad hoc design process, delegations to agencies are often duplicative. Consider delegations to the Nuclear Regulatory Commission (NRC) and the EPA. Each agency's mission was crafted in response to a distinct regulatory problem. In the 1950s, when nuclear energy first became viable in the United States, Congress charged the AEC (now the NRC) with regulating the producers of nuclear power.⁵¹ Later, in the 1970s, when air and water pollution became salient problems, Congress delegated to the EPA broad authority to regulate air and water emissions.⁵² The by-product of these ad hoc agency designs was that both agencies could reasonably claim to have been delegated authority to regulate emissions into the air and water from

49. See generally Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (making an affirmative case for broad statutory delegations).

50. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 (1975) (specifying situations in which Congress may be unable to narrow the course for agencies to follow).

51. 42 U.S.C. § 2011 (2006); see also *History*, U.S. NUCLEAR REGULATORY COMM'N (last updated May 11, 2011), <http://www.nrc.gov/about-nrc/history.html> (discussing the transition from the Atomic Energy Commission (AEC) to the Nuclear Regulatory Commission (NRC) and the corresponding change in mission).

52. See generally Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006) (air emissions); Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006) (water emissions).

nuclear power plants. Indeed, as I discussed in the Introduction, both agencies asserted authority to regulate emissions from nuclear facilities until it was settled by the OMB—and later the Supreme Court—that the AEC would have sole authority to set emission standards.⁵³

Ad hoc agency delegations may not be duplicative at the time they are created, but they may become duplicative over time as regulatory conditions change. Often, Congress does not go back and change the delegations to correct for the duplication that emerged, and thus the duplicative delegations persist. Consider ad hoc delegations to the Army Corps of Engineers and Interior's Bureau of Reclamation. In the mid-nineteenth century, flood control and the regulation of navigable waters became an important issue as interstate trade expanded during the Industrial Revolution. The Army needed to keep its Corps of Engineers occupied while the nation was not at war.⁵⁴ Thus, Congress delegated regulation of rivers and harbors to the Army.⁵⁵ Several decades later, at the turn of the century, irrigation of arid lands in the west became a pressing problem because of the boom in western settlements. Thus, Congress created what is now the Bureau of Reclamation, and charged it with regulating water use and irrigation projects in the west.⁵⁶ The unintended result of these ad hoc agency designs was that, when demand for hydropower in the early-to-mid-twentieth century led to an explosion in the construction of large dams, both agencies had reasonable claims to the authority to oversee some dam projects because dam projects need the Corps's flood control expertise and the Bureau's irrigation expertise.⁵⁷ Today, significant duplication in the production and oversight of hydropower between the two agencies still persists.⁵⁸

53. See Goldsmith, *supra* note 11, at 105–06 (noting that Office of Management and Budget (OMB) settled the dispute by granting “exclusive jurisdiction to translate those environmental standards into emission limitations applicable to individual [nuclear power] licensees” to the AEC).

54. Alan L. Dean, *General Propositions of Organizational Design*, in *FEDERAL REORGANIZATION: WHAT HAVE WE LEARNED?* 131, 134 (Peter Szanton ed., 1981).

55. 33 U.S.C. §§ 401–467n (2006).

56. 43 U.S.C. §§ 371, 373b(a) (2006); see also *BRIEF HISTORY OF THE BUREAU OF RECLAMATION*, U.S. BUREAU OF RECLAMATION 2–4, <http://www.usbr.gov/history/2011newbriefhistoryv1.pdf> (describing the history of the “reclamation movement” and how popular and political support for improved resources in the west led to the creation of the U.S. Reclamation Service).

57. See BEN MOREELL, *OUR NATION'S WATER RESOURCES—POLICIES AND POLITICS* 67–68 (1956) (noting that Congress granted the Bureau authority to build Hoover Dam in 1928 for flood control and other purposes, while granting the Army Corps of Engineers flood control authority on a federal Mississippi River project that same year).

58. See PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* 326–27 (2d ed. 1998) (detailing more recent complaints regarding the inherent irrationality in dual delegations to

Over the past two centuries, the federal regulatory system has grown agency by agency on an ad hoc basis. As the President's Committee on Administrative Management observed in 1937, the Executive Branch has "grown up without a plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm."⁵⁹ This largely inevitable ad hoc growth produces duplicative delegations among agencies. Congress and the President do not intend such duplication, but it is nevertheless a consequence of their ad hoc agency designs.

3. *Agency Design as Politics*

Agency design is not only ad hoc but also political. It is performed by political actors with political factors in mind. Political considerations often outweigh whatever concerns agency designers have about drafting duplicative delegations, if indeed agency designers even fully realize the extent of the duplication that will result from their decisions. In the end, duplicative delegations sometimes result from these politically motivated agency designs.

During times of divided government when the White House and Capitol Hill are controlled by different parties, the congressional desire to insulate agencies from presidential control can lead to duplicative delegations. Consider the creation of the Consumer Product Safety Commission (CPSC). In the early 1970s, public pressure mounted on Congress to improve the regulation of consumer products.⁶⁰ Congress considered expanding the power of the Department of Health, Education, and Welfare to regulate consumer products other than food and drugs,⁶¹ which the Department already regulated through its subagency the FDA.⁶² However, Democrats in Congress were concerned that President Nixon—a Republican—would exert too much antiregulatory influence over new consumer protection powers if those powers were granted to a cabinet-level department.⁶³ The Democratic Congress ultimately opted to delegate

the two agencies concerning federal water resources).

59. S. DOC. NO. 75-8, at 56 (1937). *See also* LEWIS, *supra* note 39, at 7.

60. *See* Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 42 n.63 (1982) (describing the "political tug-of-war between the Democratic Congress and the Republican President" on whether the Consumer Product Safety Commission (CPSC) should be an independent or executive agency).

61. S. 1797, 92d Cong. §§ 2-3 (1971), *reprinted in* 117 CONG. REC. 13,825, 13,826 (1971) (defining "consumer product" as excluding food and drugs).

62. 21 U.S.C. §§ 301-399 (2006).

63. *See* LEWIS, *supra* note 39, at 30 (noting that this fear led Congress to create seven-year terms for members of the CPSC).

broad consumer protection powers to a newly created independent agency that was insulated from the President's influence.⁶⁴ The unintended result of this politically driven agency design: duplicative delegations to the new agency—the CPSC—and to the Department of Health, Education, and Welfare (now the Department of Health and Human Services). For example, both agencies have the power to regulate the packaging of drugs and supplements.⁶⁵

Political actors' concerns about public perception and policy interests can also skew agency designs in ways that produce duplicative delegations. Consider the creation of the EPA. Initially, the Nixon Administration considered whether it would be better to expand and consolidate environmental regulatory powers in an existing department—most likely Interior—than to create a new agency. However, the Administration decided to push for a new independent agency for two reasons.⁶⁶ First, the Administration considered it politically necessary to create an agency focused solely on environmental matters because “anything else would not be seen as a fulsome response to the growing public perception that environmental problems were getting out of hand.”⁶⁷ Second, the Administration was concerned that placing environmental powers within an existing department, such as Interior, would subject environmental regulation to the influence of the interests that held sway over that department.⁶⁸ Thus, political concerns—about public perception and interest group influences—determined the EPA's construction. The unintended result of this political calculus: duplicative delegations to the EPA and Interior. For example, both the EPA and Interior have authority to oversee pollution from offshore energy projects.⁶⁹

64. See Consumer Product Safety Act, Pub. L. No. 92-573, § 4(a), 86 Stat. 1207, 1210 (1972) (codified as amended at 15 U.S.C. § 2053 (2006)).

65. See *Nutritional Health Alliance v. FDA*, 318 F.3d 92, 101 n.10, 102–05 (2d Cir. 2003) (noting that, for example, the FDA administers the Food, Drug, and Cosmetic Act, and the CPSC administers the Poison Prevention Packaging Act and the Consumer Product Safety Act).

66. See *Douglas M. Costle: Oral History Interview*, U.S. ENVTL. PROT. AGENCY (Jan. 2001) <http://www.epa.gov/history/publications/costle/04.htm>.

67. *Id.* (relating the views of Russ Train, chairman of the Council on Environmental Quality).

68. See *id.*; see also PRESIDENT'S ADVISORY COUNCIL ON EXEC. ORG., EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE PRESIDENT ON FEDERAL ORGANIZATION FOR ENVIRONMENTAL PROTECTION (Apr. 29, 1970), <http://www.epa.gov/history/org/origins/ash.htm> (stating that no preexisting agency could exercise environmental powers objectively, without favoring its own interests).

69. 42 U.S.C. § 7627 (2006) (EPA); 43 U.S.C. §§ 1331–1356 (2006) (Department of Interior (Interior)).

Personal political relationships may also alter agency designs in ways that yield duplicative delegations. Consider the creation of the National Oceanic and Atmospheric Administration (NOAA). When it was established in 1970, it was placed in the Department of Commerce—despite recommendations by some presidential advisors that oceanic programs be consolidated within Interior.⁷⁰ Why Commerce and not Interior? It appears that one reason was that the Secretary of Commerce at the time, Maurice Stans, lobbied for the new agency to be placed in his department. President Nixon was close to Stans—who would later run Nixon's infamous Committee to Re-Elect the President—while there was some political tension between Nixon and his Secretary of the Interior at the time.⁷¹ Thus, the decision to house NOAA in Commerce instead of Interior was based in part on bureaucratic lobbying and personal politics. The unintended result of this politically influenced decision: duplicative delegations to NOAA and Interior—particularly to NOAA's National Marine Fisheries Service and Interior's Fish and Wildlife Service.⁷²

I am not arguing here that the design of the CPSC, EPA, and NOAA should have been different. Rather, I am arguing that the sort of political factors that shaped the formation of these agencies—executive power, partisanship, public perception, interest group influence, and personal political relationships—often trump whatever concerns agency designers have about granting duplicative oversight authority to agencies, if the designers are even aware of any potential duplication. Thus, the political process through which agencies are constructed often yields duplicative delegations.

In short, duplicative delegations are largely the unintentional and incidental by-product of political and ad hoc agency designs coupled with Congress's necessary use of blunt drafting tools to regulate a complex environment. This is not to say that Congress never intentionally creates duplicative delegations. Empirically, it is possible that legislators believe that bargaining by agencies with duplicative delegations over which agency should perform which tasks will produce better outcomes than if the legislators made those determinations themselves—and thus they may

70. See ARNOLD, *supra* note 58, at 286–87.

71. See *A History of NOAA: Background*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. http://www.history.noaa.gov/legacy/noaahistory_3.html (last updated June 8, 2006). For information on Stans's role in Watergate and as the head of the president's reelection committee, see generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974).

72. See, e.g., 16 U.S.C. § 665 (2006) (authorizing the Service to investigate pollution in waterways); 33 U.S.C. §§ 883d–883e (2006) (authorizing the National Oceanic and Atmospheric Administration to investigate and survey oceans and waterways).

intentionally draft duplicative delegations. However, for the most part, duplicative delegations are unintended or incidental to other legislative aims.

II. AVOIDING DUPLICATION FROM DUPLICATIVE DELEGATIONS

Whatever their causes, duplicative delegations are pervasive, and they have a significant impact on legal and regulatory institutions. On their face, duplicative delegations grant multiple agencies the authority to perform the same tasks. If all agencies acted on this authority, agencies would constantly be performing conflicting or duplicative actions. Congress and the White House tend to dislike such governmental inefficiencies. However, because they do not have the capacity, foresight, or political will to avoid duplicative delegations *ex ante*, they instead screen out duplication *ex post* through what I call antiduplication institutions. Collectively, these institutions prevent significant amounts of duplication and put pressure on agencies to avoid duplication on their own.

In this Part, I first present the various antiduplication institutions based on the branch in which they originate or tend to originate. I then show how these institutions trickle down to affect agency behavior, leading agencies to abdicate their duplicative authority. I also discuss how these institutions act to resolve jurisdictional disputes among agencies with duplicative delegations.

A. Antiduplication Institutions

1. Congress

Despite drafting duplicative delegations, Congress frequently does not want agencies to duplicate or interfere with each other's behavior. Such antiduplication preferences are understandable. Bureaucratic duplication wastes the government resources that legislators are responsible for, impedes the fulfillment of coherent governmental regulatory goals that legislators care about, and burdens regulated entities. In fact, responsiveness to regulated entities' complaints about duplicative regulations appears to drive many of the congressional antiduplication institutions.⁷³ Congress expresses its antiduplication preferences to agency heads behind closed doors or in relatively private or informal communications.⁷⁴ But it also relies on more public and formal institutions

73. On the role of regulated entities as actors in public governance, see generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

74. See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61,

such as legislative hearings and statutory language and schemes. Indeed, in the same statute that Congress delegates potentially duplicative authority to an agency, it sometimes also directs that agency to take steps to avoid interagency duplication and conflict. To that end, it fills statutes with commands that agencies “avoid duplication” or act in “consultation” or “coordination” with other agencies that are operating in the same regulatory area. For example, consider the following statutes:

- The CAA commands that the EPA act in “consultation with” the Department of Transportation (DOT) before regulating transportation’s effect on air quality;⁷⁵ act in “consultation with” Interior when promulgating air quality standards that could affect Interior’s regulation of offshore energy projects;⁷⁶ and “consult with other Federal agencies to ensure that similar research being conducted [on environmental health] in other agencies is coordinated to avoid duplication.”⁷⁷
- The Consumer Product Safety Act commands that the “[Consumer Product Safety] Commission and the heads of other departments and agencies engaged in administering programs related to product safety shall, to the maximum extent practicable, cooperate and consult in order to insure fully coordinated efforts.”⁷⁸
- The Occupational Safety and Health Act directs the DOL to develop work–safety standards only “after consultation with other appropriate Federal agencies.”⁷⁹

It is difficult to know how effective these coordination commands are at reducing duplication. Agencies may simply disregard them. However, there is evidence that agencies with duplicative delegations do indeed consult with each other as directed by Congress.⁸⁰ It is common for agencies to note, when publishing proposed or final rules, that they reached their regulatory decisions after talking to other agencies as statutorily required. For example, the CAA requires that the FDA consult with the EPA when regulating medical devices that have ozone-depleting characteristics.⁸¹ And the FDA indeed consults with the EPA before

121 (2006) (discussing Congress’s use of informal interactions to monitor agencies).

75. 42 U.S.C. § 7408(e) (2006).

76. *Id.* § 7627(a)(1).

77. *Id.* § 7403(d)(1)(C).

78. 15 U.S.C. § 2078(c) (2006).

