University of Southern California Law School
Legal Studies Working Paper Series

Year 2016 *Paper* 217

Beyond Agency Core Mission

Yoon-Ho Alex Lee*

*USC Gould School of Law, alee@law.usc.edu

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Abstract

A long-standing view among legal scholars, political scientists, sociologists, and regulators posits that it is important for a regulatory agency to have a narrowly-defined core mission and to focus on activities that are central to accomplishing it successfully. Although this view has no doctrinal foundation, rhetoric grounded on it crops up frequently in regulatory dialogues, especially in opposition to prospective agency regulations. The purpose of this Article is to formalize this "core-mission model" of the administrative state and analyze its benefits, costs, and risks. An important starting point for the analysis is that, unlike a private corporation or a non-profit organization, a regulatory agency is not a free enterprise in a competitive market. Instead, as a "creature of statutes," it stands in a principal-agent relationship with Congress, whose job in turn is to respond to society's various needs and problems, as they arise, by delegating responsibilities to new or existing agencies. Given this relationship, the core-mission model has to be operationalized in one of two ways: either as an ex post prioritizing strategy (on the part of the agency) or as an ex ante delegating strategy (on the part of Congress). Both strategies, however, entail significant costs on the government and society. As an ex post prioritizing strategy, the model promotes selective attention, which can, on the one hand, reduce internal organizational costs for the agency ("intra-agency coordination costs") but, on the other hand, give rise to regulatory gaps and lead to costly outcomes, such as crises or controversies. As an ex ante delegating strategy, the model is not cost-effective where considerations based on conflicts among multiple agencies ("inter-agency coordination costs") and/or wasteful duplication of government resources ("duplicative costs") call for a deviation from the model, such as a conglomerate agency with a more intentional administrative design. In other words, a transaction-cost-based approach to agency jurisdiction design can sometimes counsel against subscription to the core-mission model. Consequently, this Article argues that, in order to maintain its relevance in today's regulatory dialogues, the core-mission model should be

recast under a more general framework and subsumed into discussions of these broader categories of social costs as well as considerations of alternative designs within each agency. The focus of these dialogues should likewise move from how well an assignment is aligned with the agency's core mission to how to effectively "cover" all interests that need protection through regulation, without wasting government resources.

Center for Law and Social Science

Beyond Agency Core Mission

(68 *Administrative Law Review* (forthcoming, December 2016))

Yoon-Ho Alex Lee
USC Gould School of Law

Center for Law and Social Science
Research Papers Series No. CLASS16-24

Legal Studies Research Papers Series No. 16-26

August 4, 2016

Preliminary Draft

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Yoon-Ho Alex Lee[1]
(Draft: July 2016)

68 ADMINISTRATIVE LAW REVIEW __ (forthcoming, December 2016)

A long-standing view among legal scholars, political scientists, sociologists, and regulators posits that it is important for a regulatory agency to have a narrowly-defined core mission and to focus on activities that are central to accomplishing it successfully. Although this view has no doctrinal foundation, rhetoric grounded on it crops up frequently in regulatory dialogues, especially in opposition to prospective agency regulations. The purpose of this Article is to formalize this "core-mission model" of the administrative state and analyze its benefits, costs, and risks. An important starting point for the analysis is that, unlike a private corporation or a non-profit organization, a regulatory agency is not a free enterprise in a competitive market. Instead, as a "creature of statutes," it stands in a principal-agent relationship with Congress, whose job in turn is to respond to society's various needs and problems, as they arise, by delegating responsibilities to new or existing agencies. Given this relationship, the core-mission model has to be operationalized in one of two ways: either as an ex post *prioritizing strategy (on the part of the agency) or as an* ex ante *delegating strategy (on the part of Congress). Both strategies, however, entail significant costs on the government and society. As an* ex post *prioritizing strategy, the model promotes selective attention, which can, on the one hand, reduce internal organizational costs for the agency ("intra-agency coordination costs") but, on the other hand, give rise to regulatory gaps and lead to costly outcomes, such as crises or controversies. As an* ex ante *delegating strategy, the model is not cost-effective where considerations based on conflicts among multiple agencies ("inter-agency coordination costs") and/or wasteful duplication of government resources ("duplicative costs") call for a deviation from the model, such as a conglomerate agency with a more intentional administrative design. In other words, a transaction-cost-based approach to agency jurisdiction design can sometimes counsel against subscription to the core-mission model. Consequently, this Article argues that, in order to maintain its relevance in today's regulatory dialogues, the core-mission model should be recast under a more general framework and subsumed into discussions of these broader categories of social costs as well as considerations of alternative designs within each agency. The focus of these dialogues should likewise move from how well an assignment is aligned with the*

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[1] Associate Professor of Law, USC Gould School of Law, alee@law.usc.edu. The author would like to thank Alex Camacho, Chris Den Hartog, Sam Erman, Jeffrey Lubbers, Jonathan Masur, Nick Parrillo, Frank Partnoy, Elizabeth Pollman, Emily Ryo, Laurence Tai, Andrew Verstein, Abby Wood, Adam Zimmerman, and the participants of the 2015 Southern California Law and Social Sciences Workshop, the 2015 Southern California Business Law Workshop, the New Voices for Administrative Law Program at the 2016 AALS Meeting, the 2016 American Law and Economics Association Meeting, and the 2016 Harvard/Stanford/Yale Junior Faculty Forum for providing helpful feedback. The author thanks Armen Aslanian, Ariel Banayan, Nandini Dasarathy, Vinh Hoang, Timothy Hughes, Jun Sik Moon, and Niles Pierson for their excellent research assistance. The author is grateful to his family for their constant support and to God for all His providence in the process of completing this work. All errors are mine.

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INTRODUCTION

Ask a group of administrative law students, "what determines the goals that a regulatory agency is tasked to promote?", they will respond, "the agency's organic statutes." Meticulous ones might be quick to add that (i) it must first be established that the statutes do not violate the Nondelegation Doctrine (to the extent the doctrine still exists)[2] and (ii) if the statutes exhibit ambiguity, courts should defer to the agency's interpretation as long as it is reasonable.[3] Ask a group of legal scholars, political scientists, sociologists, or even agency administrators, "what kinds of activities should a regulatory agency be prioritizing?", many of them will respond that it should focus on activities that are essential to its "core mission."[4]

Somehow, in moving from the question of law (what an agency is tasked to do) to the question of policy (how an agency should prioritize), we have come to impose a certain restriction

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[2] For an exposition of the Nondelegation Doctrine and the view that the Doctrine today should be better viewed as a set of canons of statutory interpretation rather than a doctrine, *see generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

[3] *See* City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

[4] For various versions of this view expressed by legal scholars, see, for example, Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093, 1095 (2012) (criticizing the SEC for enforcing the provisions of the Foreign Corrupt Practices Act and arguing "that the SEC should devote its attention to those activities that are central to its mission . . . to protect investors from securities fraud"); Kevin Corder, *The Federal Reserve System and the Credit Crisis*, 69 PUB. ADMIN. REV. 623 (2009) (warning against assigning the Fed with regulatory assignments lying outside its core mission); Antony E. Ghee, *FERC Does Not Have Anti-Manipulation Authority in Financial Markets*, 18 FORDHAM J. CORP. & FIN. L. 379, 403 (2013) (arguing that "FERC . . . should not have . . . authority to police manipulation in financial markets even if that conduct has an impact on prices in physical markets" because "FERC's primary mission is to protect natural gas and electricity consumers from exploitation by natural gas companies and electric utilities and to ensure that rates charged for wholesale sales are just and reasonable"); Bradley A. Smith & Allen Dickerson, *The Non-Expert Agency: Using the SEC to Regulate Partisan Politics*, 3 HARV. BUS. L. REV. 419, 428 (2013) ("An independent agency's singularity of purpose can be vital in developing and enforcing a unified government policy."); and Karen E. Woody, *Securities Laws As Foreign Policy*, 15 NEV. L.J. 297, 309-11 (2014) (discussing "the inherent risks of an agency operating outside of its mission"); and Glenn Harlan Reynolds, "CDC Multitasking Hurts Ebola Fight: Column," (October 5, 2014, 5:07 P.M.), *available at*, http://www.usatoday.com/story/opinion/2014/10/05/ebola-cdc-jobs-tasks-multitasking-thomas-duncan-column/16766801/ ("While we'd be better off if the CDC only had one job – you know, controlling disease – the CDC has taken on all sorts of jobs unrelated to that task. Jobs that seem to have distracted its management and led to a performance that even the establishment calls 'rocky.'"). These views could also be expressed in general terms without specifying any particular conception of "core mission." *See, e.g.*, Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 Tex. L. Rev. 1741, 1769 (2008) (suggesting as a proposal to reform the administrative state that agencies should craft "positive metrics [that] focus on [the] agency's core statutory mission or mission"); Shelley H. Metzenbaum & Gaurav Vasisht, *What Makes a Regulator Excellent?*, University of Pennsylvania Law School, Discussion Paper for the Penn Program on Regulation's International Expert Dialogue on "defining and Measuring Regulatory Excellence," (March 19-20, 2015), *available at* https://www.law.upenn.edu/live/files/4387-metzenbaumvasishtdiscussion-draftmarch-2015pdf1pdf (arguing that agencies waste time when they engage in activities not dealing with their core mission, which retards the success of agencies). For similar views expressed by economists, see, e.g., Mathias Dewatripont et al., *The Economics of Career Concerns, Part II: Application to Missions and Accountability of Government Agencies*, 66 REV. ECON. STUD. 199 (1999); Mathias Dewatripont et al., *Multitask Agency Problems: Focus and Task Clustering* 44 EUROPEAN ECON. REV. 869 (2000). For views expressed by political scientists and sociologists, see generally Part II *infra*.

based on an extrinsic concept: agency core mission.[5] The concept of core mission is extrinsic in that organic statutes for a regulatory agency rarely spell out its "core mission" or even "primary mission." Nevertheless, there is this pervasive sense that each regulatory agency's agenda should be guided by a narrowly-defined core mission, which is often only a subset of its collective statutory duties. I shall refer to this normative view as the "core-mission model" of the administrative state (or simply, the "model").

Although this model has no doctrinal foundation, rhetoric grounded on it crops up in many different forms in regulatory dialogues, especially in opposition to prospective agency regulations. Well-intentioned critics fault an agency if it interprets its statutory authority broadly to regulate activities that lie outside its core mission, and urge it to return to its core-mission activities.[6] Congress is criticized when it tasks an agency with a regulatory assignment that ostensibly falls outside the agency's core mission.[7] Some even criticize an agency for its earnest enforcement efforts taken pursuant to such a statutory mandate.[8] A regulator subscribing to the model tends to resist receiving assignments from Congress that lie outside the agency's core mission, and if assigned, she may be reluctant to execute it.[9] As such, the concept of agency core mission plays a significant role in regulatory dialogues and ultimately in shaping the administrative state.

But where exactly does this predilection for the core-mission model come from? More importantly, to what extent can we expect an administrative state in which each regulatory agency can maintain a narrowly-defined core mission and focus primarily on activities that are essential to it? The purpose of this Article is to examine these inquiries. My central thesis is that there are good reasons to move beyond conceptualizing regulatory agencies in terms of core missions, and the model in its basic form is not very useful in today's regulatory dialogues. As a result, we should do well to exercise caution before raising regulatory criticisms grounded on it.

To be sure, the core-mission model carries a good deal of intuitive appeal. We live in an era of specialization. Corporations must capitalize on their core competences. Non-profit organizations come with core values. That is how these organizations learn to excel in what they do and survive competition. Likewise, it is undeniable that if a regulatory agency has some narrowly-defined agenda, it will more likely be able to formulate a coherent plan of operation, develop specialized expertise, and become an effective regulator. This much is obvious.

Nevertheless, as soon as we move away from considering each regulatory agency as a stand-alone organization seeking to excel in what it does, the picture becomes much more complicated. To begin with, regulatory agencies are not free enterprises; rather, they are agents of Congress.[10] They are established to execute faithfully the mandates given by Congress, whose job in turn is to respond to society's various needs and problems, as they arise, by delegating

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5 *See generally infra* Part II.
6 *See, e.g.*, Ghee (2013), *supra* note 4 at 403.
7 *See, e.g.*, Woody (2014), *supra* note 4, at 309-11 (arguing that the SEC should have never been tasked with enforcing the Foreign Corrupt Practices Act because the primary reason for the passage of the FCPA was related to foreign policy concerns, which lie outside the scope of the SEC's core mission).
8 *See, e.g.*, Black (2012), *supra* note 4.
9 *See, e.g.*, *id.* at 1098-99 (describing the reaction by the Chairman of the SEC regarding FCPA enforcement); *see also* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 101 (1989)(noting that a typical government agency "will resist taking on new tasks that seem incompatible with its dominant culture").
10 *See infra* Section I.C.

responsibilities to new or existing agencies. This means that the model has to be operationalized either at the agent's level or at the principal's level.

Operationalizing it at the agent's level indicates that the model is to be understood as an *ex post* (i.e., post-delegation) prioritizing strategy by the agency. But in practice, an agency's core mission tends not to vary over time. This means that, notwithstanding its apparent benefits, this strategy can be inefficient to the extent that a regulatory agency tends to apply a time-invariant prioritization strategy to the principal's delegation, regardless of the interest or the intent of the principal or other factors of consideration. Operationalizing it at the principal's level, by contrast, indicates that the model is to be understood as an *ex ante* delegating strategy by Congress—a strategy for organizing the administrative state. But this strategy is challenging to implement in practice. For one thing, it is difficult to even imagine what an administrative state organized according the core-mission model would look. Markets are intertwined; society's pluralistic interests constantly clash; and thus, a need for regulation does not arise in isolation but is part of systems.[11] As such, we cannot design a partition of labor among various agencies without expecting significant coordination costs. Furthermore, a given agency might sometimes be in a cost-effective position to promote a goal that does not fit within its core mission.

It quickly becomes clear that before we can even begin to answer the above inquiries, a number of other questions must be answered. For example, how should we conceptualize agency core mission? How does it emerge, and what kind of characteristics does it tend to exhibit? What are the benefits to an agency of having a narrowly-defined core mission? What are the implications for the statutory mandates that fall outside the agency's core mission? What are the factors Congress should consider in delegating regulatory authority to an agency? To what extent, is the concept of core mission useful in evaluating agency regulation? What are some plausible alternatives to the model?

This Article seeks to answer these questions by canvassing the merits and risks of the core-mission model and in turn, to understand the model's relevance in today's regulatory dialogues. Given that the merits of the model are ultimately based on efficiency and effectiveness considerations, it makes sense to consider the costs and risks of the model alongside, and recast the model in a more general framework that considers the tradeoff among various cost considerations and other alternatives. For this reason, this Article grounds the model in a simple economic framework, which preserves the important aspect of the core-mission model but can also allow for more effective and transparent regulatory dialogues. On a broader level, the discussions in this Article reinforce the importance of considering how to effectively "cover" all interests that need protection through regulation, without wasting government resources.