79. 29 U.S.C. § 652(9) (2006).

80. *See* DeShazo & Freeman, *supra* note 32, at 2221, 2303 (describing interagency lobbying as a constructive mechanism for controlling Congress’s delegated power).

81. 42 U.S.C. § 7671c(d)(2).

regulating—as it professed in a recent rulemaking on the matter.⁸² Similarly, DOT has touted in its rulemakings that it has “well-established relationships with EPA, OSHA, and ATF and consult[s] frequently about jurisdictional issues”⁸³—as required by the various coordination and consultation provisions in its authorizing statutes.⁸⁴

Aside from specific statutory commands to avoid duplication, Congress has enacted several broad statutory schemes that combat duplication: the Administrative Procedure Act,⁸⁵ the Paperwork Reduction Act,⁸⁶ and the Regulatory Flexibility Act.⁸⁷ Section 553 of the Administrative Procedure Act requires that agencies publish proposed rules in the Federal Register and consider comments on those rules from interested parties.⁸⁸ This notice-and-comment requirement serves many purposes—including curbing interagency duplication. Agencies routinely ask for comments on whether their proposed regulations “duplicate, overlap, or conflict with”⁸⁹ other agencies’ actions. Regulated entities and other interests often comment that an agency’s “proposed regulations are duplicative because other government agencies . . . already exercise jurisdiction,”⁹⁰ that proposed filing or reporting requirements “put an additional burden on the operator by requiring duplicate reporting of events,”⁹¹ or that proposed rules will lead to “duplicate inspections and other burdens.”⁹² These

82. Use of Ozone-Depleting Substances; Removal of Essential-Use Designation (Flunisolide, etc.), 75 Fed. Reg. 19,213 (Apr. 14, 2010) (stating that the FDA consulted with the EPA regarding the amended regulation of ozone-depleting substances in self-pressurized containers).

83. Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage, 70 Fed. Reg. 20,018, 20,024 (Apr. 15, 2005).

84. 49 U.S.C. § 301(7) (2006).

85. 5 U.S.C. §§ 551–559, 701–706 (2006).

86. 44 U.S.C. §§ 3501–3520 (2006).

87. 5 U.S.C. §§ 601–612 (2006).

88. *Id.* § 553. For analyses of § 553, see Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 553–54 (2006) (noting that judicial interpretations have expanded notice-and-comment rulemaking requirements and made the process more akin to a “paper hearing”), and Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1122–23 (2008) (highlighting the open-ended nature of the good cause exemption from notice-and-comment rulemaking).

89. *See* 75 Fed. Reg. 32,994, 33,025 (June 10, 2010) (comments to the Department of Commerce). Sometimes the order of the words is changed, but the sentiment is the same.

90. *See* 68 Fed. Reg. 66,323, 66,325 (Nov. 26, 2003) (comments to the Federal Energy Regulatory Commission (FERC)).

91. *See* 75 Fed. Reg. 922, 923 (aviation industry comments to the National Transportation Safety Board).

92. *See* 74 Fed. Reg. 12,544, 12,548 (Mar. 25, 2009) (nuclear industry comments to FERC).

comments encourage agencies not to regulate where another agency is already doing so, and they educate agencies about what their fellow bureaucrats are up to. Both functions make it less likely that agencies will duplicate each other's regulatory efforts or interfere with each other's jurisdiction. For example, DOT abandoned its plans to regulate food transportation safety because, after considering the comments to its proposed rulemaking, the agency concluded that its regulations "could result in duplication, overlap, or conflict with current or pending FDA and USDA regulations."⁹³ Moreover, the potential for comments pushing back against duplicative efforts encourages agencies to consider whether their actions are duplicative before they propose them. Indeed, agencies routinely assert in their published proposals that they have looked into the matter and "not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule"⁹⁴—or words to similar effect.

Another statutory scheme, the Paperwork Reduction Act, exemplifies congressional efforts to cut down on bureaucratic duplication that burdens regulated entities. Among other features, the Act requires that, before collecting information from regulated entities, agencies must determine that the information "is not unnecessarily duplicative of information otherwise reasonably accessible to the agency."⁹⁵ Most proposed information collections must receive approval from the Office of Information and Regulatory Affairs (OIRA).⁹⁶ Requests for information already collected or being collected by other agencies may not receive approval. Thus, the Act pushes agencies to check with other agencies to see if they have the desired information before trying to collect it themselves. For example, the Occupational Safety and Health Administration (OSHA) scrapped its proposal to require regulated entities to notify it of major renovation and demolition projects that may release asbestos after it consulted with the EPA and learned that the EPA already collected similar information that it would share with OSHA. In explaining its decision not to promulgate its own reporting requirement, OSHA pointed out that "the Paperwork Reduction Act requires that federal agencies avoid clearly duplicative reporting requirements."⁹⁷

The Regulatory Flexibility Act similarly combats duplication by reducing duplicative reporting requirements on small businesses.⁹⁸ The Act

93. 70 Fed. Reg. 76,228, 76,229 (Dec. 23, 2005).

94. See 75 Fed. Reg. 31,730, 31,731 (June 4, 2010) (introduction to rule proposed by the USDA).

95. 44 U.S.C. § 3506(c)(3)(B) (2006).

96. *Id.* § 3504(c)(1) (2006).

97. 59 Fed. Reg. 40,964, 40,971 (Aug. 10, 1994).

98. 5 U.S.C. §§ 601–612 (2006). See generally Paul R. Verkuil, *A Critical Guide to the*

requires that, whenever agencies publish a proposed rule, they prepare a “regulatory flexibility analysis” describing the impact of the proposed rule on small businesses. The analysis must contain “identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.”⁹⁹ By performing this analysis, agencies discover that their proposed regulations are duplicative and choose to abandon them. Moreover, each agency is required to prepare an annual “regulatory flexibility agenda” briefly describing any rule that it expects to propose that will have a significant impact on small businesses.¹⁰⁰ This agenda is submitted to the Small Business Administration, which may comment on the agenda and push back on duplicative rules.¹⁰¹ Although the Small Business Administration’s comments are not binding, agencies have incentives to consider the comments because the Administration may report uncooperative behavior to agencies’ political overseers or, as it has on some occasions, file amicus briefs against agencies in cases challenging the agencies’ regulations.¹⁰² Ultimately, review by the Small Business Administration serves as another check on duplicative regulations. For example, the Small Business Administration successfully lobbied the EPA to alter proposed reporting requirements for chemical importers and manufacturers to avoid duplicating existing Department of Energy regulations.¹⁰³

When statutory commands and broad statutory schemes are not enough to prevent bureaucratic duplication, legislators hold public hearings where they voice antiduplication preferences—often directly to agency officials whom the legislators have called to testify. In recent years, legislators have expressed concern about wasteful and counterproductive duplication in some of the most pressing regulatory matters—such as the reform of the financial regulatory system.¹⁰⁴ Antiduplication statements in hearings are

Regulatory Flexibility Act, 1982 DUKE L.J. 213 (1982) (examining the provisions of the Regulatory Flexibility Act and the manner in which these contribute to regulatory reform).

99. 5 U.S.C. § 603(b)(5).

100. *Id.* § 602(a).

101. *Id.* § 602(b).

102. See *Regulatory Flexibility Act Shepardizing: Case Law*, SMALL BUS. ADMIN. 4, 5, 9 (Aug. 2, 2000), http://archive.sba.gov/advo/laws/rfa_shep.pdf (summarizing cases where the agency has either filed or threatened to file an amicus brief and the court ruled in its favor).

103. See OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT, FISCAL YEAR 1999, at 33 (2000), <http://archive.sba.gov/advo/laws/flex/99regflx.pdf> (demonstrating that the agency worked with OMB and EPA to save approximately \$13 million every reporting cycle).

104. See, e.g., *Modernizing Bank Supervision and Regulation—Part I: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 3 (2009) (statement of Sen. Christopher

not just political grandstanding. They have an effect. For example, the Senate Energy and Natural Resources Committee held a hearing in which senators questioned agency officials about inefficient, duplicative oversight of hydropower by the Federal Energy Regulatory Commission (FERC) and Interior.¹⁰⁵ Several weeks later, the two agencies formalized processes to eliminate duplication and streamline oversight.¹⁰⁶

Most drastically, Congress may consolidate agencies with duplicative delegations.¹⁰⁷ There are two ways that Congress may consolidate agencies to reduce duplication. First, it may merge two agencies with similar functions, thus eliminating any duplication between the two agencies. For example, as noted in the Introduction, Congress recently voted to merge the Office of Thrift Supervision and the Office of the Comptroller of the Currency to eliminate duplicative oversight from those offices.¹⁰⁸ Second, Congress may consolidate agencies with similar functions into a single department or single large agency. This form of consolidation occurs either when a new department is created and new agencies are placed within it or when agencies are transferred into existing departments where they appear to fit better. Although this form of agency consolidation does not eliminate duplication among agencies with similar functions, it makes agency coordination easier because it groups the agencies together in the same hierarchical management structure instead of leaving them scattered in different departments and thus under the control of different departmental management structures. For example, the Department of Education and the Department of Energy were established in the 1970s to improve the coordination among the various education and energy programs that were scattered throughout various agencies and departments.¹⁰⁹ Agency

Dodd, Chairman, S. Comm. on Banking, Hous., & Urban Affairs) (asserting that multiple federal banking regulators contributed to the banking crisis).

105. *Energy Development on Public Lands and the Outer Continental Shelf: Hearing Before the S. Comm. on Energy & Natural Resources*, 111th Cong. app. I at 79–80 (2009) [hereinafter *Energy Hearing*].

106. See MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF THE INTERIOR AND FEDERAL ENERGY REGULATORY COMMISSION (Apr. 9, 2009), <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf> (assigning exclusive jurisdiction to Interior's Minerals Management Service over non-hydrokinetic facilities and leasing authority for hydrokinetic facilities on the Outer Continental Shelf, and granting licensing authority to FERC for hydrokinetic facilities on the Outer Continental Shelf).

107. For a discussion of the trade-offs involved in agency consolidation, see generally O'Connell, *supra* note 17.

108. Enhancing Financial Institution Safety and Soundness Act of 2010, Pub. L. No. 111-203, §§ 301, 312(b), 124 Stat. 1520, 1521–23 (2010).

109. See ARNOLD, *supra* note 58, at 316–20 (describing the Carter Administration's efforts to reorganize these agencies to reduce the tremendous jurisdictional overlap).

consolidation is often a massive undertaking that generates political opposition from groups invested in the status quo, and thus it is not undertaken lightly. Nevertheless, it remains a potentially potent antiduplication tool that Congress turns to from time to time.

Congress can also prevent duplication by going back and amending the duplicative delegations to more clearly and narrowly define the agencies' jurisdictions. However, Congress is only likely to go through the amendment process if the Executive or Judiciary has reconciled the agencies' duplicative delegations in a way that Congress dislikes.

In short, Congress is the branch directly responsible for creating duplicative delegations, yet in many cases it makes clear that it does not want agencies to duplicate or interfere with each other. It is not normatively inconsistent for Congress to hold antiduplication preferences while also passing duplicative delegations that make the avoidance of duplication more difficult for agencies. It is difficult, if not impossible, for Congress to avoid duplicative delegations in many instances. Simple legislative commands to coordinate or avoid duplication are relatively cheap ways for Congress to try to limit the amount of actual duplication that results from their inevitable duplicative delegations.

2. *The White House*

The White House has played perhaps the largest role in influencing agencies to avoid duplication and conflict. As the political actors most responsible for the performance of the Executive Branch,¹¹⁰ presidents have routinely tried to achieve greater governmental efficiencies by pushing agencies to avoid duplicating each other's efforts and issuing conflicting regulations.¹¹¹ The President expresses his antiduplication preferences directly to agencies informally or through formal directives and executive orders.¹¹² However, presidents over time have also built up several antiduplication institutions that operate without direct presidential communication with agency heads.

Chief among these institutions is the centralized review of agency

110. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (explaining that presidents may set the direction and influence outcomes of the administrative process).

111. See ARNOLD, *supra* note 58, at 313 (discussing President Carter's Reorganization Project goals).

112. See, e.g., Presidential Memorandum: Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation's Fleet of Cars and Trucks, 75 Fed. Reg. 29,399 (May 21, 2010), (requesting that the EPA and National Highway and Traffic Safety Administration work together on fuel efficiency standards).

regulations by OIRA¹¹³—a subagency of OMB. President Reagan established OIRA review to “minimize duplication and conflict of regulations,”¹¹⁴ and subsequent presidents have continued to rely on OIRA review as an important antiduplication institution.¹¹⁵ Agencies must submit all “significant” regulations to OIRA.¹¹⁶ Significant regulations include those that have an annual effect on the economy of over \$100 million as well as those that “interfere with an action taken or planned by another agency.”¹¹⁷ OIRA analysts are then tasked with screening for an agency’s “regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.”¹¹⁸ OIRA may reject and return to the agencies for reconsideration any regulations that it considers unnecessarily duplicative. There is evidence that OIRA review has proven effective in minimizing duplicative regulations. One study found that most EPA officials believe that “OIRA involvement helped to coordinate EPA regulations with the regulations of other federal agencies.”¹¹⁹ But OIRA review need not discover actual duplication to have an impact. Agencies consult with each other before they act to avoid proposing duplicative regulations that OIRA may reject. That is, the existence of OIRA review encourages agencies to avoid duplication on their own. Indeed, a former OIRA official has observed that “agencies often, but not always, consult with their colleagues in other departments when developing important rules” before OIRA review takes place.¹²⁰ OIRA review is particularly valuable in coordinating the actions of the several agencies and departments whose actions make up the lion’s share of the significant regulations screened by the office: the EPA and the Departments of Health and Human Services (which includes the FDA), Transportation

113. For analyses of Office of Information and Regulatory Affairs (OIRA) review, see generally Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); and Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469 (2007).

114. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

115. *E.g.*, Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 648 (1993) (President Clinton’s request for transparency in OIRA’s review).

116. *Id.* § 6(a)(3)(A), 3 C.F.R. 645.

117. *Id.* § 3(f), 3 C.F.R. 641–42.

118. *Id.* § 1(b)(10), 3 C.F.R. 640.

119. Bressman & Vandenberg, *supra* note 113, 72 tbl.B & n.139.

120. Donald R. Arbuckle, *OIRA and Presidential Regulatory Review: A View from Inside the Administrative State* 40 (2008), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=donald_arbuckle.

(which includes the National Highway and Traffic Safety Administration), Labor (which includes OSHA), Agriculture, Commerce, and Interior.¹²¹

Sometimes agencies' attempts at coordination fail. For those instances when agencies with duplicative delegations cannot decide which agency should perform which tasks on its own, the Chief Executive has established institutions to settle matters for them. Presidents have empowered the OMB to resolve interagency disputes that agencies themselves cannot resolve.¹²² Professor Peter Strauss explains: "OMB plays a coordinating role also when agencies find themselves in the jurisdictional disputes that are the inevitable consequence of the enormous number of regulatory measures Congress enacts and the many different agencies to which it assigns responsibility."¹²³ For example, it was reportedly OMB that first determined that the AEC would have exclusive jurisdiction to regulate emissions from nuclear facilities without the EPA exercising duplicative oversight.¹²⁴ The Department of Justice's (DOJ's) Office of Legal Counsel (OLC) also has the authority to resolve any "question of which [agency] has jurisdiction to administer a particular program or to regulate a particular activity" whenever the agencies cannot resolve the question themselves.¹²⁵ In practice, if litigation addressing the question is not pending, agencies are more likely to turn to OMB than OLC to settle intractable jurisdictional issues because OMB is more involved in the day-to-day life of regulatory agencies.¹²⁶ More important than which office addresses the matter are the incentives that these antiduplication institutions create. Agencies may find top-down interference from OMB or OLC unappealing. Thus, agencies with duplicative delegations likely attempt to avoid OMB and OLC interference by figuring out on their own which agency should perform which tasks.

When regulatory problems involve several agencies, interagency coordination becomes more difficult. Presidents have relied on a few institutions to improve coordination for these situations: interagency bodies, lead agencies, and so-called White House czars.¹²⁷ Interagency bodies

121. See Croley, *supra* note 113, at 846.

122. Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1993).

123. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 588 (1984).

124. See Goldsmith, *supra* note 11, at 105–06.

125. Exec. Order No. 12,146 § 1–401, 3 C.F.R. 409, 411 (1979).

126. See Strauss, *supra* note 123, at 588 (providing an example of the NRC's and EPA's uncertainty as to which agency regulated radioactive discharges).

127. Interagency bodies are sometimes the product of legislative action, but they are more often established by executive action. See SEIDMAN, *supra* note 41, at 147–52 (exemplifying how President Truman's definition trumped congressional intent).

come in many forms and serve different purposes—although spurring interagency coordination and minimizing duplication are often key purposes.¹²⁸ By providing forums for multiple agencies to come together, interagency bodies facilitate efforts to set jurisdictional metes and bounds in regulated areas that involve many agencies. For example, the thirteen-agency National Invasive Species Council developed a master plan that spells out, task by task, which agency is expected to do what to address the problem of invasive species.¹²⁹

Interagency bodies have their shortcomings, though. Because they require consensus among many different agencies, they are often slow moving and fail to produce bold actions.¹³⁰ To avoid the time-intensive consensus building that must take place within interagency bodies, the Executive may instead rely on a lead agency—a single agency put in charge of coordinating federal action and to which all other agencies should defer. The lead agency approach has been adopted by the executive in the administration of one of the country’s most important regulatory schemes—the National Environmental Protection Act (NEPA).¹³¹ NEPA requires that all federal agencies prepare environmental assessments of any actions that significantly affect the environment.¹³² If more than one agency is involved in the same action, then the environmental review process may get bogged down or generate duplicative environmental analyses. To avoid these inefficiencies, the Executive has determined that a single lead agency shall supervise the review process.¹³³ To determine which agency among those with oversight powers should act as lead agency, the Executive has compiled a list of factors that include the magnitude of the agency’s involvement, the scope of its statutory authority, and its expertise.¹³⁴

The lead agency approach works well in some day-to-day bureaucratic activities. However, if the White House wants to spur comprehensive regulatory action on a salient political issue, it may instead rely on White House czars.¹³⁵ “Czar” is a label attached to White House officials by

128. *See id.*

129. NAT’L INVASIVE SPECIES COUNCIL, 2008–2012 NATIONAL INVASIVE SPECIES MANAGEMENT PLAN 7 (2008), http://www.invasivespecies.gov/home_documents/2008-2012_National_Invasive_Species_Management_Plan.pdf.

130. *See* SEIDMAN, *supra* note 41, at 150.

131. 42 U.S.C. §§ 4321–4370f (2006).

132. *Id.* § 4332(2)(C).

133. 40 C.F.R. § 1501.5 (2010).

134. *Id.* § 1501.5(c).

135. *See* Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 407 (2010) (pointing to the increasing number of “czars” in recent administrations who mediate between the President

journalists, political commentators, and sometimes administrations themselves to refer to various presidential advisors.¹³⁶ The label has been attached to dozens of officials working in the Obama Administration and a similar number who worked in the Bush Administration.¹³⁷ Czars typically are White House employees who have no formal powers over agencies. But because they are seen as speaking for the President, they strongly influence agencies' actions. Thus, czars coordinate agency behavior and avoid interagency interference and duplication by telling each agency what the White House expects of it.¹³⁸ For example, it was reported that President Obama's "climate change czar" Carol Browner was instrumental in coordinating the EPA's and DOT's joint efforts to craft new auto-emissions standards.¹³⁹

In short, presidents have long been enemies of duplication that wastes resources and impedes the administration's regulatory goals. Presidents combat duplication by directly communicating with agencies. However, presidents over time have also crafted several antiduplication institutions that do not require constant presidential oversight. The mere existence of these antiduplication institutions—particularly OIRA review and OMB or OLC settlement of interagency jurisdictional disputes—pushes agencies to coordinate to avoid interagency duplication and conflict.

3. *The Judiciary*

Courts occasionally hear cases involving duplicative delegations. Duplicative delegations cases typically arise when a regulated entity or interest group challenges an agency's action by arguing that Congress intended a different agency to exercise jurisdiction,¹⁴⁰ or when in a suit to compel agency action, the agency argues that it cannot act because another

and agencies).

136. Jess Henig, *Czar Search*, FACTCHECK.ORG (Sept. 25, 2009, 11:25 AM), <http://www.factcheck.org/2009/09/czar-search/>.

137. *See id.*

138. *See* Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 489 (2010) (concluding that the President need only control the czars to coordinate bureaucracy).

139. *See* Jim Tankersley, *Emissions Deal Nearly Stalled at the Finish*, L.A. TIMES, May 20, 2009, at A1 (quoting Browner's philosophy for achieving a new national standard).

140. *See, e.g.*, *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002) (drilling company regulated by both United States Coast Guard and OSHA); *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990) (power company regulated by both the Securities and Exchange Commission (SEC) and FERC); *Pub. Citizen v. Foreman*, 631 F.2d 969 (D.C. Cir. 1980) (food additive regulated by both USDA and FDA); *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979) (oil companies regulated by both Interior and EPA).

agency has jurisdiction.¹⁴¹ When reviewing agency action or inaction in these duplicative delegations cases, courts sometimes weigh whether their decisions will prevent or spur interagency duplication and conflict. By considering interagency duplication and conflict as a factor in their decisions, courts encourage agencies to avoid duplication and instead seek out tasks that other agencies do not perform. That is, judicial review of agency action serves as an antiduplication institution—albeit one that is not called on as often as legislative and executive antiduplication institutions.

In a few cases, courts have struck down agencies' attempts to exercise jurisdiction in fields where other agencies are active.¹⁴² For example, in *Nutritional Health Alliance v. FDA*,¹⁴³ the Second Circuit struck down the FDA's attempt to regulate the packaging of iron supplements under the Food, Drug, and Cosmetic Act, finding that the agency's action would potentially interfere with the CPSC's decade-long regulation of such packaging under the Poison Prevention Packaging Act.¹⁴⁴ The court concluded that "the FDA's assertion of concurrent jurisdiction rings a discordant tone with the regulatory structure created by Congress."¹⁴⁵ Decisions like this one encourage agencies to avoid regulating in fields already occupied by other agencies.

In other cases, courts have upheld agency actions after finding that other agencies with potentially duplicative delegations were not actively regulating, thus, there was little risk of duplication. For example, in *Chao v. Mallard Bay Drilling, Inc.*,¹⁴⁶ the Supreme Court held that the Coast Guard's statutory authority to regulate the working conditions of seamen did not bar OSHA from regulating the same conditions because "mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction."¹⁴⁷ Decisions like this one clear the way for agencies to perform tasks that others are not performing.

141. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (EPA's refusal to regulate greenhouse gases); *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976) (EPA's refusal to regulate the discharge of radioactive materials); *Nw. Env'tl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (EPA's refusal to regulate certain marine discharges); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983) (OSHA's refusal to regulate industrial exposure to ethylene oxide).

142. See, e.g., *Nutritional Health Alliance v. FDA*, 318 F.3d 92 (2d Cir. 2003); *Ohio Power Co. v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989); *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979).

143. 318 F.3d 92 (2d Cir. 2003).

144. *Id.* at 104–05.

145. *Id.* at 104.

146. 534 U.S. 235 (2002).

147. *Id.* at 241.

Courts also consider the potential for bureaucratic duplication in deciding the merits of suits to compel agency action. For example, in *Public Citizen v. Aucter*,¹⁴⁸ OSHA tried to fend off a suit to compel it to regulate a chemical affecting hospital workers' health by arguing that jurisdiction lay with the EPA. The D.C. Circuit rejected the agency's argument, holding that "OSHA is not disabled from issuing [a chemical] standard in areas—such as the health care industry—where EPA has apparently exercised minimal, if any, regulatory authority in an overlapping manner."¹⁴⁹ Decisions like this one prevent agencies from using the mere existence of duplicative delegations as an excuse to shirk their regulatory duties.

This is not to say that courts always rule in ways that minimize interagency duplication and conflict. For example, in *Massachusetts v. EPA*,¹⁵⁰ the Supreme Court considered whether holding that the CAA authorizes the EPA to regulate greenhouse gas emissions from motor vehicles would lead to duplication between the EPA and DOT—which is charged with regulating motor vehicle fuel standards. The Court concluded that the "two [agencies'] obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."¹⁵¹ However, even in this decision, the Supreme Court weighed the potential for bureaucratic duplication and conflict. Ultimately, courts' considerations of duplication as a factor in their decisions encourage agencies to avoid duplicating each other's efforts and instead to seek tasks that other agencies are not performing.

Overall, agencies' overseers in each of the three branches of government have sought to avoid duplication. Collectively, their actions provide strong incentives for agencies to take steps on their own to avoid duplication.

B. Agency Abdication of Regulatory Authority to Avoid Duplication

The pervasiveness of duplicative delegations has a significant impact on agency behavior. If agencies want to avoid duplication, agencies with

148. 702 F.2d 1150 (D.C. Cir. 1983).

149. *Id.* at 1156 n.23 (quotations omitted).

150. 549 U.S. 497 (2007). For analyses of this landmark case, see Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2008) (arguing that "the regulatory controversies surrounding global warming illustrate a larger theme: the Court majority's increasing worries about the politicization of administrative expertise"), and Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008) (contending that the ruling in *Massachusetts v. EPA* wrongly required the EPA to implement a major policy change without explicit authorization from Congress).

151. *Massachusetts v. EPA*, 549 U.S. at 532.

duplicative delegations cannot simply regulate as they see fit within the reasonable confines of their delegated jurisdiction. Instead, they must consider whether their efforts will duplicate or interfere with the operations of other agencies and then act to avoid duplication and conflict. In this section, I show that a primary way that agencies with duplicative delegations avoid duplication is by abdicating their authority to perform tasks that other agencies are already performing or are better suited to perform. I take a broad view of what it means to say that agencies abdicate to avoid duplication—treating such abdication as any agency decision to forgo exercising authority in order to avoid duplication with other agencies.

There are several reasons why agencies may want to avoid duplication. First, agency officials may want to act consistently with their political bosses' antiduplication preferences, and they may want to avoid running afoul of antiduplication institutions. Second, agency officials may care about efficiency, and thus they may want to avoid duplication that wastes government resources.¹⁵² Third, agency officials may care about maintaining good working relationships with their fellow bureaucrats—and thus they may want to avoid duplicating or interfering with the efforts of officials in other agencies. Fourth, agency officials may find it easier to manage an agency and motivate agency employees when they have a unique set of tasks that no other agency performs.¹⁵³ Fifth, officials may fear adverse publicity alleging government waste. Regardless of the agency officials' motives, examples of agencies avoiding duplication abound. Abdication is the primary means through which agencies avoid duplication.

Some instances of agency abdication occur when agencies adopt a narrow interpretation of their authority to avoid exercising duplicative jurisdiction. For example, the EPA abdicated its authority to regulate pesticide-treated food packaging by narrowly defining the term *pesticide* in its authorizing statute to exclude food packaging treated with pesticides—leaving such packaging to the regulation of the FDA.¹⁵⁴ The EPA explained, “EPA, in consultation with FDA, believes this rule will eliminate the duplicative [statutory] jurisdiction and economize Federal government resources.”¹⁵⁵

152. Cf. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 304 (2008) (“Administrative agencies can advance social welfare in cases where lead administrators are motivated to do so in the first place . . .”).

153. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 181–83 (1989) (discussing how agency officials strive for autonomy of their agency for better management and organizational maintenance).

154. Food Packaging Treated with a Pesticide, 71 Fed. Reg. 70,667, 70,667 (Dec. 6, 2006).

155. *Id.*

Other instances of agency abdication occur when an agency declines to exercise the authority under its discretion. For example, the Federal Railroad Administration (FRA) scrapped proposed workplace safety standards after public comments on its proposal led the agency to conclude that the standards duplicated existing OSHA standards.¹⁵⁶ The FRA said it would continue to regulate railroad-specific safety issues—such as those involving track roadbeds and switching devices—but it would not duplicate OSHA standards because it was better to “concentrate [its] limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.”¹⁵⁷

In these two examples, a single agency abdicated authority. However, abdication often takes place as part of a larger interagency negotiation process in which agencies with duplicative delegations allocate tasks among themselves to avoid duplication and interagency interference. In this process, multiple agencies abdicate—multiple agencies agree to forgo some task over which they have a reasonable statutory claim. These arrangements are often memorialized in the form of interagency memoranda of understanding and published in the Federal Register and on agencies’ websites.¹⁵⁸ Some agreements have specific end dates, while others last indefinitely.¹⁵⁹ Some agreements require that agencies consult with each other as they regulate, and thus name interagency liaisons to serve as contacts.¹⁶⁰ While the details vary, the basic purpose is the same: to avoid duplication and conflict by dividing regulatory tasks and clarifying jurisdictional bounds among agencies. Overall, most—if not all—regulatory agencies have entered into these sorts of interagency arrangements to avoid duplicative and conflicting regulatory efforts. For example:

- The FDA has broad authority to regulate additives to food and water, and the EPA has broad authority to regulate the quality of drinking water.¹⁶¹ To avoid duplication, the agencies have agreed

156. Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978).