This Article draws from three different lines of scholarship. The first line, the oldest, comes from the sociology and political science literature studying public administration.[12] This line of scholarship takes the perspective of the agency as an organization and stresses the importance for each agency to have a narrowly-defined core mission. It does not take particular interest in legislatures, but is concerned instead with how a given government agency can ensure

[11] *See* Cass R. Sunstein, *Cost-Benefit Default Principles,* 99 MICH. L. REV.1651, 1651 (2001)("Risks never exist in isolation. They are part of systems.").
[12] *See generally* PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION (1957); WILSON (1989), *supra* note 9; and Peter F. Drucker, *The Deadly Sins in Public Administration,* 40 PUB. ADMIN. REV. 103 (1980).

success in the face of bureaucratic mires.[13] The second line of scholarship, by contrast, takes the perspective of the legislature and views government agencies as instruments for effectuating the legislature's preferences.[14] The third line of scholarship, which has emerged over the past decade and is itself a progeny of the first two, is modern administrative law scholarship that has examined various innovations in agency designs.[15] This line of scholarship takes interest in questions such as how to ensure one agency can perform multiple tasks together as well as how to ensure multiple agencies can work together effectively toward a shared goal. Given that these lines have asked different questions, it is not surprising that they offer different perspectives and conclusions. This Article thus can be seen as synthesizing these perspectives together to provide a framework for evaluating agency jurisdiction design that is more holistic.

My main points can be summarized as follows. First, as a descriptive matter, the core mission of a typical agency tends to refer to only a subset of the statutory goals the agency is tasked to promote and is often characterized by the *coherence* among the regulatory objectives. When an agency is tasked with two or more conflicting statutory goals, they are unlikely to all belong to its core mission. As a result, the concept of core mission can operate as a priority filter applied to the assignments from the principal.[16] Second, the primary benefit of designing an agency's jurisdiction around this view of core mission (or of having an agency focus on its core mission) should be seen as ensuring low internal organization costs—what I term *intra-agency coordination costs*–for the implementation and enforcement of the regulation. These include the costs needed for an agency to mobilize its resources, to establish the relevant expertise, and to balance multiple regulatory objectives together. It follows that, all else equal, an agency is more likely to succeed in achieving a regulatory objective that properly lies within its core mission. Third, there are nevertheless significant costs and risks to society associated with the model.[17] As an *ex post* prioritizing strategy for the agency, the model poses a danger because any expectation that an agency should focus exclusively on its (often time-invariant) core mission, notwithstanding the multiplicity of its assignments from Congress, can lead to regulatory gaps, giving rise to costly outcomes, such as controversies or crises.[18] As an *ex ante* delegating strategy for Congress, the model may be costly because a core-mission-based jurisdictional assignment may result in high

[13] *See infra* Part II.
[14] *See, e.g.*, Barry Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147 (1984).
[15] *See generally* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENTL. L. REV. 1 (2009); Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. 78 (2011); Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. LEGIS. 19 (2014); J.R. Deshazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2015); David A. Hyman & William E. Kovacic, "Why Who Does What Matters: Governmental Design, Agency Performance, the CFPB and PPACA," (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319466; Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PENN. L. REV. 841 (2014); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015). *See also* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV 15 (2010).
[16] *See generally infra* Part I.
[17] *See generally infra* Part II.
[18] *See generally infra* Part III.A.

interagency coordination costs, wasteful duplication of government resources, and ultimately, to bureaucratic fragmentation.[19] Fourth, recent administrative law scholarship has uncovered a number of innovations by Congress and agencies designed to address the challenges of regulating outside their core missions. More specifically, a line of scholarship that started about a decade ago has highlighted (i) how to encourage a single agency to balance multiple goals and (ii) how to promote effective coordination among multiple agencies in shared regulatory space. Statutory innovations uncovered by this literature provide alternative measures, albeit limited, to reduce intra-agency coordination costs as well as to facilitate multiple agencies to promote common goals together.[20]

The upshot of these points is that the core-mission model is an outdated model for our administrative state, though not an irrelevant one. It would be more sensible to recast the model under a more general framework, and the concept of agency core mission, as such, should no longer have a prominent role in critically evaluating agency regulations or Congress's regulatory assignments. Even where the related concerns are real, arguments grounded on the model should be subsumed into broader discussions of intra-agency coordination costs, interagency coordination costs, and duplicative costs, as well as considerations of alternative institutional designs within the subject agency. From the perspective of an *ex ante* delegating strategy, for instance, it may be more fruitful to raise a transaction-cost-based inquiry: whether the intra-agency coordination costs associated with a regulation can be reduced through alternative institutional designs and/or is at any rate smaller than the resulting combination of interagency coordination costs and duplicative costs that may arise from assigning the regulatory task to a different agency (or a new agency altogether). This is not to suggest that considerations of these costs will admit accurate quantification in dollar terms or lead to easy conclusions. Nevertheless, this more general framework which moves beyond the presumption of the core-mission model—I submit—can provide a helpful way of thinking about these issues and help promote more productive and candid regulatory dialogues.

That said, the discussions in this Article will remain at a general level. It is not my intention to evaluate either the merits of any particular agency regulation—or for that matter, the merits of any particular regulatory criticism. There may always be inefficient and ineffective regulations lying outside an agency's core mission, just as there may always be inefficient and ineffective regulations lying properly within an agency's core mission. Nonetheless, my hope is that when all is said and done, although people may continue to disagree about the practical wisdom of any particular jurisdictional assignment, the nature of the discussions will shift from "whether" any agency should ever be tasked to regulate beyond its core mission, to "how" to ensure that the agency can effectively regulate beyond its core mission, when the regulatory objective is otherwise well-founded and the assignment is at least arguably defensible *a priori*.[21]

The rest of the Article is organized as follows. Part I provides a basic understanding of the core-mission principle as it is popularly invoked in the regulatory context. It offers a simple but useful framework for conceptualizing agency core mission in the regulatory context. Part II discusses the sources often cited for the core-mission model, and re-envisions the arguments advanced in support of the model as ensuring low intra-agency coordination costs. These

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[19] *See generally infra* Part III.B.
[20] *See generally infra* Part IV.
[21] *See generally* sources cited *supra* note 15.

discussions also pave the way for Part III's analysis of various types of social costs associated with the model. Part IV discusses some design innovations that have helped regulatory agencies overcome the challenges of regulating outside their core-mission areas. Part V concludes.

I. THE CORE-MISSION MODEL

The core-mission model is the presumptive view that each regulatory agency should have a narrowly-defined focus and objective of regulatory activities. The model has three normative implications. First, it suggests that Congress, where possible, should refrain from delegating a statutory responsibility to a regulatory agency if the responsibility falls outside the agency's core mission (even if constitutionally permissible).[22] Second, it suggests that, in the face of multiple goals assigned by Congress, an agency, given its resource constraints, should sensibly focus on activities that squarely fit within its core mission. In other words, an agency should discretionarily refrain from devoting significant resources to enforcing those responsibilities that conflict with, or are otherwise orthogonal to, its core mission.[23] Third, it suggests that a regulatory agency should refrain from interpreting its statutory authority overly broadly to regulate activities that lie outside its core mission, even if its efforts may be beneficial to society in some broad sense.[24]

Thus stated, the first can be seen as an *ex ante* delegating strategy on the part of Congress, whereas the second and the third can be seen as *ex post* (i.e., post-delegation) prioritizing strategies on the part of the agency. All three express some discomfort of having an agency engage in regulation whose objective lies outside what is traditionally seen as the agency's *raison-d'etre*. Although the essence of the arguments in this Article can apply to all three, my primary interests are the first two. There are good reasons for separating out the third statement. To the extent that an agency interprets its statutory mandate too broadly, there is a legal barrier, which is not present in the first two: courts can strike down the agency's interpretation as inconsistent with Congress's intention.[25] On the other hand, to the extent the agency's interpretation is based on a legally permissible construction of its organic statute, parties can genuinely disagree, as a threshold matter, as to whether the agency's regulation should or should not be considered to fit within its core mission (as Congress had envisioned).[26] But if that were the case, the contour of the agency's core mission would itself be unclear, and likewise the position of the model. For this reason, it makes sense to reserve a separate treatment to evaluate the merits of the third statement.

In order to understand the merits and the risks of the core-mission model and evaluate the

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[22] *See, e.g.*, Woody (2014), *supra* note 4, at 309-11 (arguing that the SEC should have never been tasked with enforcing the Foreign Corrupt Practices Act because the primary reason for the passage of the FCPA was related to foreign policy concerns, which lie outside the scope of the SEC's core mission).

[23] *See, e.g.*, Black (2012), *supra* note 4.

[24] *See, e.g.*, Ghee (2013), *supra* note 4 (challenging the FERC's policy choice to interpret the language from its organic statute broadly to regulate manipulations in the energy market, both on legal and policy grounds).

[25] For example, if an agency's action is based on its statutory interpretation that is unreasonably broad, courts will strike down the agency action as being inconsistent with Congress's intent. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that courts should defer to agency interpretations of their organic statutes unless they are unreasonable).

[26] *See, e.g.*, Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (examining the SEC's organic statutes and legislative history to argue that "inculcating a greater sense of public responsibility in corporate managers"—beyond investor protection—was also a central goal for Congress in designing the SEC).

general validity of the first two statements above, it is necessary to formalize the concept of agency core mission. This Part discusses a framework for conceptualizing agency core mission, illustrates how the concept applies to various regulatory agencies, and explains how the model relates to the law.

A. Conceptualizing Agency Core Mission

1. Tasks versus Goals

An agency's core mission can be formulated either in terms of the *tasks* the agency performs or in terms of the *goals* (or interests) it promotes. Depending on the statutory design of the agency, one may be more suitable than the other.

To begin with, some agencies are inherently task-oriented. These include: the U.S. Postal Service (to provide national postal services); the Internal Revenue Service (to collect federal tax revenues); the Social Security Administration (to administer social security benefits); and so on. These agencies exist primarily to execute one or more large-scale tasks that are vital for society. Naturally, their core missions are best formulated in terms of tasks. But even task-oriented agencies must take goals into account since "tasks cannot be defined completely without regard to goals."[27] When an agency is operating with a constrained budget, for example, its tasks must be carried out to reflect some priority, which implies a certain goal.

Then there are agencies that are inherently goal-oriented. These include many of the regulatory agencies that have broad discretion: the Securities and Exchange Commission (to protect investors in the market for capital); the Federal Trade Commission (to protect consumers in the product market); the Consumer Financial Protection Bureau (to protect consumers in the market for credit); the Occupational Safety and Health Administration (to protect the health and safety of workers); the Environmental Protection Agency (to protect the environment and the public health); and so on. Goal-oriented agencies exist primarily to promote some desirable goals or interests for society, the promotion of which—in principle—may not necessarily boil down to executing one or two tasks. The specific tasks they execute may even vary over time. Consequently, their core missions are best formulated in terms of goals. But the flipside is that in practice even a goal-oriented agency may operationalize its vague goals into execution of a limited set of concrete tasks (or "core tasks"), and those tasks may over time come to shape or fine-tune the agency's core mission. Protection of consumers may come down to preventing deceptive marketing schemes for one agency, rate-setting for another, and product-testing for still another; protection of the public health may come down to standard-setting for one agency and drug testing for another; preserving the soundness of the banking system may come down to determining the capital reserve requirement; protection of investors may come down to regulating periodic disclosures and public offerings; and so on.

Accordingly, the difference between these two types may be subtle: one type of agencies execute designated tasks with regard to certain goals, while the other promote designated goals through execution of certain tasks. Given my focus on regulatory agencies, I will assume the latter type: a goal-oriented agency executing a set of core tasks. Nevertheless, because tasks and goals

[27] WILSON (1989), *supra* note 8 at 26. Wilson, however, also noted that in practice "tasks and goals are not connected in the straightforward way that is implied by the notion that tasks are 'means' logically related to 'ends.'" *Id.*

are intricately related, it is helpful to keep in mind both dimensions of describing an agency's core mission.

2. Core versus Peripheral

Given this set-up, the core mission of a goal-oriented agency is easy to formulate when the agency's organic statute spells out a single, unified goal. In that case, there would be no question as to the unity or coherence of the agency's core mission. Even if the organic statute spells out multiple goals from the outset, the agency's core mission can still be formulated in a reasonably well-defined and coherent manner, as long as there is some broader goal or a common thread that encompasses these multiple goals.

But what happens when the statute specifies multiple goals, some of which are at odds with one another, or if Congress gives additional statutory assignments over time, which may be at odds with the agency's original core mission? At this point, whatever else "core mission" may mean, it seldom refers to the entire set of goals assigned to the agency. For one thing, under such an inclusive definition, the idea that each agency strategically focus on activities that are central to its core mission becomes an empty truism: by design, the agency would have effectively nothing else to pursue. No statutory assignment from Congress would be beyond the agency's core mission, but instead, the agency would reformulate its core mission to include the new goals. That such criticisms are frequently raised suggests that an agency's core mission cannot be the sum total of the agency's statutory duties. Instead, the core-mission model captures the reality that most agencies tend to "fixate on particular missions, even when the principal has expanded the number of goals the agency is supposed to take into account."[28] The model implies that if an agency is tasked to promote multiple goals, it is entitled, or even encouraged, to consider some goals significantly more important than others, *even in the absence of any such expressed will of Congress, the principal*.[29] The model thus envisions having each regulatory agency specialize in, and build expertise for, the promotion of *select* statutory goals that cohere together to constitute a narrowly-defined mission, while the rest of the goals are relegated to the periphery. As a result, an agency's core mission operates as the agency's prioritization filter applied to the principal's assignments—one that "sort[s] out tasks that either fit or dot not fit with [the agency's] mission."[30] It is in this sense that the model is operationalized as an *ex post* prioritizing strategy for the agency.

3. Coherence of Regulatory Objectives

To be sure, this filter is not without justification. The contour of an agency's core mission may often be imposed artificially, but it is not drawn randomly. In practice, an important characteristic of a typical agency's core mission is that the regulatory objectives[31] that fit within it

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[28] Biber (2009), *supra* note 15, at 17; *see also id.* (noting that there is "ample anecdotal evidence that federal agencies systematically narrow the range of their goals from the ones imposed on them by Congress").
[29] There are, however, cases in which Congress expresses an explicit prioritization. *See, e.g.*, *id.* at 8 (noting that for the Park Service and FWS, "Congress appears to have made clear that the agencies are to prioritize conservation of natural resources over the provision of facilities for the recreation of visitors.").
[30] WILSON (1989), *supra* note 8, at 371.
[31] I use the term "regulatory objective" to refer to the end, which a particular task is intended to achieve. It is more concrete than a "goal." In short, promoting a "goal" requires achieving one or more "regulatory objectives," each of

are likely to cohere together well, rather than conflict with one another: if two or more goals assigned to one agency are at odds with one another, not all of them will belong to the agency's core mission; at least one will have to be subordinated to the peripheral mission. There are at least two reasons to expect this pattern.