157. *Id.*

158. *See, e.g., Domestic Memoranda of Understanding*, FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/default.htm> (last updated Apr. 25, 2011) (describing various memoranda of understanding between the FDA and other agencies, such as the Department of Defense).

159. *See id.*

160. *See, e.g., Memorandum of Understanding with the Food Safety and Inspection Service*, 48 Fed. Reg. 39,509, 39,510–12 (Aug. 31, 1983) (identifying the liaisons and their responsibilities for each agency).

161. 21 U.S.C. § 321(f) (2006) (definitions giving rise to FDA’s authority to regulate food

that the “EPA has the primary responsibility over direct and indirect additives and other substances in drinking water,” while the “FDA retains the responsibility for water, and substances in water, used in food and for food processing and for bottled water.”¹⁶²

- Both the NRC and OSHA have been delegated authority to regulate workplace safety conditions at nuclear facilities, but the two agencies have agreed that the NRC will regulate workplace safety risks directly related to nuclear energy—such as the risk of radiation from nuclear materials—while OSHA will regulate all other “[p]lant conditions which result in an occupational risk.”¹⁶³
- The FDA has broad authority to regulate food and beverage labeling generally, while the ATF has authority to regulate the labeling of alcoholic beverages specifically.¹⁶⁴ To avoid duplication and conflict in the regulation of alcoholic beverages, the two agencies agreed that the “ATF will be responsible for the promulgation and enforcement of regulations with respect to the labeling of distilled spirits, wine, and malt beverages,” while the FDA will use its expertise to provide “laboratory assistance” and “health hazard evaluation” when necessary.¹⁶⁵

In all of the examples above, the agencies were able to neatly divide regulatory tasks among themselves. But despite agencies’ best efforts, it is not always possible to draw jurisdictional lines so that each agency will perform distinct and separate tasks. After divvying up tasks as much as possible, some duplication may persist. However, there are several steps that agencies take to minimize interference and duplication to the extent practicable when they cannot eliminate it entirely.

When tasks cannot be completely divided among agencies with duplicative delegations, agencies sometimes minimize duplication by deferring to other agencies’ determinations. For example, both FERC and the Army Corps of Engineers are statutorily required to review some of the

and drink); 42 U.S.C. § 300f (2006) (definitions giving rise to EPA’s authority to regulate drinking water).

162. Pesticides Applied to Bodies of Water, 47 Fed. Reg. 25,746, 25,746 (June 15, 1982).

163. Memorandum of Understanding Between the Nuclear Regulatory Commission and the Occupational Safety and Health Administration, 53 Fed. Reg. 43,950, 43,950 (Oct. 31, 1988).

164. 27 U.S.C. §§ 201–219a (2006) (Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)); 21 U.S.C. §§ 301–99 (2006) (FDA).

165. MEMORANDUM OF UNDERSTANDING BETWEEN THE FOOD AND DRUG ADMINISTRATION AND THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, MOU 225-88-2000 (Nov. 20, 1987), <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm116370.htm>.

same aspects of proposed oil pipeline projects. The two agencies have agreed that the “Corps will give deference, to the maximum extent allowable by law, to the project purpose, project need, and project alternatives that FERC determines to be appropriate for the project”—thus minimizing the duplication of effort in reviewing proposed oil pipelines.¹⁶⁶ Overall, deference does not eliminate the duplicative oversight authority, but it reduces the decision costs and possibly the time it takes for the agencies to finalize decisions.

Joint regulation is another way agencies minimize duplication and interference when tasks cannot be neatly divided among agencies with duplicative delegations. For example, joint regulatory efforts are common for product recalls when multiple agencies—such as the FDA, USDA, CPSC, National Highway and Traffic Safety Administration, or the EPA—have jurisdiction over some piece of the physical product or its production processes.¹⁶⁷ Joint regulation may not be agencies’ first choice for how to regulate. They may rather regulate alone. But joint regulation is a viable option when it is impossible for agencies to eliminate duplication and interagency interference completely.

Agencies with duplicative delegations also minimize duplication and conflict by referring relevant data to each other. For example, there are some food manufacturing and processing facilities that both the FDA and USDA are required to inspect. Although the two agencies inspect different aspects of the facilities’ operations—the USDA regulates meat and poultry operations, while the FDA regulates all other foods—they have agreed to inform each other of any unsanitary conditions or instances of adulterated food relevant to each other’s jurisdiction.¹⁶⁸ Sharing information may be easiest for agencies such as the FDA and USDA that have a long history of working together in the same regulatory field.

Overall, regardless of the exact details, the purpose of all of these instances of agency abdication is the same: to avoid duplication and conflicting regulatory efforts by agencies with duplicative delegations. Agency abdication does not occur in response to all duplicative delegations. But it occurs in response to many of them. Rampant agency abdication is understandable given the incentives agencies face to avoid duplication.

166. MEMORANDUM OF UNDERSTANDING BETWEEN THE ARMY CORPS OF ENGINEERS AND THE FEDERAL ENERGY REGULATORY COMMISSION FOR INTERSTATE NATURAL GAS PIPELINE PROJECTS (July 11, 2005), <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-30.pdf>.

167. For examples of joint recalls, see <http://www.recalls.gov/>.

168. Memorandum of Understanding with the Food Safety and Inspection Service, 48 Fed. Reg. 39,509, 39,510 (Aug. 31, 1983).

C. *Blurred Boundary Disputes Between Agencies with Duplicative Delegations*

By describing rampant agency abdication, I am not claiming that duplicative delegations do not lead to regulatory duplication or interagency conflict. Agencies with duplicative delegations may fail to coordinate for any number of reasons. One significant cause of duplicative regulations comes from what I call blurred boundary disputes. These disputes arise because jurisdictional dividing lines between agencies are unsettled by changes in the regulated environment or by the introduction of a new agency or regulatory scheme. As agencies jockey for position in the shifting jurisdictional spaces, multiple agencies with duplicative delegations sometimes stake claims to the same tasks. However, given the downward pressure on agencies to avoid duplicative and conflicting regulatory actions, blurred boundary disputes over specific tasks are unlikely to persist for too long. The disputes are ultimately resolved when new expectations about which agencies are responsible for which tasks are adopted—either by agencies’ political overseers or by the agencies themselves.

A dispute between FERC and Interior over the regulation of hydropower is emblematic of the kinds of blurred boundary disputes that arise and how they are resolved. For the past several decades, FERC has regulated and licensed hydropower projects,¹⁶⁹ while Interior has regulated and permitted offshore energy projects.¹⁷⁰ Historically, the two agencies’ functions did not overlap much because FERC’s hydropower projects were usually sited inland and not offshore, where Interior’s energy projects were located. That changed in the past decade when new technology enabled the capture of hydropower from ocean waves.¹⁷¹ New energy projects using this technology are both offshore and hydro—thus implicating both Interior’s job of regulating offshore energy projects and FERC’s job of regulating hydropower. When energy companies began applying for permits to build hydropower projects offshore, both agencies asserted jurisdiction over the projects.¹⁷² In response to the exercise of duplicative oversight by the agencies, regulated entities complained about inefficiencies, and congressional hearings were held in which senators

169. 16 U.S.C. § 817(1) (2006).

170. 43 U.S.C. §§ 1331–1356 (2006).

171. See *Energy Hearing*, *supra* note 105, at 79 (testimony of Philip D. Moeller, Comm’r, FERC) (stating that FERC remained within its authority when regulating this new technology and that it communicated with other agencies in interagency regulatory matters).

172. See Jon Wellinghoff et al., *Facilitating Hydrokinetic Energy Development Through Regulatory Innovation*, 29 ENERGY L.J. 397, 414–15 (2008) (explaining that FERC relied on “the plain language” of the Federal Power Act to justify its assertion of jurisdiction and that Interior relied on the Energy Policy Act of 2005 to justify its assertion).

pressured the agencies to resolve which agency would exercise jurisdiction over which parts of the hydropower projects.¹⁷³ A few weeks after the congressional hearing, FERC and Interior signed an interagency agreement establishing that FERC “has exclusive jurisdiction to issue licenses and exemptions for hydrokinetic projects located [offshore],” Interior has “exclusive jurisdiction to issue leases, easements, and rights-of-way regarding [offshore] lands for hydrokinetic projects,” and Interior will act as the lead agency in conducting “any necessary environmental reviews.”¹⁷⁴ In short, a dispute arose because changes in the regulated environment unsettled the lines dividing jurisdiction between two agencies. Both agencies asserted jurisdiction, leading to duplicative oversight. Pressure to avoid duplication—initiated by regulated entities—ultimately led the agencies to find ways to divide the regulatory tasks.

A similar fact pattern emerged in the regulation of genetically modified organisms (GMOs). In the 1980s, the production of GMOs by biotech companies exploded. The introduction of this new technology unsettled jurisdictional bounds between the FDA, USDA, and EPA. New GMOs appeared to fall under the jurisdiction of more than one of these agencies. Both the FDA and USDA asserted the authority to regulate a genetically modified bovine growth hormone.¹⁷⁵ Both the EPA and USDA exercised authority to regulate the deliberate release of GMOs into the environment.¹⁷⁶ Regulated entities complained about the slow, duplicative oversight.¹⁷⁷ Ultimately, the White House created interagency working groups and committees that included members of the agencies with duplicative delegations.¹⁷⁸ In 1986, the working group issued the Coordinated Framework for the Regulation of Biotechnology, which

173. See *id.*; see also *Energy Hearing*, *supra* note 105.

174. MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF INTERIOR AND FEDERAL ENERGY REGULATORY COMMISSION (Apr. 9, 2009), <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf>.

175. See Diane E. Hoffmann, *The Biotechnology Revolution and Its Regulatory Evolution*, 38 DRAKE L. REV. 471, 543 (1988) (explaining the jurisdictional fight between the FDA and USDA, and its impact on the time and resources expended).

176. See Scott D. Deatherage, *Scientific Uncertainty in Regulating Deliberate Release of Genetically Engineered Organisms: Substantive Judicial Review and Institutional Alternatives*, 11 HARV. ENVTL. L. REV. 203, 239–40 (1987) (identifying the acts that give the agencies the authority to regulate release and the “maze” that parties must go through in order to obtain permits for release).

177. See *White House Plan Calls for Joint Reviews When EPA, Agriculture Jurisdictions Overlap*, 10 CHEM. REG. REP. (BNA) 59, 59 (Apr. 18, 1986) (noting that the EPA and USDA’s “turf disputes” delayed biotechnology regulation).

178. See *Coordinated Framework for Regulation of Biotechnology*, 51 Fed. Reg. 23,302 (June 26, 1986) (announcing cooperation between the USDA, EPA, FDA, National Institute of Health, National Science Foundation, and OSHA).

spelled out in over one hundred pages each agency's responsibilities for the regulation of GMOs.¹⁷⁹ In short, a change in the regulated environment led to a blurring of jurisdictional bounds and interagency disputes as several agencies sought to stake their claims in this newly uncertain environment. The disputes were resolved when executive oversight pushed the agencies to sign an agreement that divided tasks among the agencies, thus setting new expectations about which agencies should perform which tasks.

Blurred boundary disputes are particularly likely in an agency's infancy. When an agency is first created, there is relatively high uncertainty about the scope of its jurisdiction—in particular how its jurisdiction meshes with the web of existing agencies' jurisdictions. The EPA is a good example. In its first decade, it found itself bogged down in several interagency disputes. There was a dispute between the EPA and OSHA over which agency should regulate the use of pesticides by farm workers.¹⁸⁰ It was resolved in the EPA's favor according to the terms of an interagency agreement—terms that were later approved by the D.C. Circuit.¹⁸¹ There was a dispute between the EPA and the AEC over the EPA's assertion of jurisdiction over emissions from nuclear facilities. This dispute over the scope of the EPA's jurisdiction was resolved by the OMB and later by the Supreme Court.¹⁸² And there was a dispute between the EPA and Interior over whether the EPA had authority to regulate emissions from offshore energy projects regulated by Interior. This dispute was resolved in the EPA's favor by DOJ,¹⁸³ then decided against the EPA by the Ninth Circuit,¹⁸⁴ and ultimately settled when Congress amended the CAA expressly to grant the EPA jurisdiction over emissions from offshore energy projects.¹⁸⁵ In each of these examples, the disputes arose because the creation of a new agency led to uncertainty about how that new agency's jurisdiction fit with other agencies' jurisdictions. The disputes did not lead to larger interagency battles though and all were all settled either through interagency agreements or decisions from agencies' overseers.

Overall, it is not uncommon for disputes over tasks to arise because

179. *Id.* at 23,303.

180. *Organized Migrants in Cmty. Action, Inc. v. Brennan*, 520 F.2d 1161 (D.C. Cir. 1975).

181. *Id.*

182. *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 25 (1976); *see also* Goldsmith, *supra* note 11, at 105–06.

183. *See* Note, *Judicial Resolution of Inter-Agency Legal Disputes*, 89 YALE L.J. 1595, 1599 n.16 (1980) (discussing the Department of Justice's defense of the EPA's claim of jurisdiction to regulate emissions in air space against that of Interior).

184. *California v. Kleppe*, 604 F.2d 1187, 1198–99 (9th Cir. 1979).

185. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 801, 104 Stat. 2399, 2685 (1990) (codified at 42 U.S.C. § 6727 (2006)).

changes in the regulated environment or the introduction of a new agency or regulatory scheme create uncertainty about the jurisdictional boundaries among agencies. As agencies adapt to the new regulatory environment, multiple agencies may seek to perform the same tasks. The disputes are ultimately resolved when agencies' overseers or the agencies themselves set new expectations and jurisdictional bounds that determine agencies' behavior in the changed regulatory environment.

III. IMPLICATIONS

In the previous Part, I showed how Congress and the White House rely on *ex post* institutions to screen out duplication among agencies with duplicative delegations. In this Part, I assess the effectiveness of these *ex post* institutions. I argue that these institutions are more efficient than leading normative theories and models assume and that existing antiduplication efforts need not be substantially reformed. I also assess how duplicative delegations alter the balance of powers among the branches of government. I show how duplicative delegations provide the Executive more discretion than it usually has to determine which agency performs a task. I then argue that, because the Executive is better than the Judiciary at allocating tasks among agencies, courts should defer to executive arrangements reconciling duplicative delegations.

A. *Implications for the Elimination of Duplication*

Early public administration scholars often railed against duplication as a hindrance to efficient government and advocated for the elimination of interagency duplication.¹⁸⁶ Today, commentators still bemoan the amount of duplication that persists among regulatory agencies despite the efforts of existing antiduplication institutions, and they call for Congress and the White House to do significantly more to eliminate duplication.¹⁸⁷ In this section, I argue that—when it comes to the elimination of duplication—the optimal course of action for Congress and the White House is close to the status quo. Because it is too costly for Congress to eradicate the statutory sources of duplication, Congress should rely instead on comparatively cheaper, existing *ex post* institutions to screen out duplication. Moreover, because these *ex post* institutions also have significant costs, there are limits to how much more duplication should be screened out *ex post*. At some

186. See ARNOLD, *supra* note 58, at 326–27.

187. See Kavanaugh, *supra* note 16, at 1475 (“Congress and the administration should seek to better organize the executive branch, eliminating overlapping responsibilities . . .”); see also O’Connell, *supra* note 17, at 1701 (noting that elected officials’ calls for “‘cutting duplication’ plays well to constituents”).

point, the costs of removing duplication will outstrip the costs from the duplication itself. Ultimately, in such a large regulatory system, some amount of duplication is not only inevitable but cost-effective.

At the outset, to reduce duplication, Congress could do more during the drafting process to prevent duplicative delegations from arising in the first place. However, the costs of legislating in ways that do not create duplicative delegations are prohibitive. As discussed earlier, Congress does not have the time or resources to harmonize every new delegation with ones that came before in order to avoid duplication. Although Congress could avoid some duplicative delegations by drafting narrower delegations, such delegations deprive agencies of the flexibility needed to address changes in the regulated environment.

After agencies start to issue duplicative regulations, Congress may use the potent tool of agency consolidation to attempt to eliminate the duplication. However, agency consolidation has severe costs and limits. Agency consolidation generates short-term uncertainty about the new agency's regulatory tasks and jurisdictional bounds, and generates the one-time cost of actually having to assemble a new agency.¹⁸⁸ But perhaps more problematic are the potential coordination costs that limit the applicability of agency consolidation. Agency consolidation to coordinate agency actions along one policy axis inevitably aggravates coordination problems along other policy axes. Take the creation of the Department of Homeland Security (DHS). Several agencies that were transferred to the Department perform functions that are not strictly security functions. These agencies must now coordinate their nonsecurity functions with agencies in the departments that they came from. For example, DHS received parts of the USDA's agricultural inspection service.¹⁸⁹ Now, DHS's agricultural inspection service must coordinate its actions with its former sister agencies in the USDA. Similarly, the Coast Guard was transferred from DOT to DHS.¹⁹⁰ Now, the Coast Guard "coordinate[s] with the Department of Transportation for the peacetime maintenance of the coast."¹⁹¹ Overall, because of these potential coordination costs, agency consolidation is only worthwhile as an antiduplication institution when the agencies being

188. See Cohen et al., *supra* note 18, at 710–11 (describing the effects of agency consolidation, which can include reorganization, reshaping of agency activities, and negative repercussions ranging from monopolistic control over a government function to decreased efficiency within the agency).

189. 6 U.S.C. §§ 231 (2006).

190. *Id.* § 468(b).

191. NORMAN M. WADE, *THE JOINT FORCES OPERATIONS & DOCTRINE SMARTBOOK: GUIDE TO JOINT, MULTINATIONAL & INTERAGENCY OPERATIONS*, at 1-26 (2d rev. ed. 2009).

consolidated perform substantially similar functions that sensibly should be grouped together in a single hierarchical management structure. However, even with agencies that have similar functions, if other antiduplication institutions are capable of reducing duplication and conflict among the agencies to acceptable levels, then consolidation may still prove too costly and risky. Overall, consolidation is not a panacea for duplication and conflict in the regulatory system. It may make sense in some regulatory areas—such as food safety regulation and financial regulation, where multiple agencies are performing substantially similar functions. But in many instances, it is wiser to forgo the costs and risks that accompany consolidation and leave it to *ex post* antiduplication institutions to screen out duplication as best they can.

Other antiduplication institutions also have costs. Regulatory delay is probably the most significant of these costs. Indeed, most of the antiduplication institutions discussed in this Article have been criticized for how they delay regulatory action. For example, a large body of literature has discussed how notice-and-comment rulemaking delays regulatory action in part because agencies take a long time to “write the lengthy preambles and technical support documents and to address public comments on proposed rules.”¹⁹² The requirement under the Regulatory Flexibility Act that agencies prepare a flexibility analysis with their proposed rulemakings may bring about similar delays. Likewise, OIRA review of proposed regulations has been criticized for generating regulatory delays.¹⁹³ Reforms instituted by the Clinton Administration cut down those delays by requiring that OIRA analysts take no more than ninety days to review a typical regulation.¹⁹⁴ But such requirements highlight the trade-off at issue: avoiding duplication versus generating regulatory delay. OIRA analysts could likely catch more instances of duplication and conflict if they had more time, but giving them more time delays regulatory action. Perhaps OIRA could review regulations faster and without sacrificing results if the agency were given more resources and personnel. But of course, resources and personnel represent costs too. My point here is not

192. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992); see also Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 70 (2000) (arguing that notice-and-comment rulemaking has “encouraged parties to marshal an enormous volume of irrelevant evidence, adopt extreme positions, and use information defensively”).

193. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1280–82 (2006) (stating that deregulatory measures need not undergo OIRA review, thus giving deregulatory measures an advantage over proregulatory alternatives).

194. Exec. Order No. 12,866 § 6(b)(2)(B), 3 C.F.R. 638, 647 (1993).

that OIRA review and these other antiduplication institutions as presently constituted are inefficient. Rather, my point is that these antiduplication institutions come with costs—the most important of which is regulatory delay—that limit how much duplication they can and should be tasked with eliminating.

Antiduplication institutions administered by the Executive Branch—in particular OIRA review, OMB oversight, and the use of White House czars—have also been criticized for expanding presidential control over agency decisions.¹⁹⁵ The critiques of all three institutions center on concerns that increased presidential involvement in regulatory matters may overpoliticize regulatory decisions and move policies away from congressional preferences.¹⁹⁶ Of course, proponents of strong presidential involvement have advanced counterarguments.¹⁹⁷ I do not intend to wade into this normative debate here. My point is only that Executive-administered antiduplication institutions come at the expense of whatever one sees the cost of expanded presidential involvement to be.

Overall, there is no reason to think that the elimination of duplication has been a disregarded function because political actors—the Executive in particular—have incentives to reduce duplication. It may be cost-effective to augment the resources dedicated to existing antiduplication institutions such as OIRA review and OMB oversight. But the additional resources will only help on the margins. Moreover, any massive new efforts to eliminate duplication will come with their own costs—costs which may outweigh the costs of the duplication itself. There is no panacea for duplication. If the cost-effective reduction of duplication is the goal, then ironically, it is efficient to let some amount of duplication persist.

195. For critiques of OIRA review and OMB involvement in agency decisionmaking, see Bressman & Vandenberg, *supra* note 113, at 71 (reporting that 60% of EPA respondents surveyed said that “OIRA involvement never or rarely helped to avoid inconsistencies” between EPA regulations), Croley, *supra* note 113, at 822, 827, and Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1135, 1140 (2010) (exploring the pros and cons of presidential oversight of the regulatory process). For critiques of White House czars, see Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 641–42 & n.22 (2010) (noting criticism of President Obama’s repeated use of policy czars), and Farina, *supra* note 135, at 407 n.233 (citing two Senate hearings on Obama’s use of czars).

196. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 504–05 (2003) (arguing that the President has “unfettered discretion” to use agencies to the benefit of his supporters).

197. See Kagan, *supra* note 110, at 2335, 2339–46 (stating that the President’s national constituency provides strong incentives to ensure the effectiveness of agency actions). See generally Pildes & Sunstein, *supra* note 113 (discussing presidential power to regulate agency matters in the context of Executive Order 12,866).

B. *Implications for Bureaucratic Redundancy and Agency Competition*

Legal scholars have recently begun to note the virtues of valuable forms of duplication among agencies—such as healthy agency competition and bureaucratic redundancies—that guard against regulatory failure.¹⁹⁸ Indeed, some have argued against policies that squelch duplication among agencies because these policies eliminate valuable forms of duplication.¹⁹⁹ In this view, the question becomes whether Congress and the Executive should reform their antiduplication efforts to avoid screening out valuable forms of duplication. In this section, I rely on bureaucratic redundancy theory and public choice models of agency competition to show that redundancies and competitions among agencies with duplicative delegations are generally not cost-effective. Thus, Congress and the White House need not reform their general antiduplication efforts to promote these forms of duplication. Moreover, I argue that, in the exceptional circumstances when competition or redundancy is cost-effective, Congress or the White House should directly order agencies to compete or perform redundant tasks—and thus avoid any ambiguity in agency officials' minds about whether they are expected to coordinate or duplicate each other's efforts.

1. *Bureaucratic Redundancy*

Redundancy theory grew out of studies of complex mechanical systems. The basic idea is that, by adding redundant parts to a system, the probability that the system as a whole will fail may decrease. For example, consider an automobile with dual breaking circuits.²⁰⁰ Assume that a malfunction in one circuit does not affect the performance of the other circuit. If the probability of one circuit malfunctioning is 1/10, then the probability of both circuits malfunctioning at the same time is 1/100. Introduce a third circuit and the probability that the breaks will fail drops to 1/1000. The key point is that a system properly engineered with

198. See Cohen et al., *supra* note 18, at 710–11 (listing five arguments in support of duplication); Gersen, *supra* note 18, at 211–12 (claiming that Congress can incentivize jurisdictional overlap to bring agencies closer to congressional preferences); Katyal, *supra* note 17, at 2324 (noting that creation of the House and Senate is an example of a constitutional redundancy); O'Connell, *supra* note 17, at 1657 (advocating balance between unification and redundancy); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1200–01 (2006) (adding that diversity of expertise fosters innovation and creative problem solving); David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823 (2006) (claiming that redundancy might increase the use of tax expenditures).

199. See Cohen et al., *supra* note 18, at 710–11; Gersen, *supra* note 18, at 211–12.

200. See BENDOR, *supra* note 40, at 26.

redundant parts may have a lower probability of system failure than a system with no such safeguards built in.

However, redundancy theory does not counsel in favor of rampant redundancies. Rather, it shows only that redundancies are desirable when they are cost-effective. Dual braking circuits in cars may prove cost-effective because the potential magnitude of harm is high when braking systems fail and the cost of installing additional braking circuits is relatively low, but dual car radios or dual spare change holders may not be cost-effective because the magnitude of harm from system failure is low. The goal is to discover those areas where redundancies are cost-effective and build the redundancies there.

In 1969, Martin Landau first applied redundancy theory to bureaucratic systems to challenge the public administration dogma that the “wholesale removal of duplication and overlap” is ideal.²⁰¹ He argued that having more than one agency perform the same task may reduce the risk of administrative failure in much the same way that redundant circuits may reduce the risk of mechanical failure.²⁰² Subsequent political scientists have expanded the theory to include notions of interagency diversity. The basic idea here is that different agencies—because of their different expertise, internal processes, interests, and statutory mandates—will take different approaches to the same problem and thus make it more likely that at least one agency will hit on the right approach.²⁰³ Bureaucratic redundancy theory has recently migrated from political science into administrative and constitutional law.²⁰⁴ Professor Neal Katyal expressly draws on the theory when he argues that “reliance on just one agency is risky. It is a form of ‘administrative brinkmanship.’”²⁰⁵

However, bureaucratic redundancies are not cost-effective for most regulatory tasks. There are two reasons. First, the costs of bureaucratic redundancies are significant. These costs include the following: public budgetary expenses, burdens on regulated entities that must comply with two agencies’ regulations, increased monitoring costs because agency

201. Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 348 (1969).

202. *Id.* at 349.

203. See BENDOR, *supra* note 40, at 49 (using mathematics to illustrate that redundant systems are always at least as likely to be successful and sometimes more likely); Weisbach, *supra* note 198, at 1839 (explaining redundancy as diversification of risk).

204. See Katyal, *supra* note 17, at 2324 (noting that “academic concern focuses on the extent to which the President and Congress should control agency decision-making”); O’Connell, *supra* note 17, at 1678, 1703 n.274; Weisbach, *supra* note 198 (examining the principle-agent problem and agency redundancy in the context of tax policy); Staudt, *supra* note 198, at 1214–22.

205. Katyal, *supra* note 17, at 2324 (quoting Landau, *supra* note 201, at 354).

overseers have more bureaucrats to oversee for each regulatory problem, interagency conflicts that distract agencies from more important regulatory matters and may generate incoherent regulatory policies, free riding by agencies that assume other agencies are on top of regulatory problems, and opportunity costs from having an agency perform a redundant task instead of focusing on other tasks. Opportunity costs are one of the most significant of these costs. Agencies have limited resources and attention spans.²⁰⁶ When an agency performs a redundant task, it is not focusing on other potentially critical tasks.

Because of these potentially high costs, bureaucratic redundancies are most often worthwhile when the redundant agency provides a significant benefit by safeguarding against high-magnitude harm. Unsurprisingly, many examples of redundancies among executive agencies come in areas where there are potentially catastrophic or irreversible risks from agency failures. For example, multiple agencies gather intelligence to prevent terrorist attacks,²⁰⁷ and both the Departments of Commerce and the Interior must sign off on orders to delist some species from the Endangered Species List.²⁰⁸ These redundancies are likely cost-effective because they reduce the risk of catastrophic and irreversible harms.²⁰⁹ However, these redundancies are also expressly ordered by the White House and Congress and thus are not susceptible to being screened out by antiduplication institutions, which are generally designed to catch unwanted duplication. Thus, the benefits from these mandated redundancies provide no reason to reform the application of antiduplication institutions.

The second reason that bureaucratic redundancies are not cost-effective for most regulatory tasks: some of the benefits from redundancies may be captured through intraagency redundancies that are cheaper to maintain than interagency redundancies. For example, the Department of Energy retains three nuclear weapons laboratories to ensure “the safety and reliability of the nuclear weapons stockpile in the absence of nuclear testing.”²¹⁰ Some of the benefits from redundancy accrue even though the redundancies here are intraagency—and they accrue without the addition

206. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 69 (2008).