First, as Professor James Q. Wilson observes, when the regulatory objectives to be achieved cohere together well, it will be easier for the agency administrator to instill "a sense of mission":

> [Agency administrators] should understand the culture of their organizations—that is, what their subordinates believe constitute the core tasks of the agency—and the strengths and limitations of that culture. If members widely share and warmly endorse that culture the agency has a sense of mission. This permits the [administrator] to economize on scarce incentives . . . ; to state general objectives confident that subordinates will understand the appropriate ways of achieving them; and to delegate responsibility knowing that lower-level decisions probably will conform to higher-level expectations. [W]orkers can make subtle, precise, and realistic judgments . . . only if those judgments refer to a related, coherent set of behaviors. People cannot easily keep in mind many quite different things or strike reasonable balances among competing tasks.[32]

In other words, when there is a clear and coherent "sense of mission," which the rest of the staff shares and endorses, the agency administrator can utilize this cultural identity to the organization's benefit by effectively mobilizing the agency's resources. For this reason, it is in the agency administrator's interest to cherry-pick and focus on those tasks that cohere together.

Second, as Professor Eric Biber notes, given multiple competing tasks an agency is charged with, *task complementarity* will tend to play an important role in determining which tasks are more likely to get completed:

> Complementary tasks make each other easier to perform—increasing marginal effort on one task will make it easier to succeed on another task. Substitute tasks are the opposite—increasing marginal effort on one task will make it more difficult to succeed on another task. An agent faced with multiple goals that are all complementary will perform those goals better than an agent performing multiple goals together that are substitutes.[33]

To say that one goal conflicts with another *ipso facto* implies that accomplishing one will make it costly to accomplish the other; by contrast, when goals cohere together, no such obstacles will be present, and the agency will thus find it easier to perform the related tasks together. Consequently, to the extent that an agency's core mission comes to be developed organically, we should expect to observe a substantial degree of complementarity among the tasks pertaining to the regulatory

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which may require completing one or more "tasks."

[32] WILSON (1989), *supra* note 8, at 370.

[33] *See* Biber (2009), *supra* note 15, at 11.

objectives that fit within it.[34]

In sum, an agency's core mission may be as narrow as a single, unified goal, or it may contain multiple goals. If it contains multiple goals, those goals are not randomly selected goals among many, but those that will tend to be characterized by some type of harmony and coherence of the regulatory objectives—that is, those goals can be unified under a broad stroke.

B. Illustrations

The foregoing description of an agency's core mission is useful in explaining many of the views posited based on the model. Consider, for example, the following excerpt from a speech by SEC Commissioner Michael Piwowar:

> I would like to . . . articulate how I believe an SEC Commissioner should approach each and every issue that comes before the Commission. [W]hen making decisions, a Commissioner should be guided by the SEC's core mission: to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. . . . My overarching philosophy as an SEC Commissioner is pretty simple. It boils down to a question that I ask myself every morning on my way to work: What can I do today to help advance and defend the SEC's core mission? . . . *The Commission . . . should carefully consider whether any . . . disclosures benefit investors or whether they enable the agenda of special interests to the detriment of investors*.[35]

Commissioner Piwowar views the SEC's core mission as the promotion of a single constituent interest: benefits accruing to investors. Proponents of the model would likely find Commissioner Piwowar's statement laudable. Consistent with this view, legal scholars have criticized the statutory assignments under the Foreign Corrupt Practices Act,[36] the Conflict Minerals Rules under the Dodd-Frank Act,[37] and proposals to regulate partisan politics through disclosure regulation as all lying outside the agency's core mission.[38] The main concern here is that these objectives are not closely aligned with investor protection.

One scholar echoes the same view more explicitly:

> The [SEC] was founded in 1934 and bestowed by Congress with a three-pronged mission: (a) protecting investors; (b) maintaining fair, orderly, and efficient markets; and (c) facilitating capital formation. . . . [T]he focus of the mandate is the creation and preservation of market integrity to assure investors that their investments are safe. Despite this clear, financial-based mission of the SEC, Congress has co-opted the agency and its

[34] *See id.* at 12 ("Where an agency is faced with multiple goals, it will tend to overproduce on the goals that are complements . . . and . . . will tend to underproduce on the goals that are substitutes . . . .").
[35] Commissioner Michael S. Piwowar, "Advancing and Defending the SEC's Core Mission" (Jan. 27, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370540671978#.VQoAn454rNE (emphases added)
[36] *See generally* Woody (2014), *supra* note 4, at 309-311 (2014); Black (2012), *supra* note 4, at 1095 (2012).
[37] *See generally* Woody (2014), *supra* note 4, at 309-311 (2014).
[38] *See generally* Smith & Dickerson (2013), *supra* note 4.

regulatory resources to achieve decidedly non-financial, extraterritorial goals related to foreign policy.[39]

This paragraph seems to imply that the SEC's core mission was set in stone once and for all in 1934 when Congress created the agency. Although no one doubts that protection of investors was the most important driver behind the creation of the SEC, in some ways, it is somewhat curious that this historical consideration should play such a sticky role for the SEC's core mission for 80 years to follow.

Consider this. The investor-protection-centric view of the SEC has been maintained despite the fact that the Securities and Exchange Act of 1934 itself granted a very broad rulemaking authority to the SEC: as it deems "necessary or appropriate in the public interest *or* for the protection of investors."[40] The statutory language seemingly places investor protection and some type of "public interest" on an equal footing.[41] Despite a compelling account that this "public interest" meant something *beyond* investor protection,[42] most people (including those cited above) reject the idea that SEC regulation should be used to promote some public interest other than investor protection. Further, the investor-protection-centric view has been maintained despite the fact that only a year later, Congress also passed the Public Utility Holding Company Act of 1935 (repealed only recently in 2005) and entrusted the SEC specifically to promote "the interests of investors *and consumers*."[43] In other words, even as early as of 1935, the set of interests to be protected by the SEC in administering this statute was not to be limited to investor welfare.

Meanwhile, regulation of brokers and dealers is considered to be properly part of the core mission even though Congress did not grant this authority to the SEC until 1940.[44] Likewise, "maintaining . . . efficient markets" and "facilitating capital formation"—concepts better aligned with investor protection—are considered to be part of the core mission even though the statutory language referencing these concepts was not formally introduced until 1996.[45] Finally, despite the fact that the SEC has been rigorously enforcing the Foreign Corrupt Practices Act over the past decade and a half, few people consider policing global corruption as part of the SEC's core mission; instead, many *criticize* the agency for its vigorous enforcement efforts.[46] In short, the original interest to be promoted and protected by the agency—as popularly perceived—has played a crucial filtering role in assessing whether additional regulatory objectives are to become part of the agency's core mission.

The framework seems to apply well to a number of other agencies also. The U.S. Forest Service's core mission is viewed as managing domestic forests to ensure a sustained timber

[39] Woody (2014), *supra* note 4, at 297 (2014).
[40] This thirteen-letter phrase appears very frequently and verbatim throughout the SEC's organic statutes. *See, e.g.*, 15 U.S.C. § 78m (emphasis added).
[41] For a more detailed exposition of this idea, see generally Yoon-Ho Alex Lee, *The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus?*, 57 ARIZ. L. REV. 85. 93-95 (2015) (discussing the statutory framework); see also Williams (1999), *supra* note 17.
[42] *See, e.g.*, Williams (1999), *supra* note 17.
[43] *See, e.g.*, 15 U.S.C.A. §79z-4 (1935) (repealed in 2005).
[44] *See generally* the Investment Advisors Act of 1940, codified at 15 U.S.C. § 80b-1 et seq.; the Investment Company Act of 1940, codified at 15 U.S.C. §§ 80a-1 et seq.
[45] *See* National Securities Markets Improvement Act of 1996 (NSMIA), Pub.L. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C. (2006)).
[46] *See, e.g.*, Black (2012), *supra* note 4.

production; as a result, the later-introduced mission of conserving forest wildlife—which would conflict with the agency's management of timber production—was seen as lying outside it.[47] Federal banking agencies are considered to be primarily responsible for ensuring the soundness of banks; therefore, prior to the 2009 mortgage crisis, regulation of consumer financial products—to ensure the economic well-being of borrowers, rather than that of depositors—was not seen as part of their core mission.[48] One of the FERC's core-mission activities is to ensure sufficient power generation through issuing dam licenses; as such, despite a statutory mandate, addressing environmental concerns arising from issuing dam licenses—insofar such concerns are at odds with power generation—is seen as lying outside the FERC's core mission.[49] In each of these examples, the original set of goals to be promoted by the regulatory agency has played an anchoring role in defining its core mission, and the newer assignment from Congress, to the extent its regulatory objective conflicts with the original set of goals, is not considered to fit within the agency's core mission.

C. The Model versus the Law

Where is the law in all this? Despite the prevalence of the views grounded on the core-mission model, the relationship between the model and the law is rather tenuous: put simply, the model is not a legal construct, but a policy construct, which the law permits.

As mentioned already, "core mission" (or "primary mission") is seldom a statutory concept. Although legislative history and the language from the preamble of the agency's enabling statute can shape the public's understanding of the general need for establishing the agency, statutes themselves rarely, if ever, spell out the agency's "core mission" in explicit terms or distinguish it from the agency's "peripheral mission." When courts review an agency action, they may invalidate it if it is inconsistent with the agency's statutory authority or if Congress's delegation of authority to the agency was unconstitutional at the outset, but not simply because it happens to lie outside what is commonly perceived as the agency's core mission.[50]

Moreover, despite the fact that a given agency's core mission tends not to vary significantly over time, the law provides no basis for presupposing a stable view of core mission. If regulatory agencies are truly "creatures of statutes,"[51] they are mere agents of Congress (and the President, within the statutory bounds, in case of executive agencies).[52] There should be no stand-alone, time-invariant core missions of their own apart from the will of the principal. When Congress provides new statutory mandates, there is no presumption that Congress intends the new mandates

[47] *See generally infra* Section III.A.
[48] *See generally id*.
[49] *See, e.g.*, Deshazo & Freeman (2005), *supra* note 15, at 2236-42.
[50] For example, when the Supreme Court invalidated the Food and Drug Administration's ("FDA") early attempt to regulate tobacco products in *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000), the Court's rationale was not that regulating tobacco products fell outside the agency's core mission. Instead, it painstakingly analyzed the structure of the FDA's organic statute and argued that the *only* way for the FDA to regulate these products, which the FDA deems "unsafe" and "dangerous," would be to ban them completely from the market, which was clearly not Congress's intent. *See id.* at 134.
[51] *See, e.g.*, Soriano v. United States, 494 F.2d 681, 684 (9th Cir. 1974).
[52] *See, e.g.*, Biber (2009), *supra* note 15, at 9 ("[Government agencies] can be seen as 'agents' attempting to fulfill the goals laid out by 'principals' such as Congress, the President, or the public as a whole.").

to be subordinate to the existing mandates.[53] An agency initially tasked with one regulatory objective has no *a priori* basis for taking its new regulatory objective any less seriously. This is not to suggest that maintaining a stable core mission offers no advantages.[54] The argument here is only that there is no constitutional or otherwise legal basis for presupposing such a view of agencies.

Meanwhile, if the law *permits* a certain narrow and stable vision of core mission, it does so indirectly. The Administrative Procedure Act of 1946[55] ("APA") affords agency administrators with vast discretion in their enforcement strategies. Significantly, a long line of Supreme Court precedents have created a general presumption against reviewing an agency's decisions not to enforce certain regulations.[56] The limited scope of judicial review for agency inaction means for the most part agency administrators can choose to focus on a narrow set of regulatory agenda without facing any legal liability. Put differently, an agency can maintain a stable core mission through selective enforcement strategies and need not worry about judicial interferences. This discretion is all but unbounded. Although the presumption of unreviewability may be rebutted where an agency exhibits a "pattern of non-enforcement amounting to an abdication of legal authority,"[57] this is a fairly easy bar for an agency to clear.

II. THE BENEFITS OF THE MODEL

If the model is a policy construct, how should we understand its benefits?[58] They are twofold. First, at the level of each agency, the model reduces, what I call, *intra-agency*

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[53] Professors Deshazo and Freeman explain as follows:

> In theory, all statutory mandates are created equal. That is, when Congress instructs an agency to do something—such as set health standard, allocate disability benefits, or gather intelligence—and even when it tells an agency to do two conflicting things at once, the agency must comply. This is true regardless of when and how such mandates are passed, whether they are assigned to the agency in its organic statute or later on, and whether they come in the form of an amendment to the organic statute or in separate pieces of legislation.

Deshazo & Freeman (2005), *supra* note 15, at 2235.

[54] *See, e.g.,* WILSON (1989). *supra* note 8, at 221 (1989) ("We ought not to be surprised that organizations resist innovation. . . . Stability and routine are especially important in government agencies where demands for equity . . . are easily enforced.").

[55] Administrative Procedure Act (APA), 5 U.S.C. § 551.

[56] *See, e.g.,* Heckler v. Chaney, 470 U.S. 821 (1985) (holding that the FDA's discretion to not undertake certain enforcement actions is not reviewable under the Administrative Procedure Act). Although the APA technically allows courts to "compel agency action unlawfully withheld or unreasonably delayed," the Court has held that enforcement of this provision is allowed only for discrete actions that are mandated by Congress. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62 (2004).

[57] *See, e.g.*, *Chaney*, 470 U.S. at 853 (1985).

[58] Those who criticize departures from the model often raise two concerns: (i) the agency may lack expertise or motivation to regulate outside its core mission, and (ii) the agency may be forced to spread itself too thin given its limited resources. *See, e.g.,* Woody (2014), *supra* note 4, at 301. Note, however, that the second concern is, technically, orthogonal to the model. The problem of underfunded agencies may be universal, and at any rate, achieving a given regulatory objective will always require resources of *some* agency or another. In addition, absent the first rationale, the proper response to the problem of underfunded agencies is not to insist that each agency focus on its core mission, but instead to argue that Congress should increase the agency's budget.

coordination costs. This follows from the fact that the contour of an agency's core mission is drawn organically in part and strategically in part. Second, beyond the walls of the agency, the ultimate benefit to society is that low intra-agency coordination costs ensure that the agency has institutional competence in ably completing at least a few related tasks, and society thereby avoids the potential problem of "non-performance."

A. Low Intra-Agency Coordination Costs: Motivation, Expertise, and Balancing

Consider first the problem within the walls of an agency. In order for an agency to complete multiple tasks successfully, three conditions must be true about each task: (i) the agency must have sufficient motivation to complete the task; (ii) the agency must have sufficient expertise to complete the task well; and (iii) the agency must be able to reasonably balance the regulatory objective of the task against other competing goals it seeks to achieve. By *intra-agency coordination costs*,[59] I refer to the cost to the agency of ensuring these three conditions. The primary benefit of the model is that it allows the agency to economize on these costs.