207. See O’Connell, *supra* note 17, at 1660–62 (describing the growth of the intelligence community after the 9/11 attacks).

208. 16 U.S.C. § 1533(a)(2)(B)–(C) (2006).

209. For a discussion of catastrophic and irreversible risks, see generally CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* (2007).

210. Presidential Statement on the Future of Federal Laboratories, 31 WEEKLY COMP. PRES. DOC. 1708, 1708 (Sept. 25, 1995), available at <http://clinton3.nara.gov/wh/eop/ostp/nstc/html/pdd5.html>.

of the coordination costs that would arise if the labs were scattered throughout multiple departments and thus under the oversight of different management structures. This is not to say that intraagency redundancies are perfect substitutes for interagency redundancies. Interagency redundancies—by staffing two agencies with potentially diverse skills and viewpoints—are stronger than intraagency redundancies in some instances. However, in other instances intraagency redundancies will prove more cost-effective. Moreover, intraagency redundancies are the responsibility of the agency head and are generally not subject to antiduplication institutions, which focus on interagency redundancies.

Ultimately, most duplication subjected to antiduplication institutions does not involve tasks that satisfy the conditions necessary to make interagency bureaucratic redundancies cost-effective. In the rare occasion when duplicative delegations entail tasks for which interagency redundancies are cost-effective, Congress or the White House can explicitly direct agencies to perform redundant functions—as they have proven capable of doing in the antiterrorism and endangered species contexts. Such direct instruction is preferable because it helps avoid confusion about how agencies should behave given potentially contrary signals sent to agencies from antiduplication institutions. Overall, so long as Congress and the White House direct agencies to perform redundant tasks when desirable, there is no reason to reform antiduplication institutions generally in order to ensure that beneficial redundancies are not screened out.

2. *Agency Competition*

Public choice models of agency competition emerged around the same time as bureaucratic redundancy theory. These models also were designed to question the canon of public administration that favors coordinating the behavior of agencies with similar powers to avoid duplication.²¹¹ The models—by analogizing public agencies to private, profit-seeking firms—show how competition among agencies may generate valuable information for agencies' congressional principals. There are several variants of models of agency competition. I focus on two influential variants that are most relevant to the duplicative delegations issue—what I will call the price competition model and the jurisdictional competition model.²¹² Under these models, competition is generally considered a “natural” tendency for

211. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 196 (1971).

212. Cf. Kathleen A. Carroll, *Bureau Competition and Inefficiency: A Reevaluation of Theory and Evidence*, 13 J. ECON. BEHAV. & ORG. 21 (1990) (calling the same models “Niskanen-type models” and “models of bureaucratic conduct,” respectively).

agencies.²¹³ Thus, even if Congress does not draft duplicative delegations with the intent to spur agency competition, the duplicative delegations may nevertheless generate valuable competition because agencies are prone to compete when given the chance. If one accepts the models' assumptions, the loss of beneficial interagency competition is one of the costs of avoiding duplication through antiduplication institutions. Indeed, the models suggest that Congress and the White House should not continue to apply antiduplication institutions that prevent duplication generally and should instead selectively encourage those duplications that generate beneficial competition. William Niskanen—the original developer of the price competition model—argues along these lines. He asserts that more beneficial “competition would develop if it were not artificially constrained”²¹⁴ by public policies that favor “the coordination of similar government services [and] the elimination of redundancy and overlap.”²¹⁵ Several legal scholars have also adopted the position that some antiduplication institutions will squash beneficial interagency competition. For example, Professor Mariano-Florentino Cuéllar and his coauthors argue that agency consolidation “can diminish the competition among agencies.”²¹⁶ However, the problem with such conclusions is that—at least to the extent that the conclusions are based on public choice models of agency competition—they rest on highly questionable assumptions about bureaucratic and legislative behavior and processes. I conclude that, while there are some potential benefits from agency competition, the benefits are not as robust as the models predict and there is little risk that antiduplication institutions will squelch beneficial competition.

a. A Price Competition Model

The price competition model predicts that duplication among agencies provides valuable information to Congress about how much it costs an agency to provide a service—information that Congress may use to make wiser decisions during the appropriations process. When agencies with duplicative delegations avoid duplication, they deprive Congress of this cost-saving information.

Under this model, agency officials want to maximize the size of their

213. William A. Niskanen, *Competition Among Government Bureaus*, 22 AM. BEHAV. SCIENTIST 517, 518 (1979).

214. NISKANEN, *supra* note 211, at 196–97.

215. Niskanen, *supra* note 213, at 518.

216. Cohen et al., *supra* note 18, at 710–11 (referring to the diminishment of beneficial competition); *see also* Merrill & Francer, *supra* note 2, at 133 (“Consolidation could also sacrifice the benefits of competition among agencies.”).

budgets.²¹⁷ Thus, the officials submit budget requests to Congress that are higher than needed to provide their agency's services.²¹⁸ Congress is ignorant about the agency's true production costs and ends up approving a budget that is higher than necessary for the agency to efficiently provide its services—thus wasting taxpayer dollars.²¹⁹ The price competition model suggests that Congress may constrain an agency's highball budgetary requests by having two or more agencies provide duplicative services and submit funding requests for those services. This budgetary "competition among bureaus provides the [congressional] review committee a contemporary basis for comparison, making it easier to recognize unusually efficient or inefficient performance and to reward or penalize bureaus on this basis."²²⁰ The price competition model predicts that these rewards and penalties—likely coming in the form of bigger budgets or expanded powers—will drive the competing agencies to become more efficient, thus saving taxpayer dollars.

Normatively, if the potential cost savings from competition are high enough, then Congress and the White House may want to relax the antiduplication institutions that push agencies to coordinate and avoid duplication. Instead, Congress and the White House may want to encourage more duplication that generates competition.

The problem with drawing this conclusion from the price competition model is that the model rests on several faulty assumptions about executive and legislative behavior and processes. First, the model assumes that bureaucrats are budget maximizers. But there is little reason to assume that bureaucrats care a lot about budgets because an agency's budget has no bearing on bureaucrats' salaries or working conditions. Indeed, bureaucrats may have a number of preferences that are uncorrelated or negatively correlated with the size of their agencies' budgets.²²¹ Second, the model assumes that agencies have the upper hand in budget negotiations with Congress—a highly dubious assumption given how much power Congress wields over agencies and given the evidence that congressional

217. NISKANEN, *supra* note 211, at 36–42.

218. *Id.* at 155–68.

219. *Id.*

220. *Id.* at 160.

221. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–33 (2005) [hereinafter Levinson, *Empire-Building*] (noting how bureaucrats may be motivated by self-interests that are contrary to the agency's purpose); see also Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 382–83 (2000) (explaining how bureaucrats may select more expensive means to accomplish their tasks to use up the budget and decrease their workloads).

committees are often stingy and push back on budget requests.²²² Third, the model assumes that price competition is the only tool available for Congress to learn about agencies' costs. However, Congress has other ways of learning about agencies' costs that are more cost-effective than price competition. Most obviously, Congress has tasked the Congressional Budget Office with providing "information and estimates required for the Congressional budget process."²²³ Thus, before signing off on agencies' budgets, Congress has in hand its own estimates of the agencies' costs. Moreover, Congress may retrieve additional information on agencies' costs by ordering the Government Accountability Office to audit agencies. Finally, the model ignores the role that the White House plays in the budgeting process. Before agencies' budget requests go to Congress, they are screened by OMB.²²⁴ Because the White House may push back on agencies' budget requests, the requests are often lower than the model assumes by the time they reach Congress.

Overall, it is highly questionable whether duplication among agencies leads to the sort of beneficial agency competition that the model predicts. It is plausible that duplication reveals some valuable information to Congress. But in the end, it appears that competition is not a cost-effective way for Congress to gain information about agencies' costs, given the high price of agency duplication. Thus, price competition is not a compelling reason for Congress and the White House to relax the application of antiduplication institutions.

b. A Jurisdictional Competition Model

The jurisdictional competition model of agency competition takes a view of the bureaucratic battlefield that goes beyond the appropriations process. The model suggests that having two agencies with duplicative delegations compete by performing the same tasks is beneficial because it allows Congress to compare the agencies' performances and ensure that agencies are acting in line with congressional preferences.

Under the jurisdictional competition model, agency officials want to expand their agencies' power and jurisdiction.²²⁵ Two agencies with

222. See Rudolph G. Penner, *The Congress and Statistics*, CHANCE, Fall 2003, at 54, 56, available at http://www.urban.org/uploadedPDF/1000584_congress_and_stats.pdf.

223. *About CBO*, CONG. BUDGET OFFICE, <http://www.cbo.gov/aboutcbo/> (last visited May 15, 2011).

224. See *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited May 15, 2011) (detailing how OMB clears all bills that agencies send to Congress).

225. See ANTHONY DOWNS, *INSIDE BUREAUCRACY* 16–18 (1967) (exploring why agencies inherently seek to expand).

jurisdiction to perform the same tasks will compete for sole control of those tasks by trying to outperform each other.²²⁶ Their performances are monitored and judged by Congress. Congress rewards the agency whose regulatory output is closer to Congress's preferences and punishes the agency whose performance is seen as lacking.²²⁷ Rewards may include increased budgets and expanded jurisdiction; punishments may include decreased budgets and diminished jurisdiction. Here, the competition ensures that agencies will act according to Congress's wishes. In particular, if Congress cares about efficiency, then competition will drive the agencies to become more efficient.²²⁸ The corollary point is that in the absence of competition, agencies will waste their resources.²²⁹ Professor Jacob Gersen embraces this basic model of agency competition when he argues, "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."²³⁰

But again, there are several problems with drawing these conclusions from the jurisdictional competition model. First, there is little reason to assume that removing institutions that influence agencies to coordinate and avoid duplication will actually produce robust agency competition. The reason is that although agency officials may want more power and jurisdiction, they may also want any number of things that would lead them to avoid competing with other agencies' officials. For example, officials may want to minimize their public failures—and thus avoid tasks that they cannot expertly perform or that come with a high risk of failure.²³¹ They may want to maximize their leisure time—and thus abdicate tasks instead of taking on new ones.²³² They may want to maximize their competence at

226. BENDOR, *supra* note 40, at 55–56 (emphasizing that agencies will fight one another for jurisdiction).

227. See Gersen, *supra* note 18, at 212–13 (stating that Congress can effectively take advantage of agency knowledge by threatening an agency with jurisdictional loss for failing to invest in expertise); O'Connell, *supra* note 17, at 1704; Ting, *supra* note 38, at 287 (asserting that principals can lead agents to compete against one another with relative ease when redundancy exists).

228. See DOWNS, *supra* note 225, at 200 ("When faced by a threat from functional competitors, a bureau is likely both to invent better ways of performing its functions and to attack its competitors.").

229. See *id.* (explaining that agencies not facing competition must "continue to look busy" during slow periods so Congress will not cut its size or importance).

230. Gersen, *supra* note 18, at 212.

231. See C.F. LARRY HEIMANN, ACCEPTABLE RISKS 18 (1997) (asserting that the "cardinal rule" governing agency activity is avoiding visible failures).

232. See Levinson, *Empire-Building*, *supra* note 221, at 933 (describing this subset of bureaucrats as "stereotypical").

work—and thus focus on expertly performing only a small core set of traditional tasks.²³³ They may want a quiet life with settled, unvarying long-term assignments. Or they may want to maintain a pleasant work environment—and thus avoid antagonizing other bureaucrats and agencies by trying to take over their tasks. Overall, there are a number of preferences that bureaucrats may have. The most that can be claimed about bureaucrats as competitive expansionists is that some bureaucrats some of the time may want to expand the size and power of their agency.

Second, even if agencies were motivated to compete with each other, it is questionable whether congressional oversight is set up to properly encourage and reward efficient competition. For agency competition to prove efficient, Congress must monitor the agencies' performances well enough to accurately determine which agency performed more to its liking. However, it is doubtful that Congress invests enough resources in monitoring mundane agency competitions to accurately determine the winner. Much congressional oversight is triggered by public complaints about regulatory failure.²³⁴ But in the absence of salient failures, Congress may not pay close enough attention to differences in agencies' everyday performances in order to accurately determine which agency is performing better on a specific regulatory task. Moreover, Congress's accuracy may be further hurt because congressional oversight committees are often biased in favor of the agencies they oversee.²³⁵ That is, in competitions between two agencies under the oversight of two different committees, each committee may push for its agency—regardless of how it performed.

Furthermore, the benefits of jurisdictional competition depend on Congress rewarding agencies that perform well and penalizing those that do not. But Congress may reward agencies that are seen as having failed—if rewards are understood to mean bigger budgets and more power—because Congress may believe that it is better to give the agencies more resources so they can prevent future failures instead of punishing them for past failures. Consider that the House recently proposed new powers for

233. See WILSON, *supra* note 153, at 181–82 (discussing by way of example USDA's distaste for the food stamp program).

234. See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 274 (1987) (explaining that administrative procedures allow the public to voice its displeasures with agency policies before those agencies have fully committed to them); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984) (arguing that Congress benefits by allowing the public to pull the “fire alarm” when agencies fail to comply with Congress's objectives).

235. See generally DeShazo & Freeman, *supra* note 41 (positing that committee agencies may favor those agencies that allow them to “further their own interests”).

the FDA after it was blamed for failing to prevent food-borne illnesses instead of granting those powers to other agencies such as the USDA.²³⁶ Similarly, Congress expanded the powers of the Federal Reserve after it was blamed for contributing to the collapse of the entire U.S. economy, despite calls for Congress to punish the agency by shifting some of its jurisdiction and power to other agencies.²³⁷ Such rewards for regulatory failure do not induce the kind of competitive efficiencies envisioned by the jurisdictional competition model. Overall, it is far from certain that congressional oversight is set up for agency competitions.

Finally, even if changing agencies' incentives would produce robust competition that was accurately monitored and rewarded by Congress, it remains questionable whether such direct competition is cost-effective. Indirect competition may produce much of the benefit of direct competition but without the costs of duplication and interagency conflict.²³⁸ By indirect competition, I mean agencies' competition for jurisdiction and power that does not entail duplication and head-to-head competition over the exact same tasks. Consider that a single agency performing a task still faces pressure from the possibility that, if it does not perform the task to the legislators' liking, Congress may replace it with another agency. An agency does not need to witness another agency performing the same task to know that its congressional bosses will look elsewhere if they are not happy with the agency's performance.

Overall, jurisdictional competition among agencies with duplicative delegations is generally not cost-effective. The jurisdictional competition model provides little justification for Congress and the White House to reform their antiduplication efforts to focus more on promoting competition than reducing duplication.