There are several reasons as to why the core-mission model would reduce intra-agency coordination costs. First, as noted already, having a narrowly-defined core mission allows the agency to instill a "sense of mission" for the staff. As noted already, Wilson argued that establishing a "sense of mission" will allow "the executive to economize on scarce incentives (people want to do certain task even when there are no special rewards for doing it); to state general objectives confident that subordinates will understand the appropriate ways of achieving them; and to delegate responsibility knowing that lower-level decisions probably will conform to higher-level expectations."[60] Wilson's arguments suggest that instilling this "sense of mission" can partly ensure that the three conditions stated above are favorably met.

Second, as also noted, the agency's core mission will tend to be characterized by task complementarity. But task complementarity is in turn a feature of an optimizing solution to an agent's problem, in which the agent seeks to maximize the number of tasks completed, subject to the budget constraint.[61] Because complementary tasks have positive feedback effects for each other, the agency can complete a greater number of tasks with the given amount of resources. To

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[59] For a fuller discussion of intra-agency coordination, see Nou (2015), *supra* note 15.

[60] WILSON (1989), *supra* note 8, at 370. Relatedly, Professors Ryan Bubb and Patrick L. Warren have also proposed a model to explain that having a relatively focused mission can engender optimal agency bias that will reduce the agency administrator from shirking on its assignment. *See* Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEG. STUD. 95, 128 (2014).

[61] Professor Biber explains as follows:

> The reason [as to why an agent will perform complementary tasks better than substitute tasks] is intuitively simple. Take an agent who is tasked with four tasks, and whose pay (or other form of non-monetary incentive) depends on success on each of those four tasks. If doing task *A* makes the agent's job easier for tasks *B*, *C*, and *D*, and accordingly results in higher pay or other incentives, the agent is surely going to do more of task *A*. However, if task *A* makes the agent's job harder for tasks *B*, *C*, and *D*, then the agent has a strong incentive to avoid task *A*, and instead maximize effort or output for the other three tasks for which he will be rewarded.

Biber (2009), *supra* note 15, at 11

the extent that an agency administrator may be motivated to complete as many tasks as possible,[62] focusing on its core mission presents a cost-effective solution.

Third, having each agency identify itself with a narrowly-defined agenda makes it easier for Congress to keep the agency accountable and for the agency to maintain transparency regarding its regulatory agenda. Greater accountability in turn leads to a more motivated agency, but also helps establish the legitimacy of the agency. Such a design will also likely to reduce the possibility of regulatory capture: when an agency worried about only one group of constituents, it is less likely to be vulnerable to lobbying efforts by other groups of constituents. All these factors of the model work together to shape a more successful and effective regulator.

The following example illustrates these intra-agency cost considerations. In 2011, Congress granted the SEC with authority to regulate corporate proxy ballots in order to promote effective corporate governance.[63] Given Congress's choice to regulate proxy ballots, its choice of agency is uneventful. Promoting effective governance for shareholders is a form of investor protection. It follows that the SEC would have the requisite motivation to mobilize its resources. The agency's staff members, who likely share a "sense of mission" of protecting investors, will have little reason to resist the assignment. The agency has long regulated other aspects of proxy ballots, and thus houses the relevant expertise.[64] But in addition, the experience of regulating corporate proxy ballots may generate further institutional knowledge that may be useful for protecting investors generally. Finally, shareholders' governance interests and investors' financial interests are well-aligned. Therefore, undertaking this assignment presents no conflict with the SEC's mission of investor protection, and the agency need not worry about balancing one regulatory objective against the other.

For the sake of this exercise, consider what might happen if Congress were to assign this task to, say, the FDA, an agency that has had no experience of regulating corporate governance matters. The mismatch would be obvious. Although Congress's delegation may be defensible as a legal matter, it would be utterly indefensible as a policy matter. Corporate governance matters have nothing to do with the FDA's mission of protecting the public health. The FDA staff will lack the requisite motivation or the relevant expertise. Furthermore, even if the FDA were to implement rules governing proxy ballots somehow, the knowledge it gains will be of no use to completing its other goals. It is also unclear how the FDA is supposed to balance this secondary objective against its objective of promoting public health in case these objectives clash. In short, the FDA would face extremely high intra-agency coordination costs to regulate corporate proxy ballots. The result will be either inadequate or unsuitable regulation. Importantly, in such

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[62] Although the idea that a regulatory agency would seek to maximize its payoff by increasing the *number* of tasks completed may be simplistic, it is not difficult to imagine why an agency administrator may care about this metric. Returns to regulatory enforcement are hard to ascertain: in many cases, compliance costs are observable, as well as the consequences of a lack of regulation, but the economic benefits that can properly be traced to the agency's performance are difficult to measure. As a result, Congress often has no systematic way to reward an agency for its successful regulatory activities. Instead, when an agency requests a budget—in competition with other agencies—it is much easier, both for Congress and the agency, to structure its dialogue around the list of tasks the agency has completed. This way, the agency will be able to justify its needs for additional resources as well as to boast its (apparent) effectiveness.

[63] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376, 1915 (2010).

[64] *See* Jill E. Fisch, *From Legitimacy To Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129 (1993).

instances, one can justifiably criticize Congress for tasking an agency with an assignment that lies outside its core mission.

B. Avoiding the Problem of Non-Performance

From society's perspective, the real danger of high intra-agency coordination cost is not that the agency will have to spend time and resources to ferret out an extensive plan to complete multiple tasks. The main concern is that, without an exclusive and coherent core mission, the agency may simply fail to get *anything* done effectively. This idea that an agency cannot function well when it faces multiple conflicting objectives traces back to the literature on public administration from the 1980s.[65] In his essay written in 1980,[66] Professor Peter F. Drucker cautions against tasking a government agency with too many objectives. He argued that one of the ways in which a public service program is guaranteed to produce "non-performance" is to have it "try to do several things at once" without "establish[ing] priorities and [sticking] to them."[67] As an example of a failed institution, Drucker discussed the Tennessee Valley Authority in the 30s, which had too many goals and "attempted to . . . satisfy every one of his constituencies."[68] Drucker noted on the other hand that "even poorly conceived programs might have results if priorities are set and efforts concentrated."[69] Drucker did not go so far as to suggest that each government agency must be given one task and only one task to complete or that the assigned tasks must be related to each other in some harmonious manner. He merely emphasized the importance of having a clear guidance and some type of priority in multitasking.

This idea also gained prominence through Wilson's landmark 1989 publication, *Bureaucracy: What Government Agencies Do and Why They Do It*.[70] In it, Wilson explains that having each agency focus on "core tasks" can lead to an improvement in an agency's performance.[71] Wilson himself draws from sociologist Philip Selznick's work, which has emphasized the importance of "institutional embodiments of Purpose" and "infusion with values" in public administration.[72] Wilson notes in particular that agency staff members cannot be expected to juggle different tasks well or "strike reasonable balances among competing tasks."[73] Most importantly, Wilson discusses a number of agencies that have deliberately neglected certain

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[65] *See generally* sources cited in note 12. For those citing Wilson, see, e.g., Biber (2009), *supra* note 12, at 52 (citing Wilson for the proposition that "focused missions may be important for agency morale and performance"); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, SUP. CT. REV. 201, 213 (2005); Mathias Dewatripont et al., *The Economics of Career Concerns, Part II: Application to Missions and Accountability of Government Agencies*, 66 REV. ECON. STUD. 199, 200 (1999). For those citing Wilson and Drucker together, see, e.g., Christopher Michael Carrigan, "Structured to Fail? Explaining Regulatory Performance under Competing Mandates," *available at* http://dash.harvard.edu/handle/1/9367009.
[66] Drucker (1990), *supra* note 12.
[67] *Id.* at 103.
[68] *Id.* (emphasis added).
[69] *Id.*
[70] WILSON (1989). *supra* note 8.
[71] *See generally id.* at 223-26 & 370-71.
[72] *See, e.g.*, Selznick (1957), *supra* note 12, at 90; see also John J. Dilulio, Jr. et al, *The Public Administration of James Q. Wilson: A Symposium on* Bureaucracy, 51 PUB. ADM. REV. 193, 194 (1991)(noting that Wilson's theoretical perspective has been shaped in part by Selznick's work).
[73] WILSON (1989). *supra* note 8, at 371.

regulatory tasks in order to successfully develop a sense of mission,[74] while describing certain agencies as having a weak sense of mission as a result of competing goals.[75] Wilson famously concludes that "conglomerate agencies rarely can develop a sense of mission; the cost of trying to do so is that few things are done well."[76]

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The discussion from this Part explains why there is such a predilection for the core-mission model. There are clear merits to having each agency develop some form of restrictive core mission. The potential problem of non-performance, if taken to an extreme, might suggest that *an agency can only do one thing well or nothing well*. This line of argument lends support for stressing the "singularity of purpose" for the design of each agency.[77]

Notice, however, that thus far the discussion has taken a completely agency-centric perspective. The accounts provided by Wilson, Selznick, and Drucker are based on organizational behavior and the sociology of bureaucracy within public administration. These scholars were concerned mainly with the question of how to ensure successful internal management of a single agency taken in isolation. But from the perspective of Congressional delegation, there are at least two further questions to analyze.

First, are there other cost considerations beyond intra-agency coordination costs that are germane to the model? To this extent, it makes sense to analyze the cost to the government of organizing the administrate state around the core-mission model and the broader consequences to society of doing so. Although Wilson does not address this question in great detail, he does note three concerns that come with having a strong "sense of mission":

> First, tasks that are not part of the culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it. Second, organizations in which two or more cultures struggle for supremacy will experience serious conflict as defenders of one seek to dominate representatives of the others. Third, organizations will resist taking on new tasks that seem incompatible with its dominant culture. The stronger and more uniform the culture—that is, the more the culture approximates a sense of mission—the more obvious these consequences.[78]

These concerns and the resulting social costs thus merit further examination.

Second, are there effective institutional designs that can reduce intra-agency coordination costs, with the ultimate goal of avoiding the problem of non-performance? For example, are there ways to motivate an agency to regulate outside its core mission (more) successfully? Are there different ways in which one agency can be tasked to work with another agency's institutional knowledge to regulate diligently and effectively? Wilson himself discusses the importance of design considerations at various points of his book. Toward the end of his book, he writes:

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[74] *Id.* at 371.
[75] *See id.* at 158 (discussing that the Immigration and Naturalization Service has a "weak sense of mission" due to its "competing goals.").
[76] *See id.*
[77] *See, e.g.*, Smith & Dickerson (2013), *supra* note 4, at 428.
[78] WILSON (1989), *supra* note 8, at 101.

If the organization *must* perform a diverse set of tasks, *those tasks that are not part of the core mission will need special protection*. This requires giving autonomy to the subordinate tasks sub-unit (for example, by providing for them a special organizational niche) and creating a career track so that talented people performing non-mission tasks can rise to high rank in the agency.[79]

For these reasons, in Part III, I move beyond the agency-centric view of the government bureaucracy and take a broader view of the administrative state to consider various costs and risks associated with the model. In Part IV, I consider some alternative safeguards for reducing intra-agency coordination costs.

III. THE COSTS AND RISKS OF THE MODEL

This Part considers the costs and risks associated with the core-mission model. There are two types to consider. First, when the model is operationalized as an *ex post* prioritizing strategy on the part of the agency, there will be *de facto* regulatory gaps in those areas of regulation that are relegated to the periphery—those regulatory activities that are not considered to be part of the agency's core mission. This implies a lack of necessary regulation and enforcement. Indeed, history has shown that these regulatory gaps can give rise to large-scale crises or controversies that could otherwise have been avoided. Second, when the model is operationalized as an *ex ante* delegating strategy on the part of Congress, there may be unnecessary government costs, in the form of interagency coordination costs or wasteful duplication of government resources. These government costs, in turn, can cause delays in executing the assigned regulatory tasks as well as addressing future regulatory needs. I consider these two types of costs in detail below.

A. *Ex Post*: Regulatory Gaps Leading to Crises or Controversies

The most obvious concern associated with the core-mission model is that an administrative state built on such a presumption and expectation for agencies can lead to critical regulatory gaps *ex post*.[80] If an agency is not expected to pay attention to all the problems it is uniquely situated to address (and authorized to do so per legislation), but is instead commended for focusing on only a subset of regulatory objectives, then there will be classes of problems that will go unaddressed.[81]

[79] *Id.* at 371 (emphasis added).

[80] Note that some regulatory gaps arise as a result of Congress's failure to recognize the need for regulation. For a general discussion of such regulatory gaps, see generally Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, SUP. CT. REV. 201, 213 (2005). This Section, however, is not concerned with those gaps. Instead, it is concerned with instances in which Congress has clearly seen a need for regulation and tasked regulatory assignments to an agency, but the agency has chosen to neglect the assignment as a result of its focus on core-mission activities.

[81] Although this Section is mostly concerned with regulatory assignments that are likely to get neglected by the agency, there are also non-regulatory functions that will likely get neglected, such as the agency's duty to comply with the Freedom of Information Act requests from the general public. *See, e.g.*, Abby K. Wood & David E. Lewis, "Agency Performance Challenges and Agency Politicization," working paper (May 31, 2016), available at https://ssrn.com/abstract=1884392 at 8-9 (noting that FOIA, as a "non-mission task," is expected to be crowded out by mission tasks, but this pattern may be exacerbated by politicization).

These regulatory gaps can lead to a lack of desirable regulation and at times to large-scale crises or controversies.

Before we discuss this concern, however, note that this type of gap will not typically arise in the private sector. The private sector is characterized by free entries and exits governed by the laws of supply and demand: where there is a sufficient demand certain goods or services, a new player will enter the market to supply them. If the supply of regulation were likewise governed by competitive dynamics, then the core-mission model should not lead to regulatory gaps. Given regulatory gaps and returns from filling such gaps, another regulatory agency might come in and provide the regulation in demand. But the supply of regulation lacks such market dynamics for several reasons. First, as already noted, agencies are not free enterprises, but are mere agents of Congress. As "creatures of statutes,"[82] they have no power on their own until Congress enacts organic statutes, and they must always act only in accordance with the delegated authority. Organic statutes often delineate not only the agencies' substantive jurisdiction but also their functional jurisdiction.[83] In other words, agencies are constrained not only in the types of interests they can promote but also the means by which they can promote such interests. Second, by design, the government sector "largely operates where markets cannot or do not function well" and "its revenues predominantly come from public budgets rather than profits."[84] Further, because regulatory "mandates are driven by politics, not market," "[w]here there is a mandate for universal service . . . public agencies [cannot] use marginal costs as a guide to expanding or contracting services."[85] Consequently, one cannot expect the same kind of market dynamics for the supply of regulation.

To be sure, there are instances where multiple agencies have concurrent or overlapping jurisdiction. In such instances, it is possible that "[s]hould one regulatory entity backslide or fail to regulate, others would be available to fill the gap."[86] But even in such cases, "it is highly questionable whether duplication among agencies leads to the sort of beneficial agency competition that the [price competition] model predicts."[87] At any rate, in great many cases, the supply of regulation is governed as a monopoly by design: one agency is given exclusive authority to regulate certain activities. The consequence of neglect by one agency can lead to a complete lack of desirable regulations over certain activities.

The literature posits numerous examples of regulatory gaps and administrative failures that arose as a result of agencies that neglected to address problems lying squarely within their mandates but outside their core missions. I will briefly discuss two case studies—both of which have been more extensively documented elsewhere—to illustrate the potential severity of the problem of regulatory gap.

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[82] *See, e.g.*, Soriano v. United States, 494 F.2d 681, 684 (9th Cir. 1974) ("[A]n administrative agency is a creature of statute, having only those powers expressly granted to it by Congress or included by necessary implication from the Congressional grant.").

[83] *See* Camacho & Glicksman (2014), *supra* note 15, at 51 (discussing two different dimensions of defining jurisdiction).

[84] DAVID H. ROSENBLOOM, PUBLIC ADMINISTRATION EVOLVING: FROM FOUNDATIONS TO THE FUTURE 14 (2015).

[85] *Id.*

[86] Camacho & Glicksman (2014), *supra* note 15, at 51. *See also* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 222-31 (2011)(discussing the potential benefits as well as costs of bureaucratic redundance and agency competition).

[87] Marisam (2011), *supra* note 86, at 228.

First, a well-known example comes from Professor Biber's case study of the U.S. Forest Service and the agency's neglect to conserve wildlife.[88] The Forest Service was created in 1905, and ever since inception it "committed itself to develop and be guided by a doctrine of 'professional' forestry, by which was meant the scientific management of forests *in order to produce a sustained yield of timber and other natural resources*."[89] But over time, "Congress expanded the Service's mission to explicitly include goals such as wildlife, recreation, and grazing."[90] But these new additional goals, such as "wildlife, recreation, and grazing," were not complementary to sustained timber productions and logging activities. As Biber observes, "a clear-cut timber project will directly conflict with a proposal to create a pristine wilderness area in the same location."[91] As long the Forest Service viewed its core mission as ensuring a sustained timber production, it had little motivation to achieve these new goals. Biber notes that "studies of employee attitudes toward timber production in the early 1980s showed that employees generally favored timber production over environmental protection."[92] Consequently, throughout the 80s, the Forest Service, despite its statutory mandate, was "reluctan[t] to compile information about the impacts of its management practices on other goals, especially relating to wildlife."[93] Even though "wildlife biologists in the 1970s started raising concerns about the impacts that massive logging of old-growth forests were having on old-growth dependent species such as the spotted owl," the Forest Service "was slow to compile information about the spotted owl and other old-growth wildlife."[94] Unfortunately, by the 80s and the 90s, "the debate over the spotted owl played across newspapers across the country and led to hostilities in many of the Pacific Northwest's small towns,"[95] pitting individual loggers against environmentalists. Biber goes on to suggest that this conflict "*might have been averted or alleviated* if the information that would have justified aggressive action to protect old-growth had been available."[96]

Second, the problem of regulatory gap also played a critical role in the 2007 subprime mortgage crisis.[97] Prior to the crisis, Congress gave jurisdiction to regulate consumer credit products to the Federal Reserve and other banking regulators. As Professors Oren Bar-Gill and Elizabeth Warren explain, however, "[t]hese agencies [were] designed with a primary mission to protect the safety and soundness of the banking system," and "[c]onsumer protection [was] a lesser priority that consist[ed] largely of enforcing Truth-in-Lending disclosure rules."[98] The main reason for the lack of effective regulation for consumer credit products, they argue, stemmed from the fact that the banking agencies due to their commitment to their core mission had little motivation to regulate these products.[99] It is not hard to see why the banking agencies would have considered regulation of consumer credit products as lying outside their core mission: consumer

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[88] Biber (2009), *supra* note 15, at 18.
[89] WILSON (1989). *supra* note 8, at 63.
[90] Biber (2009), *supra* note 15, at 18 (emphasis added).
[91] *Id.*
[92] *Id.* at 21.
[93] *Id.*
[94] *Id.*
[95] *See* The Forest History Society, "U.S. Forest Service History," http://www.foresthistory.org/ASPNET/Policy/northern_spotted_owl/index.aspx
[96] Biber (2009), *supra* note 13, at 18.
[97] *See generally* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).
[98] *Id.* at 90-91
[99] *See id.*

protection may come at the expense, on the margin, of the safety and soundness of the banking system.[100] In fact, Bar-Gill and Warren go further to explain that in certain areas, these banking agencies claimed exclusive jurisdiction and "actively resisted other regulators' effort to regulate these areas."[101] The official government report by the Financial Crisis Inquiry Commission[102] has since concluded that "the financial crisis was avoidable" but the government took "little meaningful action" to "quell the threats in a timely manner."[103] More explicitly, the report cites "the Federal Reserve's pivotal failure to stem the flow of toxic mortgages"[104] as a "prime example" of this regulatory neglect.

These are just a few well-known instances of regulatory gaps that (i) arose because a regulatory agency neglected assignments that lay outside its core mission and (ii) ultimately led to costly consequences for society. One point of clarification is necessary, however. Without a doubt, some type of prioritization is inevitable for each agency and even salutary. The reality of public administration is that there will always be more problems than an agency can reasonably be expected to address with its limited resources. The problem with the core-mission model as an *ex post* prioritizing strategy, therefore, is not that at any given point, some problems will go unaddressed. Rather, the inefficiency of the model arises from the fact that an agency will tend to prioritize certain tasks merely because they fit within the agency's core mission. But it must be recognized that factors characterizing agency core mission, such as task complementarity or the agency's "sense of mission," while providing great benefits for the internal organization of the agency, actually reveal little about the urgency or the magnitude of the problem the agency seeks to address. Put differently, to the extent that the model implies a certain stability of an agency's prioritization filter, the agency's investment of effort will not be based on the expected returns to society from regulation, and this is an economic cost of the model.

B. *Ex Ante*: Aggregate Government Costs Across All Agencies

One might argue that the above case studies reveal less about the dangers of the core-mission model, but more about Congress's poor judgment in terms of its choice of agencies: if only Congress had instead tasked these regulatory assignments with agencies whose core missions were better-aligned with the regulatory objectives, one might reason, no such regulatory gaps would have arisen. In other words, the problem may be one not of an irresponsible agent but of an irresponsible principal. This argument, of course, has to be true at some point. A responsible principle should not turn a blind eye to the fact that its many agents come with different skill sets and orientations. Assigning authority to regulate corporate proxy ballots to the FDA, as discussed, would be an indefensible delegation.

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[100] This point, while commonly assumed, is not universally accepted. For example, the Senate committee report on Dodd-Frank states that "[t]here was no evidence provided during [the committee's] hearing that consumer protection regulation would put safety and soundness [of banks] at risk. To the contrary, there has been significant evidence and extensive testimony that the opposite was the case." S. Rep. No. 111-176, at 166 (2010).

[101] Bar-Gill & Warren (2008), *supra* note 97, at 91-92.

[102] Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (2011).

[103] *Id.* at xvii.

[104] *Id.*

Aside from providing no practical remedies for hundreds of statutory goals currently assigned to regulatory agencies in contravention of their core missions, this argument raises the following inquiry: Is it desirable or otherwise efficient to organize the administrative state *ex ante* around each agency's established core mission? Note that such an organization would require partitioning society's pluralistic interests into a number of disjoint sets, with each set containing only those interests that cohere together—through task complementarities or ones establishing "a sense of mission" together. This Section explains that because markets are intertwined and government resources are scarce, such a partition raises additional types of cost considerations.

Consider the case of the SEC's regulation of proxy ballots again. Assigning this mandate to the SEC made *prima facie* sense from the perspective of intra-agency costs. But note that it also ensures low *interagency coordination costs* in the following sense. The SEC's approach to promoting effective governance is unlikely to systematically affect constituent or societal interests promoted by other agencies. Because no other agency has a stake in regulating corporate governance matters, the SEC need not worry about resolving potential conflicts or differences in viewpoints. In addition, no other agency has in-house expertise in regulating corporate governance matters or proxy ballots, or otherwise engages in ancillary tasks that relate to corporations' processing of proxy ballots. Thus, assignment to the SEC will not lead to significant, wasteful *duplicative costs* for the government. By contrast, having the FDA regulate proxy ballots will have precisely the opposite result: it will lead to both high interagency coordination costs and high duplicative costs. To the extent that the FDA's view may conflict with the SEC's mission of investor protection, the two agencies will have to resolve their differences. It will also generate duplicative costs because the SEC already has built-in expertise in corporate governance matters and is already enforcing a number of rules relating to corporate communication via proxy ballots.

In short, assignment to the SEC makes sense not simply because the regulatory objective of the task fits within the SEC's core mission—important as that may be—but because, from the perspective of aggregate government costs, the SEC is in the most cost-effective position to regulate matters pertaining to corporate governance. Generalizing from this analysis, one might envision the problem Congress faces as follows: *Given a regulatory assignment with a target outcome for society (which will entail various costs and benefits to society), how can we minimize the aggregate government cost across all agencies required to get to that outcome?* Here, the aggregate government cost across all agencies is the sum of intra-agency coordination costs, inter-agency coordination costs, and wasteful duplicative costs. Similarly, one may ask: given interests to be promoted or protected or regulatory gaps to be covered by regulation, how can we accomplish this effectively using the least amount of government resources? In the canonical case we have been discussing, assignment to the SEC scores low in terms of intra-agency coordination costs, inter-agency coordination costs, and wasteful duplicative costs; assignment to the FDA by contrast scores high on all three. In most cases, however, the outcome will not always be so obvious. Instead, we will see a trade-off among various cost factors.

In the remainder of this Section, I discuss how considerations based on intra-agency coordination costs, interagency coordination costs, duplicative costs, and functional jurisdiction may justify a delegation of a regulatory assignment to an existing agency[105] whose core mission

[105] The discussion here is limited to the cases where Congress decides to task a regulatory assignment to an existing agency. If the problem presents a sufficiently new and distinct set of tasks from those addressed by the existing agencies, Congress may indeed create a new agency. But as a historical matter, when Congress delegates new laws,

does not align well with the regulatory objective.[106] A transaction-cost-based approach (à la Coase[107]) to agency jurisdiction design might suggest the following rule of thumb: *given a legitimate need for regulation and a reasonable mode of regulation, a conglomerate agency design (i.e., resulting from a delegation that may contravene the agency's existing core mission) may be rationalized if such a delegation will result in comparatively lower interagency coordination costs and/or lower duplicative costs, which can justify the comparatively higher intra-agency coordination costs.*

This Section seeks to rationalize some of the existing or historical delegations under this rule. The purpose of this Section, however, is not to canvass all possible *ex ante* cost considerations—of which there is already a rich literature[108]—but to chart out those structural cost considerations that specifically provide insights as to whether a deviation from the model may be sensible. In reality, there may be still other cost considerations, which are orthogonal to this specific inquiry but are nonetheless germane for other circumstantial reasons.[109]

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it has been far more likely to assign them to existing agencies than to create new agencies. *See* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 358 ("[D]elegation of new laws to agencies more often takes the form of delegation to *existing* agencies than delegation to agencies created *ex nihilo*.") (emphasis added). By one account, of all acts of congressional delegation to agencies from 1947 and 1992, nearly 80 percent of delegations were given to existing agencies, rather than to new agencies. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 158 (1999).

[106] The general *ex ante* inquiry that arises in designing agency jurisdiction has been framed by Professor Biber as follows:

> There always will be questions about how to balance between two extremes: should we lump decisionmaking for different issues together within a single agency, providing greater potential for coordination but at the risk of having different decisionmaking processes interfere with each other or of losing the potential benefits of specialization; or should we separate decisionmaking for different issues into multiple organizational units, perhaps making decisionmaking for each individual issue more efficient but at the risk of having agencies get in each other's way when issues interact? So long as there are multiple things for the government to do, there will always be a question about what organizational structure will allow it to be most successful in dealing with the interactions among those different goals.

Biber (2011), *supra* note 15, at 78.

[107] In an influential article, Ronald Coase examined the conditions under which (conglomerate) firms are likely to emerge (as opposed to having the entrepreneurs simply contract out services based on market prices). Coase's main argument was that the boundary of the firm will be determined by the transaction cost of relying on the price mechanism (e.g., contracting out services) and the internal organization cost for the entrepreneur. *See generally* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[108] For general discussions of Congress's legislative discussions and its ex ante considerations, see George A. Krause, *Legislative Delegation of Authority to Bureaucratic Agencies*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY (ED (Robert F. Durant ed., 2010); William E. Kovacic & David Hyman, "Competition Agencies with Complex Policy Portfolios: Divide or Conquer?," (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2110351; Jennifer L. Selin, "The Diversity of Delegation and Consequences for Bureaucratic Responsiveness," (working paper), *available at* http://www.vanderbilt.edu/csdi/research/CSDI_WP_09-2013.pdf.

[109] Specifically, it is useful to distinguish *circumstantial* costs from *structural* costs. Circumstantial costs depend on the specific and historical circumstances under which a regulatory task was assigned to an agency. These may include, for example, a personal bias held by the chairman of a particular agency and how that reality would affect Congress's decision to assign or withhold certain authority. Most types of political costs in designing an administrative agency one way or another, for example, would be circumstantial costs. Although circumstantial costs should be considered in assigning regulatory tasks, their sources are often orthogonal to the particular

1. Interagency Coordination Costs

By *interagency coordination costs*,[110] I refer to the costs (including legal and political) of having two or more agencies coordinate, resolve conflicts, or otherwise arrive at agreements in regulatory affairs in spaces where both agencies' programs are affected. There is a growing literature of administrative law scholarship that examines the dynamics of coordination among multiple regulatory agencies.[111] Recent scholarship has highlighted that there is not just one form of interagency coordination, but *many* different forms: for example, formal versus informal, enforceable versus unenforceable, and statutorily-mandated versus unanticipated.[112] There are also many different tools for facilitating interagency coordination: joint rulemaking, interagency consultation, as well as a memorandum of understanding.[113]

Coordination between two or more agencies is most prominent when Congress explicitly assigns concurrent jurisdiction over a regulatory space to multiple agencies.[114] At times, Congress may even specifically direct multiple agencies to work together to provide a policy prescription for how they will share their regulatory responsibilities.[115] At other times, Congress's statutory design may result in a duplicative delegation by accident. According to one view of legislation, duplicative delegation arises because the *ex ante* cost of avoiding duplicative delegation may be high for Congress.[116] At still other times, Congress may have had no particular intention, but vagueness in statutory language may lead to more than one agency claiming authority to regulate the same market. These lead to "blurred boundary disputes,"[117] which can also be costly to resolve.[118]

The first thing to note about interagency coordination is that—provided that two or more agencies can actually work together harmoniously—there are certain benefits to interagency coordination. First, the agencies can pool resources together to accomplish more as a group than either can accomplish on its own.[119] Second, when the final negotiated regulatory outcome, given

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regulatory assignment at issue, and there is no reason to assume *a priori* that one agency will face greater circumstantial costs than another. By contrast, structural costs are those that arise from a regulatory assignment by virtue of the institutional structures that exist and do not vary from one context to another.