C. Implications for Separation of Powers

In the previous two sections, I analyzed duplicative delegations with reference to normative theories and models of interagency duplication. In this section, I analyze duplicative delegations with reference to constitutional separation of powers. In particular, I examine how duplicative delegations alter the balance of powers by affording the Executive significantly more discretion than it usually has to determine

236. *See generally* Food Safety Enhancement Act of 2009, H.R. 2749, 111th Cong. (2009) (granting the FDA authority to cancel or suspend the registration of facilities that manufacture, process, pack, or hold food).

237. *See* Enhancing Financial Institution Safety and Soundness Act of 2010, Pub. L. No. 111-203, § 312(b)(1)(A), 124 Stat. 1520, 1521 (2010).

238. *See* Ting, *supra* note 38.

which agency performs a task.

When Congress delegates to a single agency, the President must act through that particular agency.²³⁹ By contrast, when Congress delegates authority directly to the President, the President may retain that authority or subdelegate it to the inferior executive officer or agency of his choosing under his subdelegation powers.²⁴⁰ There are significant benefits to according the President maximum discretion to empower agencies as he sees fit, but there are significant costs too—in particular the risk of arbitrary decisionmaking and abuse of power. As it turns out, duplicative delegations provide the Executive a level of discretion to allocate responsibilities among agencies that is less than the discretion accorded through delegation to the President but greater than the discretion accorded when Congress clearly delegates to a specific agency. With duplicative delegations, the Executive has discretion to select which agency should perform which tasks. But that discretion is limited to the few agencies with duplicative delegations and to the set of tasks covered by those delegations. This intermediate level of discretion captures some of the key benefits of delegating directly to the President but with fewer costs. Indeed, although duplicative delegations are largely unintended and incidental creations, the intermediate level of discretion they afford the Executive has proven beneficial in some regulatory contexts.

Significant trade-offs come from delegation to the President. First, delegation to the President may enhance democratic accountability by linking the exercise of administrative power to the office of the President, who is of course a nationally elected figure.²⁴¹ However, when Congress delegates to the President, Congress may then take a more laissez-faire

239. See Kagan, *supra* note 110, at 2329 (explaining that when Congress delegates authority to an administrative official, it deprives the President of delegating that authority to the agency of his choice). Some have suggested that, under one reading of the Constitution, the President has the power to strip an agency of its congressionally delegated authority and reassign the authority to another agency. See Harold J. Krent, *The Sometimes Unitary Executive: Presidential Practice Throughout History*, 25 CONST. COMMENT. 489, 503 (2009) (reading proponents of a strong unitary Executive as appearing to support this proposition). However, this strong view of presidential power is not the dominant one. For the purposes of this Article, I will adopt the majority and most legally defensible position and assume that Congress's choice to delegate to a particular agency forces the President to act through that agency.

240. 3 U.S.C. §§ 301–303 (2006) (authorizing the President “to designate and empower the head of any department or agency,” contingent on appointment by the Senate, to fulfill “any function which is vested in the President by law”).

241. See Kagan, *supra* note 110, at 2331–32 (identifying two reasons for increased accountability: (1) enhanced public transparency, and (2) improved bureaucratic responsiveness to the public by establishing an electoral link).

approach to oversight—perhaps feeling that agencies acting under presidential delegations instead of congressional delegations are the responsibility of the President. If this is right, then delegation to the President sacrifices some of the benefits of interbranch oversight that come from our constitutional separation of powers. Thus, as a result of delegation to the President, accountability is strengthened because of a connection to the President, but accountability is hurt because congressional oversight of unelected bureaucrats may decrease.

Second, by virtue of his position atop the Executive hierarchy, the President is better situated than Congress to assign tasks to inferior executive agencies in ways that foster a coherent and efficiently hierarchical administrative structure. Delegation directly to the President exploits this comparative advantage.²⁴² However, delegation to the President also diminishes congressional input into the important question of which agency should regulate. It matters which agency regulates. Different agencies have different expertise and interests and will thus regulate in different ways. When the President alone decides which agency should act, the public is deprived of Congress's views on the matter—views that may reflect majority preferences.²⁴³ Thus, as a result of delegation to the President, the decision about which agency should regulate is improved because of the President's comparative advantage in making such decisions, but the decision is hurt because of the loss of congressional input.

Third, delegation to the President accords the President flexibility to respond to fast-changing or new regulatory problems by assigning oversight to the agency with the greatest expertise and ability to adapt to the new problem without the lengthy delays that come from the congressional process. However, delegation to the President also enables arbitrary decisionmaking by the President.²⁴⁴ Different agencies have different

242. See ARNOLD, *supra* note 58, at 17 (describing two theorists' views within the emerging field of public administration that the Executive should have primary administrative delegation authority).

243. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 59–60 (1998) (explaining how demands from interest groups cause legislators in Congress to make compromises, although it is debatable whether the outcome truly reflects the general public's interests); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 451, 456–57 (1987) (claiming that “accountability is attenuated, not enhanced,” when presidential intervention controls administrative decisionmaking).

244. See Bressman, *supra* note 196, at 525 (noting that the Supreme Court in *Schechter Poultry* and *Panama Refining* invalidated large delegations to the President because they increased “the possibility of arbitrary action to unacceptable levels”); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 269 (2006) (describing consequences of congressional delegations to the President, including the

interests and internal decisionmaking processes, which will yield different policy outcomes. From the array of agency decisionmaking processes to choose from, the President may select an agency for arbitrary reasons. Moreover, the Supreme Court has held that the APA does not apply to the President.²⁴⁵ Therefore, when Congress delegates to the President, it enables the President to ignore the procedural constraints of the APA—although the APA would apply if the President subdelegated authority to an agency. Ultimately, as a result of delegation to the President, the President is free to respond to changes in the regulatory environment by quickly shifting responsibility among agencies, but this time-saving benefit comes with the risk of arbitrary decisionmaking by the President.

In short, when Congress delegates to the President, it gives the President maximum discretion to decide which agencies should perform which tasks. This discretion comes with significant benefits and costs. As it turns out, duplicative delegations provide the Executive an intermediate level of discretion that captures some of these key benefits but with fewer costs.

Duplicative delegations provide a menu of agencies from which the President may select which agencies should perform which tasks—assuming the President cares enough about the regulatory matter at hand to become involved instead of leaving it to the agencies to divide tasks among themselves. This discretion allows the President to organize the relationship among agencies with duplicative delegations in a coherent and efficient manner. It affords the President flexibility to shift responsibility among agencies in response to changes in the regulatory environment. And, it enhances accountability by linking the agencies' responsibilities to the President.

At the same time, the President's discretion is subject to significant constraints. The President's decision set is limited to only those agencies with duplicative delegations and to only those tasks that fall under these delegations. Thus, the President cannot comprehensively reorganize the allocation of regulatory tasks without congressional approval. The President cannot act himself, and thus the APA will apply to whichever agencies the President decides should act. Moreover, congressional oversight committees remain invested in the balance of powers among agencies with duplicative delegations—thus retaining the benefits of interbranch oversight. Indeed, Congress has on occasion blocked agreements among agencies with duplicative delegations that it disliked.²⁴⁶

This intermediate level of executive discretion afforded by duplicative

possibility of unilateral presidential action).

245. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

246. *See infra* notes 272–75 & accompanying text.

delegations has proven beneficial on some occasions. Consider the regulation of surface mining. In response to recent studies showing the adverse and irreversible environmental impact of surface mining, the Obama Administration decided to develop new regulatory guidelines to minimize environmental harms from such mining operations.²⁴⁷ Both Interior's Office of Surface Mining (OSM) and the EPA have authority to regulate the environmental impact of surface mining.²⁴⁸ In the past, OSM has been the primary federal agency in charge of developing best management practices for surface mining. However, OSM has come under fire for its lax and inept enforcement of environmental regulations.²⁴⁹ Thus, the Obama Administration chose the EPA and not OSM to take the lead in developing and enforcing new best management practices for surface mining operations.²⁵⁰ In short, duplicative delegations between two agencies enabled the Executive to rely on one agency when the other agency may not have been up to the task at hand.

The level of executive discretion resulting from duplicative delegations also proved beneficial when the spread of GMOs in the 1980s created significant regulatory problems. The regulatory problems called for the expertise of the FDA, EPA, and USDA, but the decades-old authorizing statutes for those agencies provided little guidance on how to divide the tasks confronting them.²⁵¹ However, duplicative delegations in those statutes enabled the White House to craft a coordinated framework for the regulation of GMOs that allocated regulatory responsibility to each agency based on its expertise and capabilities. The White House was able to craft such a resolution faster than new legislation assigning roles to the agencies could have been passed by Congress. As the introduction to the coordinated framework acknowledges, dividing responsibilities among the agencies under their existing statutes provided "more immediate regulatory

247. MEMORANDUM OF UNDERSTANDING AMONG THE U.S. DEPARTMENT OF THE ARMY, U.S. DEPARTMENT OF THE INTERIOR, AND U.S. ENVIRONMENTAL PROTECTION AGENCY (June 11, 2009), <http://www.osmre.gov/resources/ref/mou/ASCM061109.pdf>.

248. The Office of Surface Mining (OSM) has authority under the Surface Mining and Control Reclamation Act. 30 U.S.C. §§ 1201–1328 (2006). The EPA has authority under the Clean Water Act. 33 U.S.C. §§ 1251–1376 (2006).

249. See, e.g., Ken Ward, Jr., *OSM "At a Crossroads," Rahall Says*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 12, 2009, at B1.

250. See Complaint at 37, *Nat'l Mining Ass'n v. Jackson*, No. 1:10-cv-01220 (D.D.C. July 20, 2010) (alleging that the EPA's rejections of existing practices and implementations of new ones that are not evaluated by OSM "invade and disrupt" Congress's authority).

251. See Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167 (2004) (arguing that the regulatory system has failed to efficiently adapt to advances in biotechnology).

protection and certainty for the industry than possible with the implementation of new legislation.”²⁵² In short, duplicative delegations enabled the Executive to quickly craft a relatively coherent approach to a new, important technology that implicated multiple agencies’ expertise.

Ultimately, duplicative delegations afford the Executive an intermediate level of discretion to choose among agencies when assigning tasks. This discretion is sometimes beneficial. This is not to say that Congress should purposefully create duplicative delegations. If Congress wants the Executive to have some discretion in this regard, it can clearly and expressly provide the Executive with a choice of specified agencies—thus reducing the *ex post* coordination and review costs that come from the ambiguity of duplicative delegations. Indeed, Congress has granted the Executive such discretion on occasion. For example, Congress has established, “Either the Secretary of Agriculture or the Secretary of Energy may be the Secretary concerned in the case of any biomass energy project” that has certain specified characteristics.²⁵³ But even when Congress does not set out with the goal of granting the Executive some discretion to determine which agency regulates, it often does so anyway by unintentionally or incidentally creating duplicative delegations. These duplicative delegations generate their share of *ex post* coordination and review costs. But they also provide the Executive a level of discretion that turns out to be beneficial when one agency is not up to the task at hand or when a relatively rapid regulatory response is needed.

D. Implications for Statutory Interpretation

In this section, I build on the analysis in the previous section by offering a separation of powers based argument for how courts should reconcile duplicative delegations. In particular, I propose an interpretive default rule under which courts would defer to executive arrangements reconciling duplicative delegations.

Recall that duplicative delegations cases arise either in suits challenging an agency action on the grounds that Congress wanted another agency to exercise jurisdiction, or in suits to compel agency action when the agency argues that another agency has jurisdiction. These cases often require courts to reconcile one agency’s governing statute with another agency’s governing statute to determine whether both or only one (and if so, which one) of the agencies has authority to regulate. Under *Chevron*, an agency has interpretive authority over silences and ambiguities in its own

252. Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302, 23,303 (June 26, 1986).

253. 42 U.S.C. § 8812(a)(2)(A) (2006).

authorizing statutes, and courts must defer to the agency's interpretations as long as they are reasonable.²⁵⁴ However, "an agency decision is not entitled to such deference when it interprets another agency's statute or resolves a conflict between its own statute and the statute of another agency."²⁵⁵ The question becomes, in duplicative delegations cases in which only one agency is a party, how should courts reconcile the duplicative delegations if the views of the agency at bar are not entitled to deference?

Some courts in duplicative delegations cases have looked to executive arrangements—such as interagency agreements and understandings between the agencies involved—and then accorded some deference to the agencies' collective position on how to reconcile the duplicative delegations (as opposed to the position of the single agency at bar). For example, when an advocacy group challenged a USDA regulation on the grounds that jurisdiction belonged to the FDA, not the USDA, the D.C. Circuit observed that "the two agencies are in agreement on the question now before us, and that agreement in itself is highly significant."²⁵⁶ Similarly, when a regulated entity challenged an action by FERC on the grounds that the Securities and Exchange Commission (SEC) had exclusive jurisdiction over the matter, the Supreme Court gave some weight to the fact that the "longtime understanding and practice" of the agencies supported the FERC's exercise of jurisdiction.²⁵⁷

However, other courts have refused to give weight to interagency arrangements. For example, consider the Seventh Circuit's treatment of an interagency agreement between the SEC and the Commodities Futures Trading Commission (CFTC). As the court stated, "The CFTC regulates futures and options on futures, [while] the SEC regulates securities and options on securities."²⁵⁸ Some new financial options can reasonably be characterized as either options on futures or options on securities, and thus either the CFTC or SEC can reasonably assert authority over these instruments.²⁵⁹ In one case involving such a hybrid financial instrument,

254. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *see also* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 *YALE L.J.* 676, 689 (2007) (describing *Chevron's* "global default rule").

255. *Dep't of the Navy v. Fed. Labor Relations Auth.*, 836 F.2d 1409, 1410 (3d Cir. 1988); *see also* *N.J. Air Nat'l Guard v. Fed. Labor Relations Auth.*, 677 F.2d 276, 281 n.6 (3d Cir. 1982).

256. *Pub. Citizen v. Foreman*, 631 F.2d 969, 975–76 (D.C. Cir. 1980).

257. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 80 (1990).

258. *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989).