110 For a detailed treatment of interagency coordination, see generally Freeman & Rossi (2012), *supra* note 15; Marisam (2013), *supra* note 15.

111 *See, e.g.*, Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237 (2011); Barkow (2010), *supra* note 13; Biber (2011), *supra* note 13; Deshazo & Freeman (2005), *supra* note 13; Freeman & Rossi (2015), *supra* note 13; Gersen (2005), *supra* note 55; Marisam (2011), *supra* note 86; and Jason Marisam, *Interagency Administration*, 45 Ariz. L.J. 183, 194 (2013).

112 *See generally* Freeman & Rossi (2015), *supra* note 13.

113 *See id.*

114 *See generally* Freeman & Rossi (2015), *supra* note 13.

115 For example, Title VII of Dodd-Frank grants the CFTC with authority to regulate all swaps except "security-based swaps," which are regulated by the SEC. But the Act also directs the CFTC and the SEC to jointly define the terms "swap," "security-based swap," "mixed swap" and "security-based swap agreement." Dodd-Frank Act § 712(a)(8).

116 *See* Marisam (2011), *supra* note 86, at 183.

117 *Id.* at 185.

118 *See id.* at 215-17 (discussing an instance of such a dispute between FERC and the Department of the Interior and another one among the FDA, the USDA, and the EPA).

119 *See generally* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); *see also* Biber (2011), *supra*

the coordination among the agencies, may be more reflective of the outcome Congress has intended, rather than the outcome that may have been arrived at if only one agency was in charge of the task. As Professor DeShazo and Freeman observe, "[a]gencies with specialized expertise in one area can press their counterparts to modify decisions in another" and "[be]cause agencies represent different constituencies . . . , the interagency process may serve as an important vehicle for interest mediation in the policy process."[120]

All of these, of course, require that the cost of coordinating among multiple agencies is not itself prohibitive. Given two or more agencies, whether interagency coordination costs between them will be high or low will depend, among other things, on how closely aligned the regulatory objectives of the agencies are. When the core missions are relatively well-aligned, the agencies are working toward achieving similar regulatory objectives, and it can even be efficient for two or more agencies to collaborate together. According to one account, the EPA and the OSHA have managed their jurisdictional overlaps quite efficiently.[121] This should not be entirely surprising since there is a close connection between public health and workers' safety and health.

By contrast, if the agencies' core missions clash so that promoting one mission implies (at least partially) hampering the other—and Congress's directive is unclear—there can be significant differences as to how each agency would like to structure the regulation and the resulting interagency coordination cost can be high. The historical relationship between the SEC and the CFTC is one example of a pair of agencies, which share regulatory space but have two different missions. As Professor Marisam describes:[122]

> [T]he SEC and CFTC historically have had different philosophies rooted in different statutory mandates. The SEC is supposed to focus on investor protection, while the CFTC focuses on risk management. As a result, each agency has been wary of the other's regulatory intentions. In fact, distrust between the two agencies reached a head when, in 1990, the SEC advocated for Congress to transfer the CFTC's functions to the SEC. The dispute grew so heated that Congress and high level administration officials chided the two agencies chairmen for their 'juvenile' behavior.

In some cases, conflict resolution may go even further and eventually lead to court challenges or otherwise getting the Department of Justice to resolve the disputes. Another example of a costly interagency coordination is the conflict that arose between the EPA and the Department of the Interior ("DOI") over issuing air pollution permits when the DOI approved Exxon's offshore drilling and production platform.[123] The EPA, concerned with public health, wanted more

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note 15.

[120] DeShazo & Freeman (2005), *supra* note 15, at 2233.

[121] *See generally* Aagaard (2011), *supra* note 98.

[122] *See, e.g.*, Marisam (2013), *supra* note 106, at 198.

[123] *See, e.g.*, Marisam (2013), *supra* note 106, at 194 ("It is not difficult to imagine what these costs would have been because the EPA had to endure similar costs in the 1970s. At that time, the EPA was considering whether to apply the CAA to pollution from offshore oil projects. The Department of the Interior was in charge of permitting these projects, and its permits included some limits on pollution. The EPA wanted more environmentally protective regulations, and it chose to exercise jurisdiction. However, the Interior asked the EPA to cease its regulatory efforts. When the EPA did not, the Department of Justice, which often settles interagency jurisdictional disputes, weighed in. The Justice Department sided with the EPA. After the EPA enacted the regulations, the oil companies then sued

stringent standards than the DOI, which was more concerned with ensuring development of the oil and natural gas reserves. The DOI ultimately asked the EPA to cease its efforts in requiring Exxon to produce air pollution permits in accordance with standards set forth in the Clean Air Act. When the Department of Justice stepped in and settled this interagency jurisdictional dispute in favor of the EPA, the oil companies involved, along with the DOI, sued the EPA for overstepping its boundaries into what they claimed was the DOI's statutory responsibility. The Ninth Circuit sided with the DOI.[124] It was only eleven years later and after an intensive lobbying by the EPA that Congress finally granted jurisdiction to the EPA to regulate offshore drilling projects.[125] These stories point to potentially high economic and political costs arising out of interagency coordination when the two agencies' have conflicting goals.

The fact that these particular agencies faced difficulties in coordinating their regulatory efforts with one another does not necessarily suggest that these regulatory matters should be assigned to a single agency. Nevertheless, it does suggest that there are general limitations, as well as pitfalls, to splitting up regulatory assignments in the presence of shared regulatory space.

Now recall the example of consumer financial product regulation prior to the 2009 crisis. Some have argued that had the FTC, a consumer-welfare oriented agency, been given authority to regulate consumer credit products, it would have been better motivated to protect consumers than the Fed and other banking agencies, who are more concerned about protecting the sound banking systems and the welfare of depositors.[126] They may be correct. On the other hand, mortgage products are ultimately banking products, and insofar as the FTC would be put in the position of regulating banking products, the FTC's regulations might have conflicted with the Fed's own programme of protecting the sound banking systems. These agencies would then need to work out their kinks before there can be any meaningful enforcement of regulation. If consumer protection would come at the expense, on the margin, of the safety and soundness of the banking system, then certainly, these agencies will not necessarily see things eye to eye. An agency that favors strong consumer protection will want more stringent regulation, while the Fed may prefer less stringent regulation. Given that the two interests may be at odds, this type of interagency coordination cost could potentially be significant. One possibility is that having the Fed (or any single agency) pursue both programmes and ensuring an institutional design to reduce its intra-agency coordination cost may be the more cost-effective solution. The route ultimately taken is not too far from this approach since the Consumer Financial Protection Bureau is officially housed within the Fed but maintains complete independence.[127] Alternatively, Congress could grant joint regulatory authority to both the FTC and the Fed and direct the two agencies to work together. This latter type of coordination, however, is likely to be more challenging to administer than ones which merely involve two or more agencies to horizontally split their jurisdiction. At any rate, what is clear is that when two interests are interrelated, there will be obstacles to tasking the

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the EPA. The regulations were ultimately overturned by the Ninth Circuit, which held that the Interior, and not the EPA, had jurisdiction.").

[124] State of Cal. v. Kleppe, 604 F.2d 1187,1189 (9th Cir. 1981).

[125] Marisam (2013), *supra* note 15, at 194 ("Eleven years later, when Congress next reconsidered the CAA, the EPA managed to have Congress grant it jurisdiction to regulate pollution from these offshore oil projects. In the end, the EPA won the power it had sought. However, it did so at great cost. It had to endure an interagency fight and a high profile lawsuit that it lost. Afterwards, it had to lobby Congress for the powers.").

[126] *See, e.g.*, Bar-Gill & Warren (2008), *supra* note 85, at 91-92.

[127] *See infra* Subsection IV.C.1.

regulatory assignments in a way that conforms to the core-mission model.

Here is a useful takeaway: when two interests in society are divergent but intricately connected—such as borrowers' interests versus depositors' interests, timber production versus conservation of wildlife, production of hydraulic energy versus the concomitant environmental concerns—the conflict between the two will remain regardless of whether the job of protecting the two interests is given to one agency or two different agencies. Likewise, "in the public lands management context, it would be inefficient . . . to have one agency in charge of logging, another agency in charge of mining, another in charge of grazing, and another in charge of recreation, all for the same geographic area" given that "[s]pace is finite and land often can be used for only one goal, or sometimes for a few conflicting goals."[128]

The core-mission model is not very useful in such cases because the result will be merely a *substitution of interagency coordination cost for intra-agency coordination cost*. The relevant question therefore must be whether the intra-agency coordination costs resulting from assigning both objectives to a single agency—for example, in terms of information production necessary to make informed regulatory decisions—will be greater than the interagency coordination costs resulting from assigning the two regulatory objectives to two different agencies and having them resolve their differences while sharing information.[129]

Finally, as with intra-agency coordination costs, the real cost to society of a costly interagency coordination is not just that one or more agencies will have to expend government resources (and perhaps political capital) to resolve these conflicts. The consequence may be stalled regulatory efforts and uncertainties for the relevant industry, all of which may play out to a greater harm for society.

2. Wasteful Duplication of Government Resources

When Congress faces a need to address a new problem through regulation, it can create a new agency or assign the problem to an existing agency. Of the two options, Congress has good reasons to prefer the latter. Establishing a new agency can be costly. Government resources are scarce.[130] Even with all the resources, it can take a long time to prepare the infrastructure, appoint officers, and recruit staff members. As a result, whenever possible, Congress is far more likely to delegate new laws to existing agencies rather than to new ones.[131] By one account, of all acts of

[128] Biber (2009), *supra* note 15, at 34-35.
[129] Professors Freeman and Rossi make a similar point going in the opposite direction:

> The same argument [for delineating agency jurisdictions] applies to proposals to consolidate the numerous federal financial regulators: they simply would convert an interagency coordination problem into an intra-agency problem. Thus the choice of organizational form—a single regulator versus multiple regulators—may be less important for effectiveness than are coordination and information sharing.

Freeman & Rossi (2012), *supra* note 15, at 1154.
[130] When Congress "faces the choice of whether to give [a new regulatory assignment] to a preexisting agency that is already responsible for at least one other mission or to create an agency dedicated solely to the task. . . , [r]esource constraints will typically point in favor of giving the function to an agency that is already up and running with a staff, or at least to setting up an agency that will do more than one thing." Barkow (2013), *supra* note 15, at 307.
[131] DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 358 (2001)("[D]elegation of new laws to agencies more often takes the form of delegation to *existing* agencies than delegation to agencies created *ex*

delegation to agencies from 1947 and 1992, nearly 80 percent of delegations were given to existing agencies, rather than new ones.[132] But when Congress chooses to go with an existing agency, Congress's choice of agency may often be driven by a desire to reduce wasteful duplication of government resources, rather than the alignment of the new task with the agency's core mission.

For example, it may be that although the new task does not belong squarely within an agency's core mission, the agency possesses relevant information about the particular industry or the relevant science as a result of its historical mission. This line of reasoning, for example, is consistent with Congress's decision to task the Forest Service with conservation of wildlife. The Forest Service would already have been knowledgeable about the resources available throughout public forests as well as the extent to which their planned timber productions may restrict other use values of forests. Congress's decision to task banking agencies to regulate consumer credit products can be similarly rationalized. Mortgage products and credit cards originate from banks, and federal banking agencies have come to develop an intimate knowledge of the industry and consumer behavior. These agencies are expected to understand the dynamics of the banking industry and their profit models better than any other agencies. That said, duplicative information costs should not be a determinative factor, but only one of many factors to consider in designing agency jurisdictions. As I discuss later, it is also possible to have one agency *borrow* expertise or information housed in another agency, thereby avoiding a wasteful duplication.[133]

It is also possible that although the new task may not belong squarely within an agency's core mission, the agency, in furtherance of its own core mission, might already possess relevant skill sets or be in the business of taking upon a certain set of preliminary tasks that are also necessary for completing the new task. Because one type of skill set possessed by an agency can often be used to address many different types of problems, we may sometimes observe a regulatory assignment that appears quite foreign to the agency's core mission. This was the case with the Foreign Corrupt Practices Act (FCPA).[134] The FCPA has two main provisions: the anti-bribery provisions[135] (which prohibit issuers from paying bribes to foreign officials to help them obtain or otherwise retain their businesses) and the accounting provisions[136] (which seek to promote accounting transparency and accuracy among the issuers). In 1977, Congress tasked the SEC to bring civil violations (and the DOJ to bring criminal violations).[137] At the time, the SEC expressed a concern that the FCPA's regulatory objectives "did not fit within its mission."[138] There is no clear connection between bribery of foreign officials and investor protection. Nevertheless, Congress tasked the SEC with this assignment "because of the SEC's early leadership on the issue and its development of expertise in foreign investigations."[139] Congress also noted that "[i]f this investigative responsibility were to be assigned solely to the Justice Department . . . that agency would have to duplicate the investigative capability already in the SEC at a greater cost to the

nihilo.").
[132] *See* DAVID EPSTEIN AND SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 158 (1999).
[133] *See infra* Section IV.B.
[134] 15 U.S.C. § 78dd-1, et seq.
[135] Securities Exchange Act of 1934 (Exchange Act) § 30A(a), 15 U.S.C. § 78dd-1(a) (2006).
[136] Exchange Act § 13(b)(2)(A)-(B), 15 U.S.C. § 78m(b)(2)(A)-(B) (2006).
[137] Exchange Act § 21(d), 15 U.S.C. § 78u(d) (2006).
[138] Black (2012), *supra* note 15, at 1093 (emphasis added).
[139] *Id.* at 1099.

Government."[140] There were additional considerations that suggested that the SEC may be in a more cost-effective position to bring about enforcement charges (than the DOJ). These included the SEC's ability to bring injunctive actions through civil charges[141] and the SEC's functional independence from the President.[142] From Congress's perspective, the SEC's involvement was justified not because FCPA enforcement was consistent with the goal of investor protection but because the SEC had the relevant investigative capability for effective and cost-effective enforcement. For this reason, whether the FCPA's regulatory objectives fall within the SEC's core mission may be a relevant question not necessarily the most important one for Congress. In this case, the relevant substitution was between the SEC's *intra-agency coordination cost* (which may arguably have proved to be low given the agency's active enforcement in recent years[143]) versus the *duplicative costs* the government would incur otherwise.

While considerations based on intra-agency coordination costs might suggest that some type of duplicative costs may be inevitable, neglecting these duplicative costs on a broad scale will lead to a fragmentation among agencies. Taken to an extreme, the core-mission model might counsel that where society has *n* different broadly-framed interests to promote—all of them conflicting with each other on the margin—there really ought to be *n* different agencies to address these problems even if there are substantial duplications. This approach would lead to the problem of inefficiency of the federal government President Obama highlighted in his 2011 State of Union address[144] and the concern the Government Accountability Office has highlighted in its multiple reports.[145]

The cost of bureaucratic fragmentation, however, goes beyond wasteful duplication of resources; it can also lead to a misallocation of government resources. In an ambitious study, Professor Christopher Michael Carrigan analyzes the problem of multi-tasking agencies and identifies the conditions under which "assigning [multiple] functions to one agency can . . . be better than dividing them between agencies."[146] In his model, he notes that agencies are often

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140 *Id.*
141 *Id.*
142 *Id.*
143 *See infra* Part IV.A. Nevertheless, it is difficult to evaluate the SEC's intra-agency coordination without also understanding the impact the SEC's enforcement effort has had on its investor protection goals.
144 In President Obama's words:

> We should give [our people] a government that's more competent and *more efficient*. . . . There are 12 different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there's my favorite example: The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated once they're smoked.

President Obama's State of Union Speech 2011, *available at* https://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.
145 *See generally* GAO, *2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap and Duplication, and Achieve Other Financial Benefits*, GAO-13-279SP (Washington, D.C: April 9, 2013); *2012 Annual Report: Opportunities to Reduce Duplication, Overlap and Fragmentation, Achieve Savings, and Enhance Revenue*, GAO-12-342SP (Washington, D.C.: Feb. 28, 2012); and *Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue*, GAO-11-318SP (Washington, D.C.: Mar. 1, 2011).
146 *Id.* Although Carrigan focuses on combining regulatory and non-regulatory functions together, his theoretical model is general enough to apply to the case of two "policy goals," which compete for agency resources. *See*

better situated than Congress in assessing the likelihood of successfully completing their assigned tasks.[147] For this reason, under some circumstances, a single agency making a judgment call to allocate its fixed budget across the two different tasks—based on its internal assessment of the various risks entailed in completing them—may be more efficient in maximizing the joint output than having Congress task the assignments to two separate agencies and making an *ex ante* budget allocation over them (without being informed about the likelihood that each task may be completed successfully).[148] Carrigan's study highlights that the general model of designing each agency with a singular mission not only can be more costly for the government but also may not necessarily lead to a superior joint outcome when we consider the advantages that agencies have over Congress in processing the regulatory needs.

3. Functional Jurisdiction

Professors Camacho and Glicksman have recently made an important contribution to the study of agency jurisdiction design by noting that jurisdiction can be determined either "on the basis of the subject matter it is authorized to regulate or manage" or "in terms of the functions an agency performs . . . such as standard setting, permitting, and enforcement . . . . "[149] As such, when an agency's jurisdiction is defined both substantively and functionally, it will come to develop expertise over not only the substantive aspect of its jurisdiction but also its functional aspect. One consequence is that one agency may at times be in a cost-effective position to address a goal not because the goal fits squarely within the agency's (substantive) core mission, but because the agency's expertise over its functional jurisdiction can provide an effective method for achieving that particular goal.

Consider, for example, the FTC's decision to regulate environmental marketing claims in the early 90s.[150] Traditionally, the FTC lacked expertise in environmental sciences as such. The agency's core mission was to protect consumers by prohibiting deceptive and unfair methods of competition (including false advertising), not to regulate against environmental harms. Nevertheless, due to consumers' growing interest in green products in the 90s, product disclosure regulation became a powerful regulatory method for promoting use of green products. Although some remained skeptical, at the time, as to whether the FTC was well-suited to effectively regulate environmental marketing claims,[151] today, the FTC's regulation, while not perfect, is seen as having had a significant effect in promoting more environmentally friendly consumer products.[152]

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generally id. at 186 & 197 (discussing both the generality of his model and the limitation of his empirical findings).

[147] The advantage Congress has over the agencies in the model, however, is that it has a clear preference over the joint outcome, and this cannot be perfectly communicated to the agencies. *See generally id.*

[148] *See generally id.*

[149] *Id.*

[150] *See generally* Paul H. Luehr, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL'Y 311 (1992). To be clear, this was not a case in which Congress gave such a mandate to the FTC. Rather, the FTC, after a discussion with eight State Attorneys General took the initiative in addressing this concern, decided on its own to engage in regulating green advertising.

[151] *See* David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green"*, 81 CAL L. REV. 991 (1993).

[152] *See, e.g.*, Nick Feinstein, *Learning From Past Mistakes: Future Regulation To Prevent Greenwashing*, 40 B.C. ENVTL. AFF. L. REV. 229, 242-255 (2013) (arguing that current regulation of greenwashing has been effective, but is inadequate).

A similar but much more controversial example is Congress's decision to address human rights violations in the Democratic Republic of Congo (DRC) through corporate disclosure regulation. The Dodd-Frank Act required the SEC to adopt rules mandating a new reporting requirement on publicly-traded companies that manufacture products using certain "conflict minerals"—minerals that originate from the DRC and bordering countries. This provision has little to do with investor protection[153] but was designed to put an effective stop to human rights violations persisting in the covered countries. According to Professor Galit A. Sarfaty, human rights advocates targeted the SEC's disclosure regulation because *there were no other effective mechanisms* (including international standards, diplomatic solutions, and litigation strategies).[154] After inquiring whether securities regulation is "the appropriate mechanism for achieving human rights compliance," Sarfaty concludes that "[c]arefully crafted securities regulation . . . can operationalize emerging international human rights norms through a domestic mechanism with real teeth."[155]

The underlying logic behind relying on corporate disclosure is that socially responsible investors and consumers may care about such information and bring pressures on manufacturer.[156] Thus, unlike other mechanisms—all of which have proved ineffective—corporate disclosure regulation promised a more promising means of stopping human rights violations.

But to what extent, does this justify Congress's tasking the SEC with protecting human rights? The inquiry can be framed as follows. Given a societal interest *unrelated* to investor protection, corporate disclosure regulation either may or may not be an effective (and cost-effective) method for promoting that interest. This threshold question should be considered with a candid discussion of various costs and benefits of promoting such a policy through corporate disclosure regulation. If this question is answered in the negative, then Congress obviously should not rely on this regulatory method. On the other hand, if corporate disclosure regulation is indeed an effective method, then absent a constitutional barrier, the government's use of this method need

[153] *See generally* Securities & Exchange Commission, Conflict Minerals: Final Rule, http://www.sec.gov/rules/final/2012/34-67716.pdf (hereinafter the "SEC Conflict Minerals Rule") at 242-244.
[154] Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97 (2013). She explains as follows:

> International, regional, and non-governmental organizations . . . have drafted standards and principles addressed to companies . . . and governments . . . . These voluntary instruments, however, lack independent monitoring, implementation, and enforcement mechanisms; do not include performance metrics to assess compliance; and are not certifiable. . . . Advocates are seeking alternative domestic mechanisms that have more teeth and can facilitate the incorporation of human rights norms into company operations.

Id.
[155] *See id.*
[156] *See, e.g.*, SEC Conflict Minerals Rule, *supra* note 133, at 8-9 (noting that "Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains" and that the rule will "enhance transparency," "help American consumers and investors make more informed decisions," and "provide information that is material to an investor's understanding of the risks in an issuer's reputation and supply chain."). *See also* Cass R. Sunstein, *How to Fight Conflict Minerals? Mandatory Disclosure.*, BLOOMBERG.COM (Oct. 26, 2015), https://www.bloomberg.com/view/articles/2015-10-26/how-to-fight-blood-diamonds-mandatory-disclosure- ("In the face of horrible conflict in that region, the law gives manufacturers an incentive to reduce their reliance on conflict minerals—and simultaneously enables investors and consumers to bring pressure to bear on manufacturers.").

not be limited to protecting investors only. It would be fallacious to argue that because corporate disclosure regulation is well-suited to protect investors' interests, it must be used to protect only investors' interests and no other interests.

Whether corporate disclosure regulation can effectively address the human rights violations in the DRC is admittedly a contestable point. Reasonable minds can disagree as to the likely effect and outcome. But if we accept Sarfaty's argument, then we can consider two different delegations. One option is to assign the task to an agency with functional expertise over corporate disclosure regulation (hence, the SEC) even though the subject interest is extrinsic to the agency's substantive core mission. In this case, we should expect nontrivial intra-agency coordination costs. The SEC may lack motivation and expertise to draft well-designed rules and enforce them. It will also need to juggle this new regulatory objective against investors' financial interests. Another option is to assign the task to an agency whose (substantive) core mission aligns naturally with the subject interest—such as the State Department. But in this case, the State Department needs to be given authority over corporate disclosure regulation pertaining to this matter. Whether the State Department would face low intra-agency coordination costs is unclear. Although it would have motivation and substantive expertise over international human rights issues, it does not possess functional expertise in structuring effective corporate disclosure regulation. Designing and enforcing corporate disclosure regulation has not been part of the State Department's core mission. Meanwhile, there can be potentially high interagency coordination costs (to the extent that the State Department's disclosure mandate might conflict with the SEC's regulation) and the related duplicative costs (to the extent that the SEC already has the infrastructure, through its EDGAR system, to manage periodic disclosure documents and the State Department does not). A third option is to take a hybrid route and encourage the SEC and the State Department to coordinate their efforts together.

A take-away here is that whenever one regulatory method can be effectively used to promote an interest that is seemingly unrelated to the method, a dilemma will arise between assigning the assignment to an agency that has functional expertise over the regulatory method and assigning it to an agency that has substantive expertise over promoting that particular interest. But as before, this dilemma, too, will also boil down to a comparison of various types of intra-agency coordination costs, interagency coordination costs, and duplicative costs.

IV. Alternative Approaches to Reduce Intra-Agency Coordination Costs

The discussion from Part II illustrated how the core-mission model can reduce intra-agency coordination costs and lead to better agency performance on the goals the agency considers as belonging to its core mission. The discussion from Part III illustrated, however, that the model can at times lead to significant costs—some of them foreseeable—for the administrative state and therefore, in certain instances, it may be *a priori* sensible to task an agency with some regulatory goals even if they lie outside the agency's core mission.

This takes us to the next question: What alternative mechanisms exist to reduce intra-agency coordination costs when an agency is tasked with conflicting goals—so as to avoid the problem of "non-performance" and regulatory gaps? As discussed, the problem of intra-agency coordination consists of three components: motivation, expertise, and balancing. In this Part, I draw upon modern administrative law scholarship and consider some of the ways in which agencies have overcome, at least partly, these challenges. These examples suggest, first, that more experiments are warranted in terms of designing agency jurisdiction, and second, that the risk of nonperformance may be overstated. Nevertheless, institutional designs intended to reduce intra-agency coordination costs should not be a substitute for carefully deliberating the choice of delegation at the outset. Design considerations should follow, not precede, considerations of interagency coordination costs and duplicative costs.

A. Motivation

Given the discussion from Part II, it is not surprising that, all else equal, an agency is likely to neglect regulatory assignments lying outside its core mission. Because the problem stems from the dominant culture that exists within an organization, absent pressure from the outside, it may be difficult to motivate an agency to pursue those assignments. To this extent, three design tools may be useful: (i) visible metric of performance, (ii) external pressures from other agencies, and (iii) administrative deadlines.

1. Visible Metric of Performance

It has been observed that "tasks that are more easily measured are more likely to be performed at a higher level by an agency as compared to tasks that are harder to measure."[157] Because a visible metric can demonstrate progress, it is easier to hold the agency accountable for its failure, and by the same token, it allows the agency to boast its progress to the general public and politicians.[158] Accordingly, a sensible proposal by Professors Sidney A. Shapiro and Rena Steinzor to reform the administrative state is to require the agencies to craft "positive metrics [that] focus on [the] agency's core statutory mission or missions."[159] But there is no reason why such an incentive mechanism—however perverse it may be—cannot be employed to motivate an agency to regulate outside its core mission. In fact, one might argue that visible metrics are *especially* important for regulatory objectives that are more likely to be neglected.

Recall the story of the SEC and the FCPA. Despite the fact that FCPA enforcement "did not fit within [the SEC's] mission,"[160] beginning in the 2000s, the SEC started enforcing the FCPA with increasing enthusiasm. During the past five years, the SEC has been bringing on average more than 10 cases a year and has been publicly touting its success.[161] In 2013 and 2014, the total amount of fines SEC collected exceeded $600 million a year.[162] The SEC also states on its website that FCPA enforcement "continues to be a high priority area for the SEC."[163] Why did the SEC

[157] Biber (2009), *supra* note 15, at 11. The case study of the Forest Service is also seen as illustrating this tendency: "it is easier to measure the economic effects of greater timber production than it is to calculate long-term environmental effects." Barkow (2013), *supra* note 15, at 310.
[158] *See, e.g.*, Biber (2009), *supra* note 13, at 1; Barkow (2013), *supra* note 13, at 310.
[159] Shapiro & Steinzor (2008), *supra* note 4, at 1769.
[160] Black (2012), *supra* note 4, at 1093.
[161] *See id.*
[162] *See id.*
[163] *See* Securities & Exchange Commission, *SEC Enforcement Actions: FCPA Cases*, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml

suddenly begin to take a keen interest in FCPA enforcement? One theory is that the agency is motivated by the visibility brought by FCPA enforcement:[164] the number of actions the agency brings and the amount of the sanctions it collects helps the SEC "project an image of a tough law enforcement official."[165] If this theory has merits, then the history of the SEC's enforcement of the FCPA provisions illustrates that an agency previously uninterested in promoting a particular regulatory objective can become motivated once it sees an opportunity to tout its performance according to a visible metric. Statutorily designating a visible metric may therefore go a long way to motivate an agency to regulate effectively outside its core mission. The Government Performance and Results Act Modernization Act of 2010 (GPRAMA) is one example of this type of effort.[166] The GPRAMA seeks to promote effectiveness and accountability among government agencies by having each agency clearly define its goals and conduct own analysis of performance.[167] These measures are intended to improve the quality of performance transparency while increasing public access to agency performance.