259. *See id.* at 539–48 (holding that the instrument in this case, the index participation, is subject to the jurisdiction of the Commodities and Futures Trading Commission, not the SEC).

the two agencies had entered into an agreement that allocated authority to the SEC.²⁶⁰ However, when the question of which agency had jurisdiction arose before the Seventh Circuit, the court refused to defer to the terms of the interagency agreement and, after independently reviewing the facts and the agencies' statutes, decided that the CFTC had jurisdiction.²⁶¹ The court explained that it ignored the interagency agreement because "the two agencies cannot thereby enlarge or relinquish their statutory jurisdictions."²⁶² However, the dissenting judge chastised the court for ignoring the agreement and thereby "frustrat[ing] the efforts of the concerned regulatory agencies at compromise."²⁶³

Similarly, the Tenth Circuit declined to defer to an interagency agreement that switched jurisdiction over a facility from the Mining Safety and Health Administration (MSHA) to OSHA.²⁶⁴ MSHA has jurisdiction over mining facilities, while OSHA has jurisdiction over most other workplaces.²⁶⁵ The facility in question performed both mining and nonmining functions. The agencies' statutes are ambiguous as to which agency should exercise jurisdiction over such hybrid facilities.²⁶⁶ The jurisdictional question arose in court after the facility challenged fines levied against it on the grounds that MSHA had exclusive jurisdiction and had improperly ceded its authority to OSHA.²⁶⁷ The Tenth Circuit declined to defer to the agreement transferring oversight responsibility because the court was troubled by the "laissez-faire view regarding agency modification of legislatively invested authority."²⁶⁸

I suggest that these courts are misguided in failing to defer. As an interpretive default rule, courts should extend some deference to executive arrangements reconciling duplicative delegations. Existing doctrine is clear that, when statutes are ambiguous or silent regarding *how* an agency should regulate, then courts should defer to the Executive's decision about *how* to regulate.²⁶⁹ The rationale behind such deference is that the Executive is better suited than the Judiciary to make technical and policy judgments about *how* to regulate.²⁷⁰ The default rule I propose extends this same

260. *Chi. Bd. of Trade v. SEC*, 677 F.2d 1137, 1142 n.8 (7th Cir. 1982).

261. *Id.*

262. *Id.*

263. *Id.* at 1184 (Cudahy, J., dissenting).

264. *United States v. Agronics, Inc.*, 164 F.3d 1343, 1344 (10th Cir. 1999).

265. *See id.* at 1344 n.3.

266. Brief of Appellee at 13–14, *United States v. Agronics, Inc.*, 164 F.3d 1343 (10th Cir. 1999) (No. 94-2258).

267. *Agronics*, 164 F.3d at 1343–44.

268. *Id.* at 1344.

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

270. *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89

rationale to the question about *which* agency regulates. When statutes are ambiguous about *which* agency with duplicative delegations should regulate, courts should defer to the executive arrangements. The Executive is better at allocating tasks among agencies based on a comparison of the agencies' technical expertise and policy interests. That is, courts should not apply deference rules that distinguish between decisions about *how* to regulate and decisions about *which* agency regulates.

Different agencies have different technical expertise and policy interests, and thus different agencies will perform the same tasks differently. The decision about which agency should regulate revolves around these differences in expertise and interests. Thus, just as technical and policy considerations inform decisions about how an agency regulates, they also inform decisions about which agency regulates. And just as the Executive is better than the Judiciary at making the technical and policy judgments to decide how to regulate, the Executive is also better at making the technical and policy judgments to decide which agency should regulate. Thus, at least on these grounds, courts should not distinguish between the two kinds of decisions when doling out judicial deference.

From a separation of powers perspective, there is also little appreciable difference between the two kinds of decisions. Congress can oversee decisions about which agency regulates as well as oversee decisions about how an agency regulates. Thus, courts need not withhold deference on questions of which agency regulates in order to protect legislative interests.

Just as Congress constrains an agency's ability to determine how to regulate through *ex post* monitoring, Congress has several tools at its disposal if it is unhappy with the division of responsibilities among agencies with duplicative delegations. Congress may simply pressure agency officials in public hearings or behind closed doors.²⁷¹ More definitively, it may amend the duplicative delegations to clearly allocate authority among agencies as it sees fit. Indeed, the mere threat of amending agencies' delegations may prove enough to push agencies with duplicative delegations to divide tasks among themselves according to Congress's liking. But Congress often does not need to act to ensure that agencies with duplicative delegations consider congressional preferences when they decide which tasks to abdicate. Agency abdication and interagency arrangements all take place in the shadow of congressional oversight.

GEO. L.J. 97, 106–12 (2000) (recognizing that voter participation is best achieved by delegating power to elected officials). See generally ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 183 (2006) (asserting that judges should not attempt to fill in gaps when statutes are ambiguous or vague but should defer to agency interpretations).

271. See Beermann, *supra* note 74, at 121–22 (describing formal and informal methods that Congress employs to oversee the execution of laws).

Agency officials know that if powerful legislators disagree with the agencies' decisions—and care enough about the regulatory problem at hand—the legislators will reverse the bureaucrats. Thus, executive agencies with duplicative delegations are likely to consider congressional preferences when they divide up tasks.

However, if Congress dislikes the agencies' allocations of tasks on a salient issue, Congress may block the agreement. Consider the fate of a 2002 agreement between the Federal Trade Commission (FTC) and DOJ. The two agencies both have authority to review proposed mergers,²⁷² and in 2002 they crafted an accord dividing up their merger responsibilities.²⁷³ However, strong opposition from one senator, Ernest Hollings, who was displeased with the interagency accord, was enough to force the agencies to repudiate their agreement.²⁷⁴ Such congressional involvement appears rare, though. Congress is more likely to accept or at least acquiesce in interagency arrangements than to scuttle them. But the possibility of congressional opposition is nonetheless real and forces agency officials to consider legislative preferences when they decide how to divide tasks among themselves. Indeed, in the merger example, the then-chairman of the FTC testified that he knew that Senator Hollings would oppose the accord, but he had contact with other legislators whose support he believed would outweigh Hollings's opposition.²⁷⁵ His calculation was wrong, but his testimony nevertheless illustrates that agencies with duplicative delegations consider congressional preferences when they divide regulatory tasks.

Overall, there is no reason to assume that the risk of agency action departing from congressional preferences is any greater for questions about which agency regulates than for questions about how an agency regulates. Indeed, the presence of multiple agencies may produce information—such as an interagency agreement—that alerts Congress to what agencies are doing and thus makes Congress's *ex post* monitoring job easier than when only one agency is involved in a regulatory matter. Thus, to protect legislative interests courts should not withhold deference on questions of which agency regulates.

Moreover, courts need not withhold deference in order to guard against

272. 15 U.S.C. §§ 18–18a (2006).

273. See TIMOTHY J. MURIS, COMMENTS ON THE FTC–DOJ CLEARANCE PROCESS: BEFORE THE ANTITRUST MODERNIZATION COMMISSION 9–10 (2005), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Muris_Statement.pdf (describing how the agencies divided up responsibilities so that each agency could focus on its area of expertise).

274. *Id.* at 17–18.

275. *Id.*

agency expansionism. In duplicative delegations cases in which the agencies are in agreement—the set of cases for which the proposed default rule would apply—the fact of the agencies’ agreement suggests that there is a low risk of improper expansionism. With an agreement, it is less likely that one agency is improperly impinging on the power of the other agency. It is more likely that the agencies are trying to avoid interagency duplication and conflict by setting agreeable jurisdictional metes and bounds according to the kind of technical and policy considerations worthy of judicial deference.

Finally, there is precedent for the Judiciary adopting presumptions that allow the Executive discretion to select which agencies should perform which tasks. A line of Supreme Court cases beginning before the Civil War repeatedly held that the President and agency heads have inherent authority to subdelegate authority vested in them to subordinate agencies and officers of their choosing.²⁷⁶ In these cases, the power to subdelegate was presumed when Congress was silent on whether subdelegation was allowed.²⁷⁷ Moreover, when subordinate officers carried out their superiors’ duties, the fact of subdelegation was presumed even if there was no evidence that the President or agency head had formally or in writing subdelegated authority.²⁷⁸ These presumed powers of the President and agency heads to subdelegate to the subordinate agency and officers of their choosing became so uncontroversial a topic that subdelegation is no longer discussed in administrative law treatises and casebooks as it once was.²⁷⁹ Indeed, much of the common law of subdelegation was later codified in the Presidential Subdelegation Act of 1950,²⁸⁰ and there was no debate about

276. For cases presuming presidential subdelegation power, see *Wolsey v. Chapman*, 101 U.S. 755 (1879), *United States v. Eliason*, 41 U.S. (16 Pet.) 291 (1842), and *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839). But see *Runkle v. United States*, 122 U.S. 543, 560–61 (1887) (invalidating court martial by Secretary of War on grounds that action required presidential approval). For cases presuming agency heads’ power to subdelegate, see *Parish v. United States*, 100 U.S. 500 (1879), and *McCullum v. United States*, 17 Ct. Cl. 92 (1881).

277. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1301 (2006) (noting that Congress presumes the President’s subdelegation authority because it cannot expect the President to carry out personally every grant of authority); see also Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 28 (2009) (discussing how Congress did not expect the President to “oversee the various and sundry details of the growing administrative state”).

278. See *Wilcox*, 38 U.S. at 513 (Secretary of War as subdelegate); *Parish*, 100 U.S. at 504–05 (Surgeon-General as subdelegate).

279. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175 n.305 (2004) (noting that attorneys no longer challenge subdelegation power in federal courts) (citation omitted).

280. 3 U.S.C. §§ 301–303 (2006).

whether the Act was on constitutionally shaky ground for granting the Executive too much discretion.²⁸¹

Ultimately, the basis for the common law subdelegation power was a presumed congressional intention—because “it is impossible for a single individual to perform in person all the duties imposed on him by his office,”²⁸² Congress intends busy Presidents and agency heads to be able to subdelegate their duties.²⁸³ The judicial default rule that stemmed from this presumption was that courts should defer to subordinate executive officers’ assertions that superior officers had subdelegated authority to them and that such subdelegation was permissible under the relevant statute. One can derive a similar presumption of congressional intent for duplicative delegations that is also based on administrative necessity: because it is impossible for Congress to avoid drafting duplicative delegations *ex ante*, Congress intends agencies with duplicative delegations to clarify jurisdictional bounds among themselves *ex post*. The judicial default rule that stems from this presumption is the one I propose: Courts should defer to interagency arrangements reconciling duplicative delegations.

The analogy between duplicative delegations and subdelegations is not perfect, though. The two concepts are distinct in at least two important ways. First, subdelegations involve vertical transfers of power from within the executive hierarchy, while duplicative delegations involve horizontal transactions by separate agencies in the Executive Branch. This distinction may prove important as a doctrinal matter. Several years ago, the D.C. Circuit struck down a subdelegation from the Federal Communications Commission to state regulators on the grounds that “subdelegation to a subordinate federal officer or agency is presumptively permissible,” but added, “There is no such presumption covering subdelegations to outside parties.”²⁸⁴ This ruling suggests at least the possibility that horizontal subdelegations among agencies are impermissible. However, even if there is a restriction on horizontal subdelegations, it would not affect duplicative delegation cases. In duplicative delegations cases, agencies act under authority delegated by Congress (or subdelegated by their superiors) and not under any authority received through horizontal transfers among agencies. Second, as discussed earlier, the President’s subdelegation power

281. See Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1335 (2003) (positing that the Subdelegation Act has never been found unconstitutional “even though it authorizes executive delegations that lack any intelligible principle”).

282. *Parish*, 100 U.S. at 504.

283. See Mashaw & Perry, *supra* note 277, at 27–28 (explaining that the growth of the administrative state also necessitated and allowed for subdelegation).

284. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

allows him to choose from any inferior executive officer or agency; by contrast, with duplicative delegations, the Executive's choice of agency is significantly constrained. This distinction cuts in favor of being less concerned about abuse of discretion in duplicative delegations cases than in subdelegation cases. Overall, despite a few of key differences, the subdelegation jurisprudence is relevant to duplicative delegations cases as precedent for allowing Executive discretion to determine which agencies should perform which tasks.

Ultimately, there is little reason for courts to distinguish between questions about how an agency regulates and questions about which agency regulates. Just as courts defer to executive decisions about how to regulate, they should too defer in duplicative delegations cases to executive arrangements on which agency should regulate.

To be clear, under the default rule I propose, the level of deference accorded to various interagency arrangements would depend on how those arrangements fit into the existing doctrine on the tiers of judicial deference. *Chevron* deference—that is, deference to reasonable agency actions—is often reserved only for agency actions subjected to formal procedures such as notice-and-comment rulemaking.²⁸⁵ The less deferential *Skidmore* standard—that is, deference based on an agency's "power to persuade"²⁸⁶—may apply to less formal agency actions.²⁸⁷ Thus, under existing doctrine, whether an interagency agreement would receive *Chevron* or *Skidmore* deference may depend on whether the agreement is subjected to notice-and-comment rulemaking or whether it is merely circulated as a memorandum among the agencies.²⁸⁸ As for interagency arrangements based on practice and understanding that are not memorialized agreements, the Supreme Court has treated "longstanding practice" by an agency as "persuasive authority,"²⁸⁹ but it has not to my knowledge extended *Chevron* deference to evidence of longstanding practice that had not been subjected to procedural formalities. Thus, under the proposed default rule, evidence of longstanding practice reconciling duplicative delegations would also receive deference for their persuasive powers but

285. *United States v. Mead Corp.*, 533 U.S. 218 (2001). For valuable discussions of *Mead*, see Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002), and Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

286. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

287. *Mead*, 533 U.S. at 234–35.

288. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2473 (2009) (granting a "measure of deference" to an internal EPA memo not subject to formal rulemaking).

289. *See Steadman v. SEC*, 450 U.S. 91, 103–04 (1981).

would not receive *Chevron* deference. Overall, different interagency arrangements would receive different levels of deference, but the bottom line would remain the same: courts would grant some deference to executive arrangements instead of independently reconciling duplicative delegations without reference to the agencies' views.

CONCLUSION

Duplicative delegations pervade our legal and regulatory system. They generate the potential for widespread, inefficient interagency duplication. However, Congress cannot easily or cheaply avoid drafting duplicative delegations *ex ante*. Ultimately, it is better to screen out the undesirable duplication through the use of comparatively cheaper *ex post* institutions. But because these *ex post* institutions also have their costs, it turns out that it is efficient to let some interagency duplication persist in the regulatory system.

Duplicative delegations also alter the balance of powers among the branches of government. Through duplicative delegations, Congress affords the Executive significantly more discretion than it usually has to determine which agency should perform a particular task. Descriptively, the President and agencies routinely divvy up tasks among agencies with duplicative delegations. Normatively, because the Executive is better than the Judiciary at allocating tasks among agencies, courts should defer to executive arrangements reconciling duplicative delegations.