2. External Pressures from Other Agencies

An agency's reluctance may also be overcome as a result of statutorily-designed external pressures from other agencies. A recent innovation on this point is statutory engagement of multiple agencies. One example is *interagency lobbying*—the lobbying activity by *another* agency whose core mission is consistent with the task and therefore takes a keen interest in seeing the task completed. Professors Deshazo and Freeman formalize this idea in their influential article.[168] As a case study, they examine the FERC's responsibility to promote environmental goals while issuing hydroelectric licenses.[169] They document two findings: (i) the FERC had long neglected these goals until Congress *required* the FERC to consult with the EPA,[170] but (ii) once Congress by statute allowed the EPA to act as a lobbyist for environmental concerns, there was a measurable mitigation on the FERC's part.[171] More generally, Professors Freeman and Rossi document a number of interagency coordination tools, which allow multiple agencies to share regulatory spaces and promote efficiency, effectiveness, and accountability of regulation.[172] To be sure, these tools reduce intra-agency coordination costs at the expense of increasing interagency coordination cost. Nevertheless, the findings of these studies suggest that interagency coordination tools can allow for an efficient substitution between intra-agency coordination costs and interagency coordination costs.

[164] *See* Black (2012), *supra* note 4, at 1112-13.
[165] *Id.* at 1112.
[166] The Government Performance and Results Act Modernization Act of 2010, Pub.L. 111–352. Section 10.
[167] Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 125-126 (2012); United States Government Accountability Office, "Government Performance, GPRA Modernization Act Provides Opportunities to Help Address Fiscal, Performance, and Management Challenges," *available at* http://www.gao.gov/products/GAO-11-466T (March 16, 2011).
[168] Deshazo & Freeman (2005), *supra* note 15, at 12.
[169] *See generally id.* at 2235-52.
[170] *See id.* at 2265-60.
[171] *See id.* at 2220-21.
[172] *See generally* Freeman & Rossi (2012), *supra* note 15, at 1151-96.

3. Administrative Deadlines

As discussed already, the difficulty with trying to address the problem of an agency's reluctance to regulate is that agency inactions are typically not reviewable.[173] The Supreme Court has, however, held that statutory deadlines imposed on certain discrete actions are "one of the . . . areas where courts will compel agencies to act despite multiple demands on their resources."[174] Consequently, administrative deadlines constitute another form of statutorily-designed external pressure: any affected party with standing can exert pressure on the agency to comply with the mandate.

An example of a potential agency inaction avoided is the Federal Communication Commission's regulation of radiofrequency radiation. The Telecommunications Act of 1996 required the FCC to regulate harmful radiofrequency radiation when it granted licenses to broadcasters.[175] Under ordinary circumstances, the FCC might not have been motivated to issue regulation in this area; promotion of the public health by reducing harmful radiofrequency radiation can conflict with the FCC's goal of granting broad access to broadband services for the general public. According to Professor Marisam, however, the FCC could not discretionarily neglect this mandate in part because Congress placed a very specific deadline for the FCC's rulemaking.[176] Thus, if promotion of goals and objectives lying outside an agency's core mission can be reduced to discrete and enforceable agency actions, Congress can rely on administrative deadlines to motivate the agency.

B. Expertise

It is commonly asserted that tasking an agency to regulate outside its mission is dangerous because the agency will not have the requisite expertise to provide effective regulation. This argument should not be carried too far, however. An agency's expertise (or access to it) is neither static nor completely exogenous. For instance, no agency at its inception houses any particular expertise, but that is not a valid argument against creating a new agency. The reality is that developing expertise is itself a function of motivation: if an agency can be sufficiently motivated, it will find a way to develop new expertise in-house or if necessary, borrow from another agency.

1. Developing In-House Expertise

In some sense, a regulatory agency should always be developing new expertise in house and procuring new skill sets. The industry is always innovating and trying to find ways to skirt the burden of regulation. Even in promoting goals that fit within its core mission, the regulator must always keep abreast of the latest products, technologies, or industry trends. A responsible regulator is one who is constantly expanding its knowledge reservoir. This type of learning, of course, need not be confined to the knowledge essential to the agency's core mission. Given a new regulatory goal, one should expect a sufficiently motivated regulator to spend resources to

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173 *See supra* note 56 and accompanying text.
174 Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 952 (2008).
175 47 U.S.C. § 332(c)(7)(B)(iv) (2012).
176 *See* Marisam (2013), *supra* note 111, at 192.

develop the necessary and relevant expertise over time.

The Federal Trade Commission's initiative to regulate environmental marketing claims, already discussed, is one such example. Although the FTC began regulating environmental marketing claims without the relevant expertise in environmental science, over the past two decades, the agency has heavily invested in understanding the relevant aspects of environmental sciences. The agency issued its first Green Marketing Guides in 1992, and revised it three times in 1996, 1998, and most recently in 2012.

2. Borrowing Outside Expertise

At times, it may not even be necessary for an agency to develop the relevant expertise in-house.[177] It can choose to "borrow" the expertise, as needed, from other agencies. To be sure, borrowing is not costless. When an agency tasked to regulate an area decides to borrow expertise from another agency, it faces a trade-off: on the one hand, reliance on another agency can constrain the agency's effort to promote its own agenda; on the other hand, borrowing expertise can reduce or eliminate the cost of establishing in-house expertise from scratch and allow the agency to avoid adopting rules based on insufficient records.[178] From this perspective, an agency should rationally choose to borrow expertise from another if "the resource savings [likely] more than compensate for the agency's loss of control over some of its regulatory processes."[179]

The FCC's regulation of radiofrequency radiation, discussed above, serves as an illustrative example here as well. Lacking expertise in public health, the FCC "decided to rely on technical data, analysis, and policy guidelines contributed by the EPA, which had long been studying radiation for decades, and the FDA, which for years had been regulating radiation from medical devices."[180] Professor Marisam notes that in the end "a relatively pro-industry regulator like the FCC enacted a regulation that was more in line with the pro-public health interests of the EPA and FDA[.]"[181] To be sure, this outcome may have been salutary—the final equilibrium reached among the FCC, the EPA, and the FDA may well be consistent with what Congress intended in tasking the FCC to regulate radiofrequency regulation.[182] A recent study has shown more generally that regulatory agencies routinely pool resources together to combine legal authority and expertise in a more strategic manner.[183]

C. Balancing

[177] *See generally* Marisam (2013), *supra* note 111, at 190-92; *see also* Nou (2015), *supra* note 15, at 490 ("Moreover, further attention might also be paid to the ways in which agency heads contract out their informational needs to external actors as opposed to fulfilling them in-house. There may be fruitful parallels here to the analogous decisions made in private firms.").

[178] *See* Marisam (2013), *supra* note 111, at 190-92.

[179] *Id.* at 190-91.

[180] *Id.* at 192.

[181] *Id.* at 193.

[182] Professors DeShazo and Freeman note the productive dimension of interagency conflict. See DeShazo & Freeman, *supra* note 15, at 2233 ("Because [different] agencies represent different constituencies, and adhere to different statutory mandates, the interagency process may serve as an important vehicle for interest mediation in the policy process.").

[183] *See generally* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015).

Even if an agency can overcome its reluctance to regulate and procure the necessary expertise to regulate effectively outside its core mission, there still remains a concern that it will find it difficult to balance multiple regulatory objectives that conflict with one another. On this point, the following two design tools merit consideration: (i) structural independence and (ii) harmonization of regulatory objectives.

1. Structural Independence

As Wilson notes, when an agency has a strong tendency to gravitate towards its core mission but must handle multiple tasks, the "tasks that are not part of the core mission will need special protection," which "requires giving autonomy to the subordinate tasks sub-unit (for example, by providing for them a special organizational niche) and creating a career track so that talented people performing non-mission tasks can rise to high rank in the agency."[184]

One of the ways in which Congress can ensure that an agency will make a good-faith effort to balance multiple conflicting objectives is to ensure some level of autonomy to the subunit that is entrusted with enforcing the specific new task. An extreme version of this solution is the design of the Consumer Financial Protection Bureau (CFPB). After the financial crisis of 2009, given the urgency of regulating consumer credit products, Congress responded in part by creating a separate agency to oversee consumer mortgage products.[185] Although the CFPB is officially housed within (and funded by) the Federal Reserve, the organic statute grants the Bureau complete independence from the Fed.[186] Although it is too early to gauge the success of the CFPB as an organization, at a minimum, the agency is strategically situated to promote consumer welfare in coordination with the Federal Reserve.

Notwithstanding this example, however, Congress may face some limitations in granting autonomy to a subunit of the agency if the subunit is housed within an independent regulatory agency. As the Supreme Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[187] if an agency administrator enjoys for-cause removal protection from the President, the head of a subunit of that agency cannot himself enjoy a separate layer of for-cause removal from the agency administrator without running afoul of the Constitution. Therefore, short of creating an entire agency housed within a larger agency, a subunit of an independent regulatory agency may have only a limited degree of autonomy.

2. Harmonization of Regulatory Objectives

An alternate approach to balancing multiple conflicting goals is to *harmonize* the goals according to a common metric—one that allows aggregation. This can be done, for example, by having each agency articulate a framework for considering the costs, benefits, and tradeoffs involved in promoting multiple goals simultaneously. A policy practice that may go a long way is to have agencies publish interpretive releases, which afford them with an opportunity to state their own understanding of their statutory authorities and various responsibilities.

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184 WILSON (1989). *supra* note 8, at 371.
185 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376, 1964 (2010).
186 *Id.*
187 561 U.S. 477 (2010).

An example of such self-articulation is the SEC's Guidance Document on its economic analysis requirement in rulemaking.[188] The SEC's organic statutes specify that whenever the agency is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest," the agency must "consider, in addition to the protection of investors, whether the action will promote *efficiency, competition, and capital formation*."[189] These three concepts are generally viewed as market virtues, but can also conflict with one another depending on how they are defined. Although "competition" (in the sense of antitrust law) is a prerequisite for allocative efficiency in the product market,[190] if it is interpreted to mean "U.S. competitiveness," as some have argued, this notion becomes a "distinct and conflicting goal" [191] for the SEC. If "efficiency" refers not to allocative efficiency, but plausibly "informational efficiency" (as in the Efficiency Capital Market Hypothesis),[192] the link between efficiency and competition is less clear. Requiring too much information disclosure can become a barrier to entry for smaller firms.[193] More importantly, economists have established that "even with apparently competitive and 'efficient' markets, resource allocations may not be Pareto efficient."[194] Encouraging "capital formation" is considered beneficial to the market for capital, but only up to some point: over-investment in the market for capital is contrary to allocative efficiency.

In 2014, after losing a number of rule challenges by interest groups—all of them as a result of its failure to consider the effects of its rule on "efficiency, competition, and capital formation"—the SEC issued a Guidance Document to explain how it understood its statutory mandate. Importantly, the SEC harmonized these multiple ideals under the general rubric of cost-benefit analysis.[195] There is reason to believe that this Guidance Document has since improved the SEC's rulemaking process. A report by the SEC's Inspector General has noted certain improvements in

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[188] *See* U.S. SEC. & EXCH. COMM'N, CURRENT GUIDANCE ON ECONOMIC ANALYSIS IN SEC RULEMAKINGS (2012), *available at* http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf (hereinafter "SEC Guidance").

[189] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106(a)(2), 110 Stat. 3416, 3424 (1996) (enacting Section 2(b) of the Securities Act) (emphasis added). For an extensive discussion of the historical context of this adoption, see James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1818–24 (2011).

[190] *See* William J. Kolasky & Andrew R. Dick, ""The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers" 2, *available at* http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11254.pdf (discussing the link between competition and various notions of market efficiency).

[191] *See* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 334 (2013) ("Some commenters . . . seem to believe that the statutory term 'competition' [in the context of the SEC statute] means the same thing as 'U.S. competitiveness,' a distinct and often conflicting goal, but one the Commission has never formally gainsaid.").

[192] *See generally* Lee (2015), *supra* note 31, at 95-98 (discussing the competing notions of efficiency in the context of the SEC statutes).

[193] For example, empirical studies have confirmed the hypothesis that the high cost of complying with the "[Sarbanes-Oxley Act] induced small firms to exit the public capital market." Ehud Kamar et al., *Going-Private Decisions and the Sarbanes-Oxley Act of 2002: A Cross-Country Analysis*, 25 J. OF L. ECON. & ORG. 107, 107 (2009).

[194] *See* Joseph E. Stiglitz, *The Allocation Role of the Stock Market: Pareto Optimality and Competition*, 36 J. FIN. 235 (1981).

[195] *See* U.S. Sec. & Exch. Comm'n, *Current Guidance on Economic Analysis in SEC Rulemakings*, SEC (Mar. 16, 2012), http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

the agency's economic analyses,[196] and in the same year, the SEC was able to defend against challenges to its economic analysis for the very first time.[197] This was a significant achievement for the SEC since the rule the agency sought to defend was the Conflict Minerals rule—one that called for an especially difficult job of considering both investor welfare and humanitarian goals. Although the SEC did not attempt to quantify the humanitarian benefits, its rule release demonstrates the care with which the agency tried to balance competing objectives as well as analyze the impact of its rule on efficiency, competition, and capital formation.[198] The SEC's story suggests that having an agency self-articulate a metric that allows for aggregation of conflicting objectives may be a salutary step toward balancing one against the others.

V. CONCLUSION

This Article has analyzed the costs, benefits, and risks of the core-mission model. The model tends to stress the benefit of having a relatively focused core mission for each agency, which usually translates to emphasizing the coherence of multiple regulatory objectives assigned to a single agency. This Article acknowledges the advantages of such a vision of the administrative state, but also suggests that we should do well to move beyond this paradigm for several reasons. To this extent, it has argued for a need to recast the model under a more general framework that takes into account broader cost considerations, including aggregate government costs across all agencies. More broadly, this Article has highlighted the importance of moving the focus of the regulatory dialogues from how well a regulatory assignment is aligned with the agency's core mission to how to design regulatory agencies to effectively cover all interests that need protection through regulation, without wasting government resources. ■

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[196] *See generally* Office of Inspector General, Office of Audits, "Use of the Current Guidance on Economic Analysis in SEC Rulemakings," SEC (2013), *available at* http://www.sec.gov/oig/reportspubs/518.pdf.
[197] The DC Circuit's case reviewing the SEC's "Conflict Minerals" rules was the first case in which the SEC prevailed over a legal challenge to the SEC's *economic analysis*. *See* Nat'l Ass'n. of Manufacturers v. SEC, 748 F.3d 359, 369 (D.C. Cir. 2014) (holding that the court does "not see any problems with the Commission's cost-side of the rule" and "find[ing] it difficult to see what the Commission could have done better" on the benefit-side). For a more detailed discussion of the SEC's historical losses on the D.C. Circuit, see generally Kraus & Raso, *supra* note 192. Nevertheless, the rule was remanded based on the First Amendment claim. *See* 748 F.3d at 371-72; Nat'l Ass'n. of Manufacturers v. SEC, No. 13-5252 (D.C. Cir. Aug. 15, 2015) (order affirming its earlier holding).
[198] *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,335-354 (Sept. 12, 2012), *available at* https://www.gpo.gov/fdsys/pkg/FR-2012-09-12/pdf/2012-21153.pdf (discussing discretions the SEC exercised to structure the rule